



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: 06 July 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: 06 July 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE'S MOTION FOR PARTIAL
RECONSIDERATION OR CERTIFICATION TO APPEAL THE
DECISION ON DEFENCE'S SECOND BAR TABLE MOTION**

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 23 May 2016, the Chamber issued a decision (“Impugned Decision”), *inter alia*, denying the admission into evidence of the documents bearing Rule 65 *ter* numbers 1D04428 and 1D07005 (“Tendered Documents”).¹ On 30 May 2016, the Defence filed a motion (“Motion”), requesting that the Chamber reconsider the Impugned Decision as to the admission of the Tendered Documents or, alternatively, grant certification to appeal the Impugned Decision.² On 8 June 2016, the Prosecution responded (“Response”), opposing the Motion.³ On 15 June 2016, the Defence requested leave to reply (“Request”).⁴

II. SUBMISSIONS OF THE PARTIES

A. Reconsideration

2. The Defence submits that the Chamber’s ‘primary concern’ in denying the admission into evidence of the Tendered Documents was ‘whether the news articles reliably convey the words of the interviewee, Hakiya Meholjic, and whether such have been published’.⁵ In that regard, the Defence requests admission of the video excerpt bearing Rule 65 *ter* number 1D06012a,⁶ in which Meholjić repeats similar assertions as those contained in the Tendered Documents.⁷ The Defence requests reconsideration of the Impugned Decision as to the Tendered Documents in light of this video excerpt, which it submits ‘provides the type of indicia of authenticity which the Trial Chamber found lacking’ in the Tendered Documents.⁸ The Defence further submits that various other news journals also reported on Meholjić’s assertions.⁹ In response to the Chamber’s note that the URL provided in the document bearing Rule 65 *ter* 1D07005 is broken, the Defence provides URLs that it submits direct to news agencies that ‘reference the article as having been published in

¹ Decision on Defence’s Second Motion to Admit Documents from the Bar Table, 23 May 2016, paras 19-20, 30.

² Defence Motion for Reconsideration or, in the Alternative, Certification to Appeal the Fourth Bar Table Decision (As to 65 *ter* #1D04428 and #1D07005), 30 May 2016. The Chamber notes that the Motion in fact refers to the decision on the Defence’s second (rather than fourth) bar table motion.

³ Prosecution Response to Defence Motion for Reconsideration or, in the Alternative, Certification to appeal the Fourth Bar Table Decision, 8 June 2016.

⁴ Defence Motion for Leave to Reply in Support of Motion for Reconsideration or, in the Alternative, Certification to Appeal the Fourth Bar Table Decision (as to 65 *ter* #1D04428 and #1D07005), 15 June 2016.

⁵ Motion, para. 10.

⁶ The Chamber notes that on two occasions, the Motion erroneously refers to this video excerpt as bearing a different Rule 65 *ter* number (*see* Motion, paras 10, 25).

⁷ Motion, para. 15. In other portions of the Motion, the Defence refers to the video excerpt as ‘tendered’ and ‘proposes that the Trial Chamber consider admission’. Motion, paras 10, 11, 13, 25. The Chamber notes that nowhere in the Motion has the Defence made arguments concerning the admissibility of the video excerpt pursuant to Rule 89 (C) of the Rules.

⁸ Motion, para. 10.

⁹ Motion, para. 11.

June 1998 and carr[y] the same news facts'.¹⁰ The Defence submits that the additional information it has provided justifies reconsideration of the Impugned Decision.¹¹

3. The Prosecution submits that the Defence has not demonstrated that the Chamber clearly erred in its reasoning in the Impugned Decision and that the additional information provided by the Defence does not amount to new facts justifying reconsideration.¹² It also opposes the admission of the video excerpt bearing Rule 65 *ter* number 1D06012a.¹³

B. Certification to Appeal

4. The Defence submits that the Impugned Decision would significantly affect the fairness of the proceedings by contravening the equality of arms, as the Chamber has admitted into evidence documents tendered by the Prosecution 'with no evidence led as to availability of URLs or evidence of publication'.¹⁴ It submits that the Chamber is thereby denying it the opportunity to introduce significant evidence that directly relates to Srebrenica.¹⁵

5. In support of the Defence's further submission, that the Impugned Decision would significantly affect the expeditiousness of the proceedings, it argues that the Impugned Decision forces it to seek admission of the evidence in question through other – inefficient and less expedient – means.¹⁶

6. The Defence further submits that the Impugned Decision would significantly affect the outcome of the trial. In this respect the Defence claims that the Impugned Decision forces it to establish the facts in question by way of other more indirect and circumstantial evidence that would likely not be as persuasive as the direct and probative Tendered Documents.¹⁷ It points to these facts as being critically relevant and directly bearing on the charges related to Srebrenica, and it explains that establishing the facts in the alternative manner described would result in unnecessary analysis and legal work, which would affect its ability to effectively manage its limited remaining trial time and to advocate effectively for the Accused.¹⁸ The Defence finally submits that the corresponding delays and non-performance of tasks, including preparation for the drafting of its

¹⁰ Motion, para. 12.

