



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: 16 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: 16 August 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADMIT
EVIDENCE IN REBUTTAL**

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 21 June 2016, the Prosecution filed a motion (“Motion”) tendering seven documents as evidence in rebuttal pursuant to Rule 85(A)(iii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ On 6 July 2016, the Defence responded (“Response”), opposing the admission of six of the tendered documents.² On 13 July 2016, the Prosecution requested leave to reply (“Request”),³ attaching its reply as an annex (“Reply”), in which it withdrew the tendering of one document.⁴ On 14 July 2016, the Prosecution filed a corrigendum, correcting the Rule 65 *ter* number of the document it had withdrawn.⁵ On 21 July 2016, the Defence requested leave to sur-reply (“Request to Sur-Reply”).⁶

II. SUBMISSIONS OF THE PARTIES

A. General Submissions

2. The Prosecution requests leave to exceed the word limit for motions in order to present detailed arguments with respect to each document tendered.⁷ The Prosecution submits that the proposed rebuttal evidence directly refutes specific and significant issues raised by Defence evidence that could not reasonably have been anticipated during the Prosecution’s case-in-chief.⁸ The Prosecution argues that the limited number of tendered documents will not unduly extend the length of the proceedings or infringe on the rights of Ratko Mladić (“Accused”).⁹ The Defence makes specific submissions in relation to each of the documents as summarized below. In the Request, the Prosecution submits that the Reply addresses the Defence’s misstatement of the standard for admitting evidence in rebuttal, and its flawed argument that the proposed rebuttal evidence is not probative of significant issues contested in this case.¹⁰ In its Request to Sur-Reply,

¹ Prosecution Motion to Admit Evidence in Rebuttal, 21 June 2016 (with Confidential Annex).

² Defence Response to Prosecution Motion to Admit Evidence in Rebuttal, 6 July 2016 (with Confidential Annex A), paras 12, 20, 23-25.

³ Prosecution Request for Leave to Reply to Defence Response to Prosecution Motion to Admit Evidence in Rebuttal, 13 July 2016 (with Partly Confidential Annex).

⁴ Request, Annex: Prosecution Reply to Defence Response to Prosecution Motion to Admit Evidence in Rebuttal (with Confidential Annex).

⁵ Corrigendum to Prosecution Reply to Defence Response to Prosecution Motion to Admit Evidence in Rebuttal, 14 July 2016. The Prosecution withdraws its tendering of the document bearing Rule 65 *ter* number 33259. Where the parties have referred to the document bearing Rule 65 *ter* 33259, the Chamber understands them to have referred to the document bearing Rule 65 *ter* number 33259.

⁶ Defence Request for Leave to Sur-Reply to Prosecution Reply to Defence Response to Prosecution Motion to Admit Evidence in Rebuttal, 21 July 2016.

⁷ Motion, para. 4.

⁸ Motion, paras 1, 7.

⁹ Motion, para. 1.

¹⁰ Request, para. 2.

the Defence submits that its sur-reply addresses the Prosecution's misstatements of the standard for the rebuttal of adjudicated facts.¹¹

B. Documents Bearing Rule 65 *ter* Numbers 33645, 33646, and 02559s

3. The Prosecution tenders the documents bearing Rule 65 *ter* numbers 33645, 33646, and 02559s to rebut (i) exhibit D1514, a VRS Main Staff order to the Drina Corps Command and the Rogatica Brigade dated 28 November 1992 in which the Accused orders the Drina Corps Command to take measures to protect the Muslim population in the villages of S. Burati and Vrhbarje because they expressed loyalty to the *Republika Srpska*; and (ii) the Defence submission that exhibit D1514 runs counter to the argument that the Accused shared the common purpose of removing Muslims from Serb-claimed territories.¹² The Prosecution submits that the documents bearing Rule 65 *ter* numbers 33645, 33646, and 02559s demonstrate that starting in April 1994, Muslims from the village of Vrhbarje were subjected to forced labour at the front lines by both the Army of the Bosnian-Serb Republic and the Ministry of the Interior of the Bosnian-Serb Republic ("VRS" and "RS MUP", respectively), after which civilian and RS MUP authorities arranged for their departure.¹³ The Prosecution argues that the Defence first raised the treatment and ultimate fate of Muslim villagers from Vrhbarje and S. Burati during its case-in-chief when it tendered exhibit D1514, and that the specificity of this evidence, raised solely by the Defence, could not have been anticipated.¹⁴

