



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: 1 August 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: 1 August 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR CERTIFICATION
TO APPEAL THE SECOND DEFENCE CASE OMNIBUS
DECISION AS TO EXHIBIT P7782**

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 31 March 2016, the Chamber issued a decision to admit the document bearing Rule 65 *ter* number 33441a into evidence as exhibit P7782 and gave the Defence one week to further address the document if needed.¹ On 7 April, the Defence filed a submission.² On 21 April, the Prosecution responded.³ On 2 June, the Chamber issued a decision dismissing the Defence's submissions of 7 April ("Impugned Decision").⁴ On 9 June 2016, the Defence filed a motion ("Motion"), requesting that the Chamber grant certification to appeal the Impugned Decision.⁵ On 22 June 2016, the Prosecution filed a response ("Response") requesting that the Motion be dismissed.⁶

II. SUBMISSIONS OF THE PARTIES

2. The Defence submits that the Impugned Decision affects the fairness of the proceedings as: (i) it contravenes the equality of arms, as can be seen by the different legal standard applied by the Chamber in the admission of Prosecution evidence and, in this instance, not requiring follow-up on the provenance of exhibit P7782 after having 'invited' the Prosecution to make further submissions about its authenticity;⁷ and (ii) portions of the exhibit had not been read and confirmed by the witness and should have been redacted in light of concerns about authenticity.⁸ The Defence also submits that the Impugned Decision poses a detriment to the expeditiousness of the proceedings as the Defence will be forced to investigate and call evidence as to the authenticity and reliability of exhibit P7782, whereas the most efficient and expedient option would be requiring that the Prosecution provide further information as to the authenticity and reliability of the document.⁹ The Defence further submits that the outcome of the trial will be significantly affected by: (i) the Chamber's lenient and divergent standard as to 'invitations' when issued to the Prosecution as opposed to more formal 'orders';¹⁰ (ii) exhibit P7782's questionable authenticity and reliability given the concerns about the source of the document as 'AID Sarajevo';¹¹ and (iii) the Chamber's mistaken understanding that the Defence agreed to the admission of the additional excerpt pages in

¹ First Defence Case Omnibus Decision, 31 March 2016, para. 24.

² Defence Submissions Pursuant to First Defence Case Omnibus Decision, 7 April 2016.

³ Prosecution Response to Defence Submissions Pursuant to First Defence Case Omnibus Decision, 21 April 2016.

⁴ Second Defence Case Omnibus Decision, 2 June 2016, para. 6.

⁵ Defence Motion for Certification to Appeal the Second Defence Case Omnibus Decision as to P7782, 9 June 2016.

⁶ Prosecution Response to Defence Motion for Certification to Appeal the Second Omnibus Decision as to P7782, 22 June 2016.

⁷ Motion, paras 9-11, 13.

⁸ Motion, paras 7, 12.

⁹ Motion, paras 14-16.

¹⁰ Motion, para. 18.

¹¹ Motion, paras 17-20.

the exhibit as a way to address its concerns about authenticity and reliability.¹² The Defence further posits that an immediate resolution is required to materially advance the proceedings to provide the Defence with clarity and direction as it is preparing its final brief as well as to ensure that the trial is not extended if the Defence is forced to call additional evidence.¹³

3. The Prosecution submits that the Motion fails to satisfy either prong of the cumulative test for certification to appeal pursuant to Rule 73 (B) the Tribunal's Rules of Procedure and Evidence ("Rules").¹⁴ With regard to the first prong of Rule 73 (B) of the Rules, the Prosecution states that the Defence's equality of arms claim is both unsupported and insubstantial, noting that the Defence has made no effort to provide a single example of the Chamber applying a double standard in its 'invitations' to the parties, nor has it explained the practical significance or impact of any such standard.¹⁵ Further, in response to the claim that the Defence is required to investigate the exhibit's authenticity, the Prosecution notes that the document was admitted into evidence after the Chamber found that it contains indicia of authenticity and that the Defence is relying on speculation.¹⁶ With regard to the second prong of Rule 73 (B) of the Rules, the Prosecution states that the Defence relies on vague claims without indicating how proceedings would be materially advanced.¹⁷ For both prongs, the Prosecution submits that rather than preventing a distraction from drafting the final trial brief within the time frame, the arguing of an interlocutory appeal at this late stage would itself interfere with, and not advance, the proceedings.¹⁸

III. APPLICABLE LAW

4. 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.¹⁹

IV. DISCUSSION

5. Exhibit P7782 is a series of excerpts from a document from the water supply and sewage disposal systems public utility company, the JKP, Vodovod i Kanalizacija, titled 'Shelling and Destruction of the Sarajevo Vodovod i Kanalizacija', which covers the period from April 1992 to

¹² Motion, para. 20.

¹³ Motion, paras 21-23.

¹⁴ Response, para. 1.

¹⁵ Response, paras 3-4.

¹⁶ Response, para. 5.

¹⁷ Response, para. 8.

¹⁸ *Ibid*

¹⁹ Decision on Defence Motion for Certification to Appeal the Decision on the Admission of the Evidence of Milan Tutić, 15 July 2015, para. 4.

October 1995. This exhibit was tendered during the testimony of Witness Sergey Moroz.²⁰ In the Impugned Decision, the Chamber noted that after initially objecting to the admission of a document from which the tendered document was derived, the Defence agreed with the Chamber's suggestion to admit an excerpt and that, contrary to the Defence's claim, the document does contain indicia of authenticity.²¹

6. With regard to the first prong of Rule 73 (B) of the Rules, the Chamber recalls that the Impugned Decision involves a decision on the admission of evidence pursuant to Rule 89 (C) of the Rules. The admission of exhibit P7782 into evidence does not yet determine the weight to be ultimately given to it. Furthermore, the testimony of Witness Moroz is, to a large extent, in line with the substance of the excerpts used and read to him in court. In view of these circumstances, the Defence failed to substantiate how the admission would affect the outcome of the trial. The Chamber further finds that the decision does not significantly affect the fairness of the proceedings. In determining the minimal impact of the admission of this one and only document on the proceedings as a whole, the Chamber considered the testimony of Witness Moroz, which would still be part of the record irrespective of the admission of the document, as well as the position initially taken by the Defence that it did have concerns of authenticity for the document as a whole, but did not oppose those pages where the witness testified about events to be admitted as excerpts.²² In response to the Defence's claims regarding the Impugned Decision's significant impact on the expeditiousness of the trial, the Chamber finds that the Impugned Decision does not require the Defence to investigate the authenticity and reliability of the document. Based on the above, the Chamber finds that the Defence has failed to demonstrate that the first prong of Rule 73 (B) of the Rules is met.

7. As the test under Rule 73 (B) of the Rules is cumulative and the first prong of the test has not been satisfied, the Chamber will not address the second prong of the test.

²⁰ T. 42512.

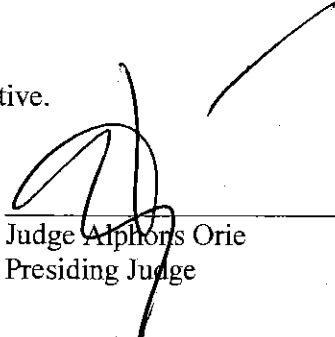
²¹ Impugned Decision, para. 6.

²² T. 42538-42539.

V. DISPOSITION

8. 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 first day of August 2016.
At The Hague
The Netherlands

[Seal of the Tribunal]