¹¹ Motion, para. 23.

¹² Response, paras 3-5.

¹³ Response, paras 1, 10-11.

¹⁴ Motion, para. 16.

¹⁵ Motion, para. 16.

¹⁶ Motion, para. 17.

¹⁷ Motion, para. 19.

¹⁸ Motion, para. 19.

final brief, would have ramifications on the content and analysis contained in its final brief and therefore on the outcome of the trial.¹⁹

7. An immediate resolution by the Appeals Chamber is required for several reasons, according to the Defence, in order to materially advance the proceedings. In this respect it first submits that a prompt resolution is essential due to the gravity of the crimes to which the Tendered Documents relate.²⁰ Second, it argues that resolving the matter would protect the Accused's rights to a fair trial and to the equality of arms.²¹ Third, resolving the matter would ensure that the latter phase of the trial is not 'distracted' by redundant evidentiary procedures.²² Fourth, the Defence claims that an immediate resolution is necessary given the impending deadline for its final brief, as a lack of clarity and direction during this time would be a distraction from the drafting of said brief, whereas the Defence wishes to avoid an extension of the trial.²³ Finally, it submits that significant time, resources, and legal work would be needed to call additional witnesses, which would impact the current trial schedule.²⁴

8. The Prosecution responds that the Defence has not demonstrated 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.²⁵ It states that the allegations contained in the Tendered Documents do not have any apparent bearing on the Accused's alleged criminal responsibility for the crimes charged in the Indictment with respect to Srebrenica and that the Defence's assertion regarding the impact the Impugned Decision would have on its ability to draft the final trial brief – and therefore the outcome of the trial – is unsubstantiated.²⁶ Finally, the Prosecution submits that the Defence has failed to demonstrate how an immediate resolution by the Appeals Chamber would materially advance the proceedings, as its reference to 'redundant evidentiary procedures' is hypothetical and unfounded.²⁷

¹⁹ Motion, para. 19.

²⁰ Motion, para. 20.

²¹ Motion, para. 20.

²² Motion, para. 20.

²³ Motion, para. 21.

²⁴ Motion, para. 22.

²⁵ Response, para. 7.

²⁶ Response, paras 7-8.

²⁷ Response, para. 9.

C. Request for Leave to Reply

9. The Defence requests that leave to reply be granted to allow it to reply to the Prosecution's assertion that the additional information provided in the Motion does not justify reconsideration and to demonstrate that the circumstances justify reconsideration of the Impugned Decision.²⁸

III. APPLICABLE LAW

10. The Chamber recalls and refers to the applicable law governing reconsideration of decisions, as set out in a previous decision.²⁹ The Chamber further recalls and refers to the applicable law governing certification to appeal pursuant to Rule 73 (B) of the Tribunal's Rules of Procedure and Evidence ("Rules"), as set out in a previous decision.³⁰

IV. DISCUSSION

A. Preliminary Considerations

11. The document bearing Rule 65 *ter* number 1D04428 is a news article from the Republika Srpska News Agency quoting Hakija Meholfjić, and the document bearing Rule 65 *ter* number 1D07005 is the transcript of an interview of Meholfjić. Both documents contain assertions from Meholfjić to the effect that Bosnian President Alija Izetbegović discussed a proposal to 'swap' or 'sacrifice' Srebrenica for Vogošća, a suburb of Sarajevo.³¹

12. In the Impugned Decision, the Chamber denied the admission into evidence of the document bearing Rule 65 *ter* number 1D04428 because it did not contain a date of publication, making it impossible for the Chamber to determine the time frame to which the article refers when it states that there had been nine burials at the Memorial Centre in Potočari '[s]o far'.³² The Chamber also suggested that Meholfjić's far-reaching and uncorroborated allegation would more properly have been tendered through a witness rather than from the bar table.³³ With respect to the document bearing Rule 65 *ter* number 1D07005, the Chamber denied its admission into evidence because the

²⁸ Request, paras 1-2, 4.

²⁹ Reasons for Decision on Defence Motion for Reconsideration, 29 June 2012, para. 10.

³⁰ Decision on Defence Motion for Certification to Appeal the Decision on the Admission of the Evidence of Milan Tutorić, 15 July 2015, para. 4.

