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19 July 2013

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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: 19 July 2013
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 19 July 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR ADMISSION
OF DOCUMENTS FROM THE BAR TABLE**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 7 May 2013, the Prosecution filed a motion requesting the admission of documents from the bar table ("Motion").¹ The Defence filed a response on 21 May 2013 objecting to the Motion in its entirety ("Response").² On 27 May 2013, the Prosecution requested leave to reply to the Response, and filed its reply ("Request to Reply", and "Reply", respectively).³ Leave to reply is hereby granted.

2. The Prosecution requests the admission of 30 documents ("Documents") from the bar table which it submits demonstrate the intent of the Accused with respect to the charges of genocide and persecution contained in the Indictment.⁴ The Prosecution submits that the admission of the Documents will save court time and facilitate the presentation of the Prosecution's case.⁵ To avoid the tendering of lengthy documents included on its Rule 65 *ter* exhibit list, the Prosecution tendered a number of excerpts.⁶

3. The Prosecution recalls the Chamber's instructions relating to the submission of bar table motions, and submits that it is appropriate to tender the Documents at this stage of the proceedings.⁷ In this respect, the Prosecution clarifies that some of the Documents relate to the Sarajevo and Municipalities components of the case, while others relate to the Srebrenica component. Nonetheless, the Prosecution submits that the intent of the Accused with regard to the charges of persecution and genocide is relevant to each component of the case and, for reasons of judicial efficiency, the Documents are tendered and should be evaluated together.⁸ Lastly, the Prosecution submits that the Documents are relevant as they illustrate patterns of speech demonstrating the

¹ Prosecution Motion to Admit Evidence from the Bar Table: Mladić's Statements Indicating Genocidal and Persecutory Intent, filed with Public Annex A, 7 May 2013.

² Defence Response to Prosecution Motion to Admit Evidence from the Bar Table: Mladić's Statements Indicating Genocidal and Persecutory Intent, 21 May 2013.

³ Prosecution Request for Leave to Reply to Defence Response to Prosecution Motion to Admit Evidence from the Bar Table: Mladić's Statements Indicating Genocidal and Persecutory Intent, 27 May 2013; Prosecution Reply to Defence Response to Prosecution Motion to Admit Evidence from the Bar Table: Mladić's Statements Indicating Genocidal and Persecutory Intent, 27 May 2013.

⁴ Motion, para. 1; Motion, Annex A.

⁵ Motion, para. 2.

⁶ Motion, para. 2. These are documents bearing Rule 65 *ter* nos 01643A, 01643B, 20799A (marked for identification as P327), 27524A, 01724A, 22883A, 01728A, 10682A, 22658A, 25430B, 01737A, and 01737B. See Motion, Annex A.

⁷ Motion, para. 10.

⁸ Motion, paras 10-11.

Accused's *mens rea* and the connection between his utterances and the crimes committed on the ground.⁹

4. The Defence opposes the Motion in its entirety.¹⁰ First, it challenges the reliability of the tendered excerpts containing previous statements of the Accused made during the Indictment period, which were not made under oath, and were not corroborated by other evidence.¹¹ Second, it submits that the Prosecution has not demonstrated the statements' relevance as these were not linked to specific crimes or incidents included in the Indictment.¹² It also submits that the excerpts do not sufficiently present the context in which the Accused's statements were made.¹³ Third, it argues that the use of derogatory language, which it submits was commonly accepted and used by the warring parties, does not demonstrate the requisite intent.¹⁴ It therefore submits that the Documents fail to meet the requirement of Rules 89 (C) of the Rules and Procedure and Evidence ("Rules").¹⁵

5. In its Reply, the Prosecution submits that corroboration of the Documents is not required for their admission into evidence pursuant to Rule 89 (C).¹⁶ It also submits that contemporaneous utterances allegedly made by the Accused are admissible without the procedural safeguards which would be required for admission of non-contemporaneous sworn testimony by an accused.¹⁷

II. APPLICABLE LAW

6. The Chamber recalls and refers to the applicable law governing the admission of documents from the bar table as set out in a previous decision.¹⁸

III. DISCUSSION

7. On 10 November 2011 and 29 March 2012, the Chamber provided guidance to the Parties regarding the submission of motions for admission of evidence from the bar table.¹⁹ The Chamber

⁹ Motion, paras 3, 12-13; Motion, Annex A.

¹⁰ Response, para. 1, p. 5.

¹¹ Response, para. 4.

¹² Response, paras 4-5, 10-11.

¹³ Response, paras 4-5, 10-11.

¹⁴ Response, paras 6-9, 13.

¹⁵ Response, para. 4.

¹⁶ Reply, para. 5.

¹⁷ Reply, paras 3-4.

¹⁸ Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment, 2 May 2013, paras 7-8.

¹⁹ T. 109-110, 234-236. See also T. 8875, 9505.

noted in particular its preference to receive any bar table evidence at the end of each component of the Prosecution's case.²⁰ The Chamber notes that the Prosecution's request deviates from the Chamber's guidance insofar as the Documents relate to the Municipalities and Srebrenica components of the case. It also notes that the Defence has not made submissions regarding the timing of the Motion. The Chamber acknowledges that material regarding the Accused's alleged state of mind (discriminatory intent) during one component of the case may be relevant to the other components, and *vice versa*. While it is preferable that such evidence is presented during the relevant component of the case through witnesses, in the present instance it is not in the interest of justice to require the Prosecution to tender the Documents in a piecemeal manner. The Chamber will therefore allow the Prosecution's request to deviate from the Chamber's guidance in this respect.

8. The Chamber notes that document bearing Rule 65 *ter* no. 02388 is 153-pages long and that the Prosecution only appears to rely on one page of this document.²¹ The Chamber stresses that it is generally not assisted by the tendering of documents of considerable length, when the tendering Party does not rely on the majority of the document to argue its case. This creates an unnecessary burden on the Parties and the Chamber to review material which, ultimately, will likely have no bearing on the case. The Parties are therefore encouraged to tender extracts from documents where possible, provided that the extract does not present a false or misleading picture of the overall document. With regard to the document bearing Rule 65 *ter* no. 02388, the Chamber considers that the Prosecution has not provided with sufficient clarity and specificity (i) the relevance and probative value of the document, and (ii) how it would fit into its case, and will deny its admission into evidence without prejudice.

9. The Chamber notes that documents bearing Rule 65 *ter* nos 20781, 20782, and 20784 have only been uploaded in eCourt in the BCS language. As a result, the Chamber is unable to assess their relevance and probative value. The Chamber therefore will deny their admission into evidence, without prejudice.

10. The remaining Documents appear to be directly relevant to the alleged conduct of the Accused during and shortly after the Indictment period,²² and were either recorded in the form of a contemporaneous audio/video recording (such as an intercept or a video), or in the form of other

²⁰ Ibid.

²¹ Motion, Annex A, