



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-01-42-T
Date: 9 September 2004
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: Mr. Hans Holthuis

Decision of: 9 September 2004

PROSECUTOR

v.

PAVLE STRUGAR

**DECISION II ON THE ADMISSIBILITY OF CERTAIN
DOCUMENTS**

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Philip Weiner

Counsel for the Accused:

Mr. Goran Rodić
Mr. Vladimir Petrović

I. THE MOTIONS

1. This decision of Trial Chamber II is in respect of the Defence Motion of 22 July 2004¹, and the Defence Submission of 26 July 2004.² The Defence Motion of 22 July 2004, filed immediately following the close of the Defence case, seeks to have admitted into evidence the following documents, all of which were originally disclosed to the Defence at the pre-trial stage as part of the Prosecution's 65 *ter* materials:

- Document 65 *ter* no. 90 is an intelligence report dated 9 December 1991 from the command of the 2nd OG to the General Staff of the Armed Forces of the SFRY reporting, *inter alia*, on the damage to the Old Town, as conveyed by visiting representatives of the 9th VPS;
- Document 65 *ter* no. 34 is a directive from the General Staff of the Armed Forces of the SFRY to the Command of the 2nd OG dated 2 October 1991 discussing issues of command responsibility and re-subordinations of certain units within the 2nd OG;
- Documents 65 *ter* nos. 54, 55, 57, 7, 9 and 21 are a group of documents which originate from the Republic of Croatia and relate to the activities of the Croatian forces in and around Dubrovnik during the relevant time-period.

2. The Prosecution objected to the admission of each of these documents on the ground that they lack the required relevance and/or probative value,³ with the possible exception of Document 65 *ter* no. 7 to the extent that it may be relevant to the question whether from 8 October 1991, Croatia and the Federal Republic of Yugoslavia were engaged in an international armed conflict, as alleged by the Prosecution.⁴

3. With regard to the Defence submission that it reserves its right to supplement its Motion of 22 July 2004 through oral arguments⁵, nothing has been advanced which persuades the Chamber that oral submissions are necessary. The Chamber will proceed on the sole basis of the written submissions.

¹ See Defence Motion: Requesting Admission of Proposed Defence Exhibits into Evidence, 22 July 2004 ("Defence Motion of 22 July 2004").

² Defence Submission: Requesting Admission of Outstanding Defence Exhibits Marked for Identification into Evidence, 26 July 2004 ("Defence Submission of 26 July 2004").

³ See Prosecution's Response to "Defence Motion: Requesting Admission of Proposed Defence Exhibits into Evidence", 29 July 2004 ("Prosecution Response to Defence Motion of 22 July 2004").

⁴ *Ibid.*, para. 10.

⁵ Defence Motion of 22 July 2004, para. 9.

4. The Defence Submission of 26 July 2004 seeks admission of the following outstanding Defence exhibits marked for identification at trial, but not yet admitted into evidence:

- MFI D13, MFI D14 and MFI D15 are photographs of the Old Town of Dubrovnik, used by the Defence during the cross-examination of Prosecution witness Slavko Grubišić.
- MFI D16 is two articles from the “Pobjeda” newspaper, of which photocopies were tendered by the Defence.⁶
- MFI D18 is an extract of the transcripts of the *Milošević* Trial⁷, corresponding to part of the testimony of Nikola Samardžić.
- MFI D30 is an Annex to the Final Report of the United Nations Commission of Experts, entitled “The battle of Dubrovnik and the law of armed conflict”.⁸
- MFI D72, MFI D73 and MFI D74 are three photographs copied from the book by Mladen Jurković “Dubrovnik se (ne) brani pjesmom”⁹.
- Expert report of the Defence expert witness Dr. Miodrag Šoć.

5. The Prosecution objected to the admission of each of these documents, aside from MFI D13, MFI D14, MFI D15 and the expert report of Dr. Miodrag Šoć.¹⁰

II. THE LAW

6. The admissibility of evidence is principally governed by Rule 89(C) of the Rules of Procedure and Evidence which states that a Chamber “may admit any relevant evidence which it deems to have probative value.”

7. While Rule 89(C) appears to grant the Trial Chamber a “broad discretion”, the Appeals Chamber has held that it “must be interpreted so that safeguards are provided to ensure that the

⁶ The Defence said during the trial that it would provide the Chamber with the original of the newspaper, T. 1248, 1258.