4. The Defence submits that exhibit D1514 was disclosed to the Prosecution and listed for potential use with a witness's cross-examination during the Prosecution's case-in-chief and, therefore, the Prosecution cannot claim that it was unaware of the existence of this document, the fact that it might be tendered, or of the information that it contains.¹⁵ The Defence argues that because the Prosecution chose not to lead the proposed evidence during its case-in-chief, the documents tendered to rebut exhibit D1514 do not respond to a significant issue arising from the Defence case and could reasonably have been anticipated.¹⁶ Moreover, the Defence submits that the documents bearing Rule 65 *ter* numbers 33645 and 33646 only refer to the expulsion of the villagers in Vrhbarje and do not refer to the involvement of the VRS or the Accused as claimed, and therefore cannot rebut exhibit D1514, which concerns the Accused and his intentions.¹⁷ The Defence argues that because these documents do not rebut exhibit D1514, they do not respond to a

¹¹ Request to Sur-Reply, para. 1.

¹² Motion, paras 8-9

¹³ *Ibid.*

¹⁴ Motion, para. 8.

¹⁵ Response, para. 9.

¹⁶ *Ibid.*

significant issue raised by the Defence which could not reasonably have been anticipated.¹⁸ The Defence also submits that the Prosecution included the document bearing Rule 65 *ter* 02559s on its original Rule 65 *ter* Exhibit List, meaning that the document was available to the Prosecution, but it chose not to introduce the document and, therefore, the document does not respond to a significant issue arising from the Defence case, and could nonetheless reasonably have been anticipated.¹⁹

5. In its Reply, the Prosecution submits that the Defence's argument concerning the Prosecution's awareness of exhibit D1514 amounts to an assertion that evidence cannot be admitted in rebuttal if the Prosecution knew of its existence during its case-in-chief.²⁰ The Prosecution argues, however, that its awareness of a document's existence, or even the inclusion of a document in its Rule 65 *ter* Exhibit List, does not necessarily mean that the Prosecution could have reasonably anticipated every possible assertion the Defence might raise in relation to that document.²¹ With regard to the documents bearing Rule 65 *ter* numbers 33645, 33646, and 02559s, the Prosecution submits that while it did anticipate issues related to the Accused's alleged intent generally, it could not have been expected to preemptively lead evidence related to every village in Serb-claimed territory, and that the Defence case concerning the specific villages of Vrhbarje and S. Burati could not have been anticipated or countered until the issue was raised during the Defence case.²²

C. Document Bearing Rule 65 *ter* Number 33649

6. The Prosecution tenders the document bearing Rule 65 *ter* number 33649 to rebut exhibit D2010, a criminal investigation report in relation to crimes in Kotor Varoš Municipality allegedly committed in part by VRS soldiers.²³ The Prosecution argues that the document bearing Rule 65 *ter* number 33649 clarifies the VRS's failure to punish a particular VRS soldier for alleged crimes in Kotor Varoš.²⁴ The Prosecution submits that while the allegation of a general failure on the part of the VRS to investigate and punish its soldiers for crimes was a part of its case-in-chief, the specific dispositions of individual cases, such as that introduced by the Defence in exhibit D2010, were not.²⁵ The Prosecution argues that it could not have anticipated the Defence's tendering of such

¹⁷ Response, para. 11.

¹⁸ *Ibid.*

¹⁹ Response, para. 10.

²⁰ Reply, para. 3.

²¹ *Ibid.*

²² Reply, para. 4.

