



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-02-54-R77.5

Date: 19 May 2009

Original: English

IN A SPECIALLY APPOINTED CHAMBER

Before: Judge Bakone Justice Moloto, Presiding
Judge Mehmet Güney
Judge Liu Daqun

Registrar: Mr. John Hocking

Decision of: 19 May 2009

IN THE CASE

AGAINST

FLORENCE HARTMANN

PUBLIC

**DECISION ON PROSECUTION MOTION FOR
ADMISSION OF EVIDENCE FROM THE BAR TABLE
PURSUANT TO RULE 89(C)**

Amicus Curiae Prosecutor

Mr. Bruce MacFarlane, QC

Counsel for the Accused

Mr. Karim A. A. Khan, Counsel
Mr. Guénaél Mettraux, Co-Counsel

THE SPECIALLY APPOINTED CHAMBER (“Chamber”) of the 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 (“Tribunal”),¹ is seized of the “Prosecution Motion for Admission of Evidence from the Bar Table Pursuant to Rule 89(C)”, filed confidentially on 17 February 2009 (“Motion”) by the *Amicus Curiae* Prosecutor (“Prosecution”), and hereby renders its decision thereon.

I. PROCEDURAL HISTORY

1. In response to the Motion, on 4 March 2009 counsel for Florence Hartmann (“Defence”) filed the “Defence Response Regarding *Amicus* Motion for Admission from the Bar Table” (“Response”), opposing the Motion. On 5 March 2009, the Prosecution filed the “Prosecutor’s Request for leave to Reply to Defence Response to Motion for Admission from the Bar Table”, followed on 10 March 2009 by the “Prosecutor’s Reply to Defence Response to Motion for Admission from the Bar Table” (“Reply”).

2. As a preliminary matter, the Chamber notes that the Response was filed one day out of time.² In the absence of an objection from the Prosecution and considering that the Chamber did not suffer any inconvenience on account of the slight delay, the Chamber will recognise it as validly filed. However, in future, parties are expected to ensure that all future filings are done in a timely manner.

II. SUBMISSIONS

3. The Prosecution requests the admission into evidence of eleven documents, pursuant to Rule 89(C) of the Rules of Procedure and Evidence (“Rules”), set forth in an addendum to the Motion.³ It points out that these items have already been disclosed to the Defence pursuant to Rule 65 *ter* (E) and submits that their admission at this stage would expedite trial proceedings.⁴ The Prosecution classifies the proffered items into three categories: audio recordings and transcripts of the interviews conducted while Florence Hartmann (“Accused”) was a suspect (“First Category”);⁵

¹ Order Replacing Judges in a Case before a Specially Appointed Chamber, 2 April 2009.

² Pursuant to Rule 126*bis*, the Response should have been filed within fourteen days of the filing of the Motion, therefore the Response was due no later than 3 March 2009.

³ Submission of Exhibits Relevant to “Prosecution Motion for Admission of Evidence from the Bar Table Pursuant to Rule 89(C)” (confidential), 15 May 2009.

⁴ Motion, para. 1.

⁵ The Chamber notes that these specifically include a sealed CD of the first Suspect Interview, initialled and dated 22 May 2008, together with its English transcript; and a sealed CD of the second Suspect Interview, initialled and dated 9 June 2008, as well as its English transcript.

relevant publications of the Accused (“Second Category”);⁶ and legal documents consisting of an order and decisions of the Tribunal, together with a publishing contract (“Third Category”).⁷

4. In support of its Motion, the Prosecution submits that:
- a. The First Category of items is relevant and probative of the facts in issue outlined in the Order in Lieu of an Indictment.⁸ It adds that the interviews were conducted with the benefit of experienced counsel of the Accused’s own choosing, and in accordance with the safeguards provided under the Rules and the Practice Direction on Contempt.⁹
 - b. The Second Category is comprised of publications of the Accused which the Prosecution submits lie at the heart of this case. It adds that because the book and article are public editions, not created for the purposes of litigation, they are inherently reliable, easily verifiable as accurate, and their existence is not disputed by Defence.¹⁰
 - c. The Third Category is comprised of legal documents. It submits that because it consists of documents from the trial of *Prosecutor v. Slobodan Milošević*,¹¹ as well as a publishing contract signed by the Accused and a representative from *Flammarion*, their existence, accuracy and authenticity are clear.¹²

5. In support of its objection, the Defence submits that the Motion is premature, should not be admitted pursuant to Rule 89,¹³ and that:

- a. With respect to the First Category, there are serious issues pertaining to the accuracy and incompleteness of the record made of the conversation as well as interpretation made during the interview, and thus challenges the general reliability of the recording and the transcript.¹⁴ The Defence adds that its “Defence Motion for Leave to Appeal Trial Chamber’s Decision Re Stay of Proceedings for Abuse of Process” of 9 February 2009, pertaining to the

⁶ The Second Category is comprised of an excerpt of a book entitled “*Paix et Châtiment*”, a translated excerpt of “*Paix et Châtiment*”, and an article entitled “Vital Genocide Documents Concealed” dated 21 January 2008.

⁷ The Third Category consists of two confidential decisions of the Appeals Chamber filed on 20 September 2005 and 6 April 2006; a publishing contract between *Flammarion* and the Accused; and the Order appointing the *Amicus Curiae* Prosecutor of 1 September 2008; Motion, paras 2, 21-23.

⁸ Motion, para. 16.

⁹ Motion, paras 18-20; Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the International Tribunal, IT/227, 6 May 2004 (“Practice Direction on Contempt”).

¹⁰ Motion, para. 22.

¹¹ Case No. IT-02-54-T.

¹² Motion, para. 23.

¹³ Response, paras 2, 5, 10.

¹⁴ Response, paras 7 and 8, fn. 2.

Accused's erroneous belief that a waiver of her immunity had been obtained by the Prosecution would also have to be resolved before this material is admitted.¹⁵

- b. Regarding the Second Category, subject to the pending motions as well as those arising during trial, the Defence has no objections to the admission of these publications at trial.¹⁶
- c. Regarding the Third Category, the Defence submits that the Prosecution has not made any arguments concerning the relevance of these documents.¹⁷ It further submits that it takes no position as regards these documents, with the exception of the Flammarion contract, the reliability of which in the Defence's view has not been established.¹⁸

6. In its Reply, the Prosecution submits that the Motion is intended to avoid spending a disproportionate amount of time on admissibility issues.¹⁹ It further argues that the Defence confuses the interpretation during the interview with the translated transcripts that the Prosecution seeks to have admitted, and submits that the argument concerning immunity is *res judicata*.²⁰

III. APPLICABLE LAW

7. The legal standard for the admission of evidence pursuant to Rule 89 (C) of the Rules, is that a Chamber may admit any evidence, including evidence from the bar table, provided it is relevant and has probative value.²¹ As regards the required probative value, it must not be substantially outweighed by the need to ensure a fair trial.²² In addition, the Chamber reiterates that evidence must be reliable in order to have probative value, although a *prima facie* showing of reliability is sufficient.²³ Concerning the required showing of relevance, "the offering party must be able to demonstrate, with clarity and specificity, where and how each document fits into its case".²⁴

¹⁵ Response, para. 9.

¹⁶ Response, paras 11 and 12.

¹⁷ Response, paras 13 and 14.

¹⁸ Response, para. 14.

¹⁹ Reply, para. 4.

²⁰ Reply, paras 6 and 7.

²¹ *Prosecutor v Rasim Delić*, Case No. IT-04-83-T, Decision on Prosecution Motion to Admit Documents in Evidence, 9 May 2008 ("Second *Delić* Decision on Evidence"), para. 8.

²² *Prosecutor v Rasim Delić*, Case No. IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008 ("*Delić* Decision on Evidence"), para. 7.

²³ Second *Delić* Decision on Evidence, para. 8; *Prosecutor v. Milutinović et al*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006 ("*Milutinović* Decision"), para. 10; *Prosecutor v Prlić et al.*, Case No. IT-04-74-T, Decision on Admission of Evidence, 13 July 2006, p. 5.

²⁴ Second *Delić* Decision on Evidence, para. 8; *Milutinović* Decision, para. 18.

IV. DISCUSSION

8. The Chamber considers that it would be assisted by further arguments from the Prosecution in reply to those raised by the Defence in the Response. The Chamber therefore grants leave for the Prosecution to reply.

9. With respect to the proffered evidence contained in the First Category, consisting of the two interviews of the Accused conducted while she was a suspect, together with their transcripts, the Chamber notes that the “Decision on Motion for Certification to Appeal Trial Chamber’s Decision Re Stay of Proceedings for Abuse of Process”, was filed on 13 May 2009, dismissing the “Defence Motion for Leave to Appeal Trial Chamber’s Decision Re Stay of Proceedings for Abuse of Process” of 9 February 2009. Thus, the Defence’s submission that this motion would have to be resolved before the admission of this evidence is now moot.

10. The Chamber further notes that the Defence essentially challenges the accuracy or completeness of the record made of these conversations, which it submits affect the reliability of the said evidence.²⁵ However, the Defence fails to substantiate its claims or provide any argument concerning the inaccuracy or incompleteness of the recording made of these interviews. On the other hand, the Chamber notes the Prosecution’s detailed submissions describing the gathering and preservation of this proposed evidence.²⁶ The Chamber finds that the Prosecution has established a *prima facie* showing of reliability sufficient for the purposes of admitting the evidence. The Chamber emphasises that a decision to admit evidence does not in any way constitute a binding determination as to its authenticity or credibility. These are matters to be assessed by the Chamber at a later stage in the course of determining the weight to be attached to the evidence in question.²⁷ Thus, the following proposed exhibits are admitted into evidence: (1) Sealed CD of the First Suspect Interview dated 22 May 2008; (2) Sealed CD of the Second Suspect Interview dated 9 June 2008; (3) English Transcript of Sealed CD of the First Suspect Interview dated 22 May 2008; and (4) English Transcript of Sealed CD of the Second Suspect Interview dated 9 June 2008.