⁷ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, T. 11185-11186.

⁸ “The battle of Dubrovnik and the law of armed conflict” is an Annex to the Final Report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992), S/1994/674/Add.2 (Vol. V), 28 December 1994. [Despite it is not clear in the document itself whether its name is “Annex IX.A” or “Annex XI.A”, because of it being entitled “The battle of Dubrovnik and the law of armed conflict”, the Chamber has no doubts about both the Defence in its Submission and the Prosecution in its Response referring to the same document].

⁹ The translation given in the Defence Submission of 26 July 2004 is “Dubrovnik is (not) Defended by singing”, fn. 5 to para. 8.

¹⁰ See Prosecution’s Response to the Defense’s Request for Admission of Outstanding Defense Exhibits Marked for Identification, 30 July 2004 (“Prosecution Response to Defence Submission of 26 July 2004”), paras 2-4 and 12.

Trial Chamber can be satisfied that the evidence is reliable.”¹¹ With this in mind, the Appeals Chamber has indicated that the reliability of a statement may be relevant to its admissibility, and not just to its weight. Indeed, “[a] piece of evidence may be so lacking in terms of the indicia of reliability that it is not ‘probative’ and is therefore inadmissible.”¹² This consideration has been commonly expressed in the case-law as a requirement, said to be implicit in Rule 89(C), that evidence must have “sufficient indicia of reliability”.¹³

8. Although there is no general prohibition against the admission of hearsay evidence in cases before the Tribunal,¹⁴ the fact that the evidence is hearsay, and whether the hearsay is first-hand or more removed, may be relevant to a determination of the probative value of that evidence.¹⁵

9. The question whether evidence may be admitted other than through a witness is directly raised by the Defence request in its Motion of 22 July 2004 seeking to admit new documents after the close of the Defence case. While there is no explicit requirement in the Statute or the Rules that an exhibit must be admitted through a witness, the case law reflects the fact that, apart from a few special categories of document, this is the usual and, in principle, the correct approach.¹⁶ The accused’s right to a fair trial will, in many cases, require that there be an opportunity to test the evidence by cross-examination in court.¹⁷ Consequently, the Chamber must proceed cautiously in considering whether to admit documentary evidence that has not been presented through a witness in court.

10. This matter has been recently considered in the *Hadžihasanović* case.¹⁸ While recalling that the Statute and the Rules are a combination of procedural provisions from common and civil law systems, and that there is no reason to follow general rules relating to the exclusion of evidence

¹¹ *Prosecutor v. Dario Kordić et al*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, paras 20 and 22.

¹² *Ibid.*, para. 24.

¹³ See e.g. *Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21-AR 73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, paras 19 and 20.

¹⁴ *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

¹⁵ *Ibid.*

¹⁶ See, ex. g., in *Prosecutor v. Mladen Naletilić aka “Tuta” and Vinko Martinović aka “Štela”*, Case No. IT-98-34-T, the following decisions: Decision on the Admission of Exhibits Tendered through Witness MV, 4 October 2002; Decision on the Submission of the Defence concerning Exhibits Tendered through Witnesses MC, ME and MH, 4 October 2002; Decision on the Admission of Exhibits Tendered through Witness Mladen Ancić, 4 October 2002; Decision on the Admission of Exhibits Tendered through Witness Davor Marijan, 3 October 2002.

¹⁷ See, *inter alia*, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Admission into Evidence of Documents Tendered from the Bar Table by the Prosecutor, 11 September 2002.

¹⁸ *The Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Décision relative à l’Admissibilité de Certaines Pièces Contestées et des Pièces aux Fins d’Identification, 2 August 2004 [Note: as to the date of this Decision, the quoted Decision on the *Hadžihasanović* case, originally rendered in French, has not yet been translated into English].

applied in common law systems¹⁹, the Chamber held that Rule 89(D) provides for the “possibility” of excluding evidence, where its probative value is substantially outweighed by the need to ensure a fair trial. It held that Rule 89(D) did not impose an “unconditional obligation” to exclude evidence which might in any way infringe the rights of the accused.²⁰ Bearing this in mind, the responsibility of the Chamber is to ensure that the trial is fair and expeditious and that the proceedings are conducted in accordance with the Statute and the Rules, with due respect for the rights of the accused. It was held in *Hadžihasanović* that there is not a principle of automatic exclusion simply on the grounds that the purported author of a document has not been called to testify.²¹ However, special categories of document aside, a party seeking to admit a document without calling its author is running a certain risk: in particular in so doing, the probative value of the document in question may be diminished and, in some instances, the document may have to be excluded on the basis of Rule 89(D).²² It was held in *Hadžihasanović* that the need for oral evidence in support of the admission of a document depends on various factors; the most important of which are the nature of the document, the document’s content, and whether the document contains statements of persons other than the author of the document.²³