³¹ Rule 65 *ter* no. 1D04428, p. 1; Rule 65 *ter* no. 1D07005, p. 1.

³² Impugned Decision, para. 19.

³³ Impugned Decision, para. 19.

document did not contain any identifying information regarding its source apart from the URL of a webpage that is no longer available and because the document bore no other indicia of reliability.³⁴

B. Request for Leave to Reply

13. The Defence submits that the reply would address arguments that it has already made in the Motion, namely that the additional information provided therein constitutes circumstances justifying reconsideration. The Defence does not assert that it would reply to any new issue raised by the Prosecution in the Response. Therefore, the Chamber finds that the Defence has not shown good cause for the Request and will deny it.

C. Reconsideration

14. The Defence does not argue, and the Chamber does not find, that the Chamber committed a clear error of reasoning in the Impugned Decision. The Defence submits that the existence of sources corroborating that Meholjić made the assertions reported in the Tendered Documents, including the video extract bearing Rule 65 *ter* number 1D06012a, amount to a particular circumstance justifying reconsideration in order to avoid injustice.

15. The Defence's submissions regarding reconsideration are premised on the erroneous understanding that the Chamber denied the admission into evidence of the Tendered Documents due to a concern as to whether those documents reliably conveyed assertions made by Meholjić and whether such assertions had been published.³⁵ The Impugned Decision did not dispute whether Meholjić had in fact made such assertions. As noted above, the Chamber denied the admission into evidence of these documents for reasons wholly separate from the issue of whether Meholjić made the assertions in question or whether such assertions had been published. Regarding the above-mentioned URLs provided in paragraph 12 of the Motion, one directs to a webpage in Dutch and the other to a webpage in BCS. The Defence has not provided English translations of the content of these sites, and the Chamber therefore considers that it would be inappropriate to rely on such information in the absence of translations into one of the official languages of the Tribunal. The Defence's submissions do not address the specific concerns elucidated by the Chamber in denying the admission into evidence of the Tendered Documents and thus have no bearing on the Impugned Decision. The Defence has therefore failed to establish that there are particular circumstances justifying reconsideration in order to avoid injustice.

³⁴ Impugned Decision, para. 20.

³⁵ Motion, para. 10.

16. Considering the above, the Chamber will deny the Defence's request for reconsideration of the Impugned Decision and therefore also its request to have the video excerpt bearing Rule 65 *ter* number 1D06012a admitted.

D. Certification to Appeal

17. With regard to the first prong of Rule 73 (B) of the Rules, the Defence identifies the issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial as the denial of its opportunity to submit evidence that is significant to the Srebrenica component of the case. The Impugned Decision does not involve such an issue. Rather, in the Impugned Decision, the Chamber denied the admission into evidence of the Tendered Documents *as tendered from the bar table*. As noted above, the reasons for these denials were not related to the significance of the evidence in question or its bearing on the Srebrenica component of the case. The Chamber has not decided whether this evidence would have been admitted if properly tendered. As the Defence has failed to demonstrate that the Impugned Decision involves the issue as the Defence has defined it, the question whether the issue would qualify as one that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial has become moot.

18. While the test under Rule 73 (B) of the Rules is cumulative, the Chamber will nevertheless address the second prong of the test. The Defence's submission invoking the gravity of the crimes is irrelevant. The Defence's submission regarding the equality of arms and the fairness of the proceedings are inapposite in the context of the second prong of that test. With respect to the Defence's submissions regarding redundant evidentiary procedures and delays, the Chamber notes that it is within the Defence's discretion how to allocate resources and when and how to present evidence, taking into consideration the potential consequences of tendering evidence in the later stages of the proceedings. The Defence's submissions regarding potential delays are presumptive, as the Defence is not in a position to determine whether additional time will be made available. The Defence has therefore failed to establish that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

19. The Chamber will deny the request for certification to appeal the Impugned Decision.

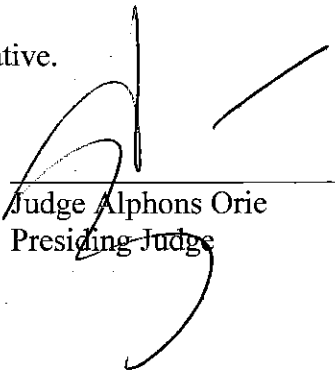
V. DISPOSITION

20. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber

DENIES the Request; and

DENIES the Motion.

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



Judge Alphons Orié
Presiding Judge

Dated this sixth day of July 2016
At The Hague
The Netherlands

[Seal of the Tribunal]