11. Concerning the Second Category of proffered exhibits, given that the Defence has no objections to their admission and that the Chamber is satisfied of their relevance and probative value, the Chamber admits the following items into evidence: (1) *Paix et Châtiment* - French

²⁵ Response, paras 7-8.

²⁶ Motion, para. 19.

²⁷ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 22.

excerpt), *Paix et Châtiment* – English translation excerpt;²⁸ and (2) the article entitled “Vital Genocide Documents Concealed”, 21 January 2008.

12. Regarding the Third Category of documents, the Chamber notes in relation to the Appeals Chamber decisions in the *Slobodan Milošević* case of 20 September 2005 and 6 April 2006, as well as the Order Appointing the *Amicus Curiae* Prosecutor of 1 September 2008, that the Defence “takes no position” because “it is not in a position to ascertain the alleged relevance of these documents.”²⁹ The Defence adds that the Prosecution has not established the relevance of the Flammarion contract.³⁰ While the Defence challenges the relevance of all four documents contained in the Third Category, the Chamber finds that they are indeed clearly relevant to the present case as they directly relate to charges in the Indictment.

13. The Defence further disputes the reliability of the publishing contract dated 20 December 2006 between *Flammarion* and the Accused. However, the Chamber finds that it fails to substantiate its arguments in this regard. Moreover, the Chamber notes that the Defence has previously indicated in a letter dated 20 January 2009 addressed to Mr MacFarlane from Mr Karim A. A. Khan, filed as an annex to “Prosecution’s Statement of Admissions of the Parties and Matters not in Dispute”, that it does not dispute the existence of this contract, specifically stating that “[o]n 20 December 2006, Ms. Hartmann entered into a publishing contract with Flammarion”. In these circumstances, and taking into account the Prosecution’s submissions regarding the nature of this document, the Chamber finds that the said contract is *prima facie* reliable and has probative value. Similarly, the Chamber finds that it is apparent from their nature and source that the Appeals Chamber decisions and Order appointing the *Amicus Curiae* Prosecutor, are reliable and have probative value.

14. Thus, the Chamber is satisfied that the following proposed exhibits fulfil the requirements of Rule 89 and are therefore admitted into evidence: (1) Order of 1 September 2008 appointing the *Amicus Curiae* Prosecutor; (2) Appeals Chamber decisions of 20 September 2005 and of 6 April 2006 (admitted under seal); and (3) the publishing contract with *Flammarion*.

V. DISPOSITION

15. For the foregoing reasons, and pursuant to Articles 20, 21 and 22 of the Statute of the Tribunal and Rules 54 and 89 of the Rules, the Chamber

²⁸ The Chamber notes that the Prosecution requests the admission of Registry pages D2067-2064 of the French version of *Paix et Châtiment* excerpt, and Registry pages D2062-D2051 of the English excerpt of *Paix et Châtiment*.

²⁹ Response, para. 13.

³⁰ Response, para. 14.

GRANTS the Prosecution's Request for Leave to Reply;

GRANTS the Motion,

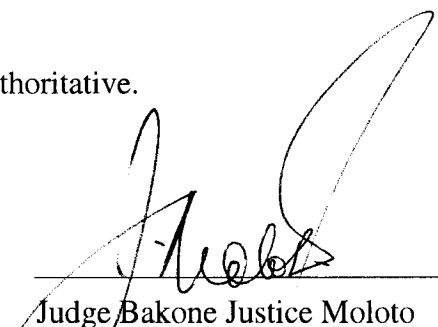
DECIDES as follows:

The following proposed exhibits are admitted into evidence:

- 1) Sealed CD of the First Suspect Interview dated 22 May 2008.
- 2) Sealed CD of the Second Suspect Interview dated 9 June 2008.
- 3) English Transcript of Sealed CD of the First Suspect Interview dated 22 May 2008.
- 4) English Transcript of Sealed CD of the Second Suspect Interview dated 9 June 2008.
- 5) *Paix et Châtiment*, French excerpt, Registry pages D2067-2064.
- 6) *Paix et Châtiment* – English translation excerpt, Registry pages D2062-D2051.
- 7) Article entitled "Vital Genocide Documents Concealed", 21 January 2008.
- 8) Order appointing Amicus Curiae Prosecutor of 1 September 2008.
- 9) Appeals Chamber decision of 20 September 2005 (admitted under seal).
- 10) Appeals Chamber decisions of 6 April 2006 (admitted under seal).
- 11) Publishing contract with *Flammarion* dated 20 December 2006.

AND REQUESTS the Registry to assign numbers to the exhibits admitted into evidence.

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



Judge Bakone Justice Moloto
Presiding

Dated this 19th day of May 2009

At The Hague

The Netherlands

[Seal of the Tribunal]