11. In this case, it is also relevant to the admission of some of the documents now in contention that the Defence failed to put the document to a witness, even though the Defence contends that the document contradicts material evidence given by the witness.²⁴

12. The Chamber wishes to emphasise that the decision to admit a particular piece of evidence is no indication of the ultimate weight to be accorded to it.

III. DISCUSSION

1. Documents of the Defence motion of 22 July 2004

13. Document 65 *ter* no. 90 appears to be an intelligence report from the 2nd Operational Group (“2nd OG”) to the General Staff of the Secretariat for National Defence dated 9 December 1991. It purports to be based on information provided to the 2nd OG by the 9th Military Naval Sector (“9th VPS”). The Defence submits that it would show that very different information was given by the

¹⁹ *Ibid.*, paras 16-17.

²⁰ *Ibid.*, para. 16, that states: “L’article 89 (D) envisage une possibilité **d’exclusion** et non une **obligation inconditionnelle** pour tout cas où un élément de preuve serait susceptible de causer un préjudice quelconque à l’accusé” (emphasis in the original) [*See note in fn. 19*].

²¹ *Ibid.*, para. 18: “Il n’y a pas de principe d’exclusion systématique du fait que l’auteur présumé du document n’est pas cité à la barre”. [*See note in fn. 19*].

²² *Ibid.*, para. 44.

²³ *Ibid.*, para. 46.

²⁴ *See* Rule 90(H)(ii).

Command of the 9th VPS to the Deputy Federal Secretary for National Defence, on the one hand, and to the 2nd OG, on the other, with regard to the damage to the Old Town of Dubrovnik on 6 December 1991. The relevance of the issue of damage was clear throughout the hearing, as was the Defence contention that the 9th VPS kept the 2nd OG “in the dark” or misinformed them. However, this document ought to have been put to relevant Prosecution witnesses, especially Admiral Miodrag Jokić, and introduced into evidence in the ordinary course of the trial. Furthermore, it appears on its face to be reporting information originally gleaned by the 9th VPS from various sources, and purports to be an accurate relay of that information. The original sources of the information are unknown and untested, and there has been no opportunity to examine whether the document does truly reflect information originally provided to the 2nd OG by the 9th VPS, so that there is not shown to be a sufficient indication of reliability of the information to justify the admission of the document.

14. Document 65 *ter* no. 34 is an Order from the JNA Chief of Staff to the 2nd OG regarding the temporary structural placement of some units. The Defence contends that it demonstrates that the 2nd OG was merely a “messenger” of the Supreme Command.²⁵ The Prosecution submits that it is common ground between the parties that the 2nd OG was subject to the orders of the Supreme Command, which could alter the composition of the 2nd OG and its subordinate units. The document is dated 2 October 1991 and does not deal with the Dubrovnik area, so it is not of immediate relevance to the events of this trial. It appears clear on the evidence that the 2nd OG was a temporary command structure created by the Supreme Command and therefore was able to be changed by it, both as to composition and responsibilities. The document does not, on its face, demonstrate or support the proposition that the 2nd OG functioned merely at the direction of the Supreme Command, *i.e.*, as its “messenger”, and as the relevance of the document to that proposition has not been put (as it should have been) to the relevant Prosecution witnesses, or demonstrated through an appropriate Defence witness, there is no adequate evidentiary basis on which this document could be used to establish what the Defence wants to prove from it. The document will not be admitted because it is not shown to be sufficiently relevant to the live issues in this trial.

15. Document 65 *ter* no. 54 is apparently a list of ammunition and weapons received by the Croatian Defence Command in Dubrovnik on 3 December 1991. While it is true that the Prosecution does accept that there were armed hostilities in the Dubrovnik area at that time, many of the Prosecution witnesses were reluctant to acknowledge any military capacity by the Croatian side. In the circumstances, there is a clear relevance of this document. It also may disclose

something of the Croatian military supply organisation and methods. The document was not put to any relevant Prosecution witness, as it should have been, but its general effect is in keeping with much other evidence so that the Prosecution would not be significantly disadvantaged by the admission of this document, even though there has been no opportunity to deal with it in evidence. Furthermore, there is no dispute as to its authenticity. The Chamber will admit this document.