²³ Motion, paras 13-14.

²⁴ Motion, para. 13.

²⁵ *Ibid.*

specific information, or the tendering of what it submits is only a partial record that creates a misleading impression of the complete record.²⁶

7. The Defence submits that since exhibit D2010 was on the Prosecution's Rule 65 *ter* Exhibit List, the issue it relates to could reasonably have been anticipated and, therefore, the document bearing Rule 65 *ter* number 33649 does not meet the standards for admission in rebuttal.²⁷ In its Reply, the Prosecution argues that the Response itself both concedes that the document bearing Rule 65 *ter* number 33649 is probative of a significant issue.²⁸

D. Document Bearing Rule 65 *ter* 10505

8. The Prosecution tenders the document bearing Rule 65 *ter* number 10505 to rebut exhibit D1810, a Sarajevo CSB criminal investigation report concerning an alleged sniper attack that took place on 25 October 1994.²⁹ The Prosecution argues that the document bearing Rule 65 *ter* number 10505 clarifies an incorrect assertion in exhibit D1810 by a member of UNPROFOR that the fire came from the Muslim side.³⁰ The Prosecution argues that it could not have anticipated a need to lead evidence on this specific incident, in particular not for the purpose of ensuring against an inaccurate and misleading characterisation of the related UNPROFOR investigation.³¹

9. The Defence submits that the information contained in the document bearing Rule 65 *ter* number 10505 does not relate to or rebut UNPROFOR's specific findings.³² The Defence argues that since exhibit D1810 is included in the document now tendered by the Prosecution, the Defence's argument that the Muslim side fired on its own people could have been anticipated.³³

10. In its Reply, the Prosecution submits that the Defence, by introducing exhibit D1810, has "cherry-picked" a misleading portion of an investigative file, and that the remainder of the file is probative of the significant issue raised by the Defence and cited in its Response concerning the source of sniper fire.³⁴ The Prosecution submits that although it could have foreseen a general defence that the Army of Bosnia and Herzegovina ("ABiH") fired on Muslim civilians in Sarajevo, it could not have been expected to lead evidence with regard to this particular sniper attack and, more importantly, that it could not have foreseen that only a portion of the file would be admitted

²⁶ Motion, paras 13-14.

²⁷ Response, para. 23.

²⁸ Reply, para. 7.

²⁹ Motion, paras 17-20.

³⁰ Motion, paras 16, 18-20.

³¹ Motion, paras 17, 20.

³² Response, para. 24.

³³ *Ibid.*

³⁴ Reply, para. 5.

out of context.³⁵ The Prosecution submits that had the Defence tendered the file in its entirety as has been done jointly by the parties in other instances, no related rebuttal submissions would have been necessary.³⁶

E. Document Bearing Rule 65 ter 33653

11. The Prosecution tenders the document bearing Rule 65 *ter* number 33653 to rebut a challenge made by the Defence when it introduced evidence during its case contesting a witness's testimony that he and another person were members of the ABiH.³⁷ The Prosecution argues that it could not have reasonably anticipated such a challenge to their membership in the ABiH, particularly because such evidence was not tendered during the witness's cross-examination.³⁸

12. The Defence does not oppose the admission of the document bearing Rule 65 *ter* number 33653, although it makes additional submissions on its content.³⁹

III. APPLICABLE LAW

13. The Chamber recalls and refers to the applicable law governing the admission of evidence tendered from the bar table pursuant to Rule 89(C) of the Rules, as set out in a previous decision.⁴⁰

14. Rule 85(A) of the Rules states that unless otherwise directed by the Chamber in the interests of justice, rebuttal evidence at the trial stage shall be presented after the presentation of the Defence case. The Appeals Chamber has held that rebuttal evidence must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated.⁴¹ The Prosecution cannot call additional evidence in rebuttal to remedy a defect in its case or merely because its case has been met by contradictory evidence.⁴²

15. In relation to the Prosecution's request to exceed the word limit for motions, the Chamber notes that the Practice Direction on the Length of Briefs and Motions states that motions shall not exceed 3,000 words and that a party must seek authorization from the relevant chamber to exceed

³⁵ Reply, para. 6.

³⁶ *Ibid.*

³⁷ Motion, Confidential Annex, paras 1-4.

³⁸ Motion, Confidential Annex, para. 3.

³⁹ Response, para. 25; Confidential Annex A, paras 1-2.

⁴⁰ Decision on Defence's Eighth Motion for the Admission of Documents from the Bar Table, 24 March 2016, paras 6-7.

⁴¹ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, ("Čelebići Appeal Judgment"), para. 273. See also *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006 ("Naletilić and Martinović Appeal Judgment"), paras 255, 258.

⁴² *Čelebići Appeal Judgment*, paras 273, 275. See also *Naletilić and Martinović Appeal Judgment*, paras 255, 258.

this word limit, providing an explanation of the exceptional circumstances that necessitate the oversized filing.⁴³

IV. DISCUSSION

16. As a preliminary matter, the Chamber will grant the Prosecution's request for an extension of the Motion's word limit due to the importance of the subject matter and because the limit was not significantly exceeded. Moreover, in light of the submissions in the Response, the Chamber finds that the Prosecution has shown good cause for its Request. Lastly, the Chamber notes that the Defence's sur-reply addresses submissions made by the Prosecution with respect to a document that it has since withdrawn and, therefore, the Chamber considers the Request to Sur-Reply moot.

A. Documents Bearing Rule 65 *ter* Numbers 33645, 33646, and 02559s

17. The document bearing Rule 65 *ter* number 33645 is a statement given by Avdija Katić that describes Muslim inhabitants of Vrhbarje being subjected to forced labour in April 1994 by Serb police from Sokolac and members of the VRS. This document is linked in subject matter to the document bearing Rule 65 *ter* number 33646, which is a dispatch dated 31 October 1994 from the Sokolac Public Security Station to the Sarajevo Public Security Centre, stating that on 29 October 1994, policemen from Sokolac had handed over 61 Muslims to the Kula correctional facility who were then moved out of Vrhbarje. The document bearing Rule 65 *ter* number 02559s is an excerpt from census data published in 1995 concerning the ethnic composition of settlements, showing the number of Muslim residents in Vrhbarje prior to 1994.

18. With regard to the requirements of Rule 89(C) of the Rules as applied to documents tendered from the bar table, the Chamber considers these documents describe a sequence of events which relate to the charge of forced labour as an underlying act of persecution, and the alleged joint criminal enterprise to permanently remove Bosnian Muslims from the municipalities. The Chamber therefore finds the documents to be relevant to the Municipalities component of the case. Moreover, the Chamber considers the documents to contain indicia of reliability such as attestations, information with regard to their provenance, stamps, and signatures. The Chamber therefore finds the documents to be of probative value for the purposes of admission. The Chamber also considers that the Prosecution has set out with clarity and specificity how the documents relate to its case.

19. With respect to the Defence arguments that admission of these documents should be denied because the Prosecution cannot claim that it was unaware of the existence and content of exhibit

⁴³ Practice Direction on the Length of Briefs and Motions, IT/184 Rev. 2, 16 September 2005, paras 5, 7.

D1514 or the fact that it might be tendered into evidence by the Defence, the Chamber notes that not only has the Prosecution not made such claims, its awareness of a particular document or its potential admission into evidence does not mean that it could reasonably foresee every use of that document. As for the Defence argument that the evidence does not respond to a significant issue because the Prosecution did not lead the evidence during its case-in-chief, the Chamber considers that such an argument, if followed, would rule out the possibility of rebuttal evidence altogether. Finally, with respect to the Defence argument that the documents do not refer to the involvement of the Accused, the Chamber notes that the Prosecution has made no such claim and, in any event, evidence would not necessarily have to refer to an accused to rebut evidence related to that accused's intent. For all these reasons, the Chamber finds the Defence arguments with respect to the Prosecution's submissions and the admissibility of these documents in rebuttal to be inaccurate, unsupported, and unpersuasive.

20. Turning to the requirements for the admission of evidence in rebuttal, the Chamber considers the issues of forced labour and the forcible removal of Muslim inhabitants of Vrhbarje to be significant issues arising from the Defence case because they relate to alleged crimes and were first introduced by the admission of Defence exhibit D1514. The Chamber considers that the specific issues relating to the general treatment and fate of the Muslims from Vrhbarje and S. Burati, as introduced by the Defence, could not have been anticipated by the Prosecution because it could not be reasonably expected to anticipate the Defence adducing evidence on these particular subjects for each village in a particular municipality. For these reasons, the Chamber finds that the documents meet the criteria for admission as rebuttal evidence.

B. Document Bearing Rule 65 *ter* Number 33649

21. The document bearing Rule 65 *ter* number 33649 relates to crimes allegedly committed by former VRS soldier Predrag Cicmanović. With respect to the requirements of Rule 89(C) of the Rules as applied to documents tendered from the bar table, the Chamber considers that the document relates to the general allegation that the VRS and other elements of Serb Forces failed to take adequate steps to prevent, investigate, or punish members who committed crimes against non-Serb civilians. The Chamber therefore finds the document to be relevant to the Indictment. The Chamber also considers the document to have indicia of reliability such as dates, stamps, and signatures. The Chamber therefore finds the document to be of probative value for the purposes of admission. The Chamber also considers that the Prosecution has set out with clarity and specificity how the document relates to its case.

22. The Defence assertion that the Prosecution could have reasonably anticipated its use of exhibit D2010 simply because the Prosecution was aware of the document's existence finds no support in the Tribunal's jurisprudence or practice with respect to the admission of rebuttal evidence. As pointed out by the Prosecution, adopting such an approach would mean that no document appearing in a Rule 65 *ter* Exhibit List or otherwise known to the Prosecution could be admitted in rebuttal. As this is clearly not the case, the Chamber considers that the Defence arguments in this regard seem to be addressing the criteria for the admission of fresh evidence not previously available to the Prosecution, rather than evidence in rebuttal.

23. Turning to the requirements for the admission of evidence in rebuttal, the Chamber considers the alleged failure to prosecute crimes in Kotor Varoš by VRS members to be a significant issue raised by the admission of exhibit D2010, which relates directly to the commission of the crimes alleged in the Indictment. The Chamber considers that although the Prosecution could reasonably have been expected to anticipate Defence evidence related to the general topic of VRS criminal cases, it could not reasonably have anticipated which individual cases might be raised by the Defence. For these reasons, the Chamber finds that this document meets the criteria for admission as rebuttal evidence.

C. Document Bearing Rule 65 *ter* Number 10505

24. The document bearing Rule 65 *ter* number 10505 comprises the complete criminal investigation file relating to a purported sniper attack on 25 October 1994 in Sarajevo. With respect to the requirements of Rule 89(C) of the Rules as applied to documents tendered from the bar table, the Chamber considers that the document relates to the charged objective of the alleged joint criminal enterprise to spread terror among the civilian population of Sarajevo through a campaign of shelling and sniping. The Chamber therefore finds the document to be relevant to the Sarajevo component of the case. The Chamber observes that the document contains indicia of reliability such as dates, stamps, and signatures, and therefore finds it to be of probative value for the purposes of admission. The Chamber also considers that the Prosecution has set out with clarity and specificity how the document relates to its case.

25. With respect to the Defence argument that the information contained in the full investigation file does not relate to or rebut UNPROFOR's findings contained in exhibit D1810, the Chamber notes that the complete file not only refers specifically to UNPROFOR's findings,⁴⁴ but also includes multiple references to the origin of fire,⁴⁵ which is precisely the subject of exhibit D1810, a

⁴⁴ Rule 65 *ter* number 10505, p. 24.

⁴⁵ Rule 65 *ter* number 10505, pp. 3-6, 8-10, 14-15, 19-20, 24, 29, 31, 33, 38, 40-41.

one-page excerpt of the document bearing Rule 65 *ter* number 10505. As for the Defence argument that the Prosecution was aware of the existence of the exhibit introduced by the Defence, the Chamber again considers that such awareness does not mean that the Prosecution could have reasonably anticipated the Defence's use of this single page, taken out of context of the complete investigation file, to support an argument that the ABiH attacked Muslim civilians.

26. With respect to the requirements for the admission of evidence in rebuttal, the Chamber considers that the issue of the source of fire for this incident is a significant issue raised by Defence through the admission of exhibit D1810 in relation to the crimes charged in the Indictment. Lastly, the Chamber considers that although the Prosecution could have reasonably anticipated contradicting evidence to be adduced by the Defence with respect to the scheduled incidents of alleged sniping in Sarajevo, it could not have reasonably anticipated the introduction of evidence for all of the unscheduled incidents such as the one to which this document appears to relate, or in particular the admission of such a limited excerpt of the whole investigation file now tendered. For these reasons, the Chamber finds that the document meets the criteria for admission as rebuttal evidence.

D. Document Bearing Rule 65 *ter* number 33653

27. The document bearing Rule 65 *ter* number 33653 is a request for assistance from the Prosecution to the Government of Bosnia and Herzegovina with regard to the ABiH membership of two individuals. With respect to the requirements of Rule 89(C) of the Rules as applied to documents tendered from the bar table, the Chamber considers that the document relates to the credibility of a Prosecution witness and therefore finds the document to be relevant to the case as a whole. The Chamber also observes that the document contains indicia of reliability such as dates, stamps, and signatures, and finds it to be of probative value for the purposes of admission. The Chamber also considers that the Prosecution has set out with clarity and specificity how the document relates to its case.

28. With respect to the requirements for the admission of evidence in rebuttal, the Chamber considers that the issue of whether these people were members of particular units of the ABiH at the relevant times as raised by the admission of exhibit D1463, is significant to the witness's credibility and to the issues about which he testified. The Chamber considers that the Prosecution could not reasonably have anticipated that the Defence would challenge their membership in the ABiH without doing so during the witness's cross-examination, or base such a challenge on the limited information presented by the Defence. The Chamber also notes that the Defence does not

object to the admission of the document. For these reasons, the Chamber finds that the document meets the criteria for admission as rebuttal evidence.

V. DISPOSITION

29. For the foregoing reasons, pursuant to Rules 54, 85(A)(iii), and 89(C) of the Rules, the Chamber

GRANTS the Prosecution's request to exceed the word limit in the Motion;

GRANTS the Request;

DECLARES the Request to Sur-Reply to be moot;

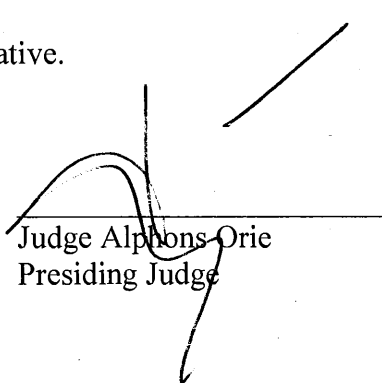
GRANTS the Motion as amended by the Reply;

ADMITS into evidence the documents bearing Rule 65 *ter* numbers 33645, 33646, 02599s, 33649, 10505, and 33653 (under seal);

ORDERS the Defence to file any motion for rejoinder evidence as a result of the admission of rebuttal evidence within one week of this decision; and

INSTRUCTS the Registry to assign exhibit numbers to the documents admitted and inform the Chamber and the parties of the numbers so assigned.

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



Judge Alphons Orie
Presiding Judge

Dated this sixteenth day of August 2016
At The Hague
The Netherlands

[Seal of the Tribunal]