16. Document 65 *ter* no. 55, dated 7 December 1991, is not altogether clear as to its intended meaning for relevant purposes (“apartments in which our men at the positions are”), but it would most naturally appear to be a list of apartments in Dubrovnik, although apparently not in the Old Town, where Croatian military personnel were located. The Defence contends that this demonstrates the use of civilian apartments “as military locations” and, further, may be seeking to read into this that these locations were used as firing points or the like. The document does not on its face disclose a use more than the accommodation of personnel in the apartments listed, and as any more significant use was not put to any relevant Prosecution witness, and as the document itself was not dealt with by any witness, it would be quite unfair and unjustified to read more into the document than this. In these circumstances, the document will not be admitted as, when read in this way, it is not shown to have sufficient relevance to the live issues in the trial.

17. Document 65 *ter* no. 57 is a protest note dated 2 December 1991 from the VPS – BOKA addressed to the Republic of Croatia Reporting Centre at Dubrovnik regarding repeated sniper fire by Croatian forces located at Srdj directed against JNA units. Its relevance is clear. The issue of protests was alive in the evidence and dealt with by a number of witnesses. The failure to put this document to some witnesses may detract from the probative value of the document, but in the circumstances, it does not require its non admission. The Document will be admitted.

18. Document 65 *ter* no. 7 appears to be a Croatian Government document dated 17 June 1991 addressed to all police commands regarding the transfer of some forces of the National Guard and their arms from the police to the military command. While not of immediate relevance to events in Dubrovnik in December 1991, it is capable of revealing a relationship between the Croatian police and the defence forces which is an issue that was explored during the evidence and is relevant to the defence case. The failure to put this document to relevant Prosecution witnesses may affect its probative value, but its authenticity is not disputed. The document will be admitted.

19. Document 65 *ter* no. 9 appears to be an Order for Defence from the 116th Brigade of the ZNG at Dubrovnik on 20 July 1991. The Prosecution submits it has insufficient relevance to the

²⁵ See Defence Motion of 22 July 2004, para. 6.

activities of the Croatian armed forces in December 1991, as it is dealing with their location in July 1991. However, the relevance of the military activities of the JNA and the Croatian forces in the months leading to 6 December 1991 has been accepted during the hearing and has been well canvassed in evidence. Hence, the nature and distribution of Croatian forces, even in July, does have some relevance to the case which is sufficient to justify the document's admission into evidence. The failure to put this document to relevant witnesses may well detract from its probative value, but in the circumstances does not require its non-admission. The document will be admitted.

20. Document 65 *ter* no. 21 purports to be a compilation or collection of Croatian intelligence information, possibly prepared in 1994 but relating to events in the period from October 1990 to October 1992. The Defence seeks to rely on some of the information in the document as relevant to factual issues and also on the document generally as disclosing that the Dubrovnik Information Centre had an intelligence role perhaps from July 1991. The document does not show who collected the information or from what immediate source or sources. Nor is it possible to discern what information, if any, was edited out in the course of compilation, which may be highly relevant to the issue of the reliability of what is contained in the compilation. It is not possible to determine the original source or sources of what is contained in the document, which is of particular relevance as the contents are of a nature which suggests that the original information could well have been drawn from a variety of hearsay sources, none of which are known, and for a variety of purposes, including propaganda, which may materially affect reliability. With respect to the Information Centre, the nature and contents of this one document do not provide a satisfactory basis on which any factual conclusion could properly be drawn of the kind for which the Defence contends, and no witness has had an opportunity to comment on this document to assist the Chamber to come to any more positive conclusion, one way or the other. In the circumstances, the document is lacking sufficient indicia of reliability to give it probative value for the purposes of this trial. The document will not be admitted.

2. Documents of the Defence Submission of 26 July 2004

21. MFI D13, MFI D14 and MFI D15 were tendered by the Defence during the cross-examination of the Prosecution witness Slavko Grubišić. The photographs clearly show damage to certain buildings and structures in the Old Town of Dubrovnik. The Defence claims that the photographs are highly relevant to the case as well as being of a considerable probative value regarding the reliability of Grubišić's testimony.²⁶ The Prosecution does not object to their

²⁶ See Defence Submission of 26 July 2004, para. 3.

admission.²⁷ As they are relevant and probative as to the damage to the Old Town in December 1991, the Chamber will admit these documents.

22. MFI D16 appears to be a photocopy of two articles from the “Pobjeda” newspaper dated 3 October 1991. The Defence contends that it has made a request to obtain an original of the newspaper.²⁸ The Prosecution submits that it should not be admitted because its only purpose is the impeachment of the witness through whom it was tendered.²⁹ The material passages were put to the witness Nikola Samardžić and are therefore sufficiently set out in the transcript.³⁰ The Chamber sees no reason for admitting the original articles into evidence.

23. MFI D18 is a copy of excerpts from the transcripts of the *Milošević* trial. The Defence seeks to tender these extracts which deal with the evidence of Nikola Samardžić in that case, in order to point out inconsistencies in his testimony.³¹ The Prosecution submits that a document used solely for impeachment purposes, in this instance a transcript from another case, is “not admissible substantively”.³² In view of the fact that the material passages were put to Mr. Samardžić during his testimony in this case, and are therefore already set out in the transcript, the Chamber sees no reason for admitting the transcripts themselves.

24. MFI D30 is an Annex to the Final Report of the United Nations Commission of Experts, entitled “The battle of Dubrovnik and the law of armed conflict”. Relevant parts of this Report were put to Dr. Colin Kaiser, a Prosecution witness and one of the four listed authors of the Report, during his cross-examination. The Defence contends that Dr. Kaiser’s evidence at trial differed in some respects from the information contained in the Report.³³ The Defence put each of the material passages from the Report to Dr. Kaiser, so they do appear in the transcript. Therefore, the Chamber sees no reason to admit this document.

25. MFI D72, MFI D73 and MFI D74 are a series of photographs showing troops in uniform engaged in various drilling exercises said to be at Lapad and Hotel Belvedere, which, according to the Defence, have been extracted from a book by Mladen Jurković entitled “Dubrovnik se (ne) brani pjesmom”.³⁴ While the photographs were put to the Prosecution witness Ivan Negodić, he did not identify the photographs and could not date them. The Prosecution further submits that no explanation was provided as to how these photographs could be relevant to the pleaded incidents of

²⁷ Prosecution Response to Defence Submission of 26 July 2004, paras 2 -4.

²⁸ Defence Submission of 26 July 2004, para. 4.

²⁹ Prosecution Response to Defence Submission of 26 July 2004, paras 5-7.

³⁰ T. 1248-1258.

³¹ Defence Submission of 26 July 2004, para. 5.

³² Prosecution Response to Defence Submission of 26 July 2004, para. 8.

³³ Defence Submission of 26 July 2004, para. 6.

6 December 1991.³⁵ In the absence of reliable evidence as to the date of the photographs, they are not shown to be relevant to the case. The Chamber will not admit these documents.

26. As regards the expert report of the Defence expert witness Dr. Miodrag Šoć, the Defence states that by oversight it omitted to tender it into evidence during the cross-examination of Dr. Šoć.³⁶ The Prosecution does not object to the admission of this report.³⁷ As this report was the subject of examination and cross-examination, there appears to be no reason why it should not be admitted. Therefore, the Chamber will admit this document.

IV. DISPOSITION

27. Based on the foregoing, the Chamber will admit the following documents into evidence:

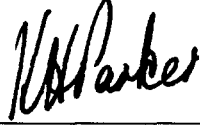
- Document 65 *ter* no. 54, Document 65 *ter* no. 57, Document 65 *ter* no. 7, Document 65 *ter* no. 9.
- MFI D13, MFI D14, MFI D15, expert report of Dr. Miodrag Šoć.

The remaining documents, or parts thereof, are not admitted.

28. The Chamber requests the Registry to (a) mark as exhibits documents D13, D14, D15, D16, (b) assign exhibit numbers to those documents which are now admitted and which have not previously been marked for identification and, to inform the Chamber and the parties of the exhibit numbers in writing as soon as practicable.

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

Dated this ninth day of September 2004
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]

³⁴ Defence Submission of 26 July 2004, para. 8.

³⁵ Prosecution Response to Defence Submission of 26 July 2004, para. 11.

³⁶ Defence Submission of 26 July 2004, para. 9.

³⁷ Prosecution Response to Defence Submission of 26 July 2004, para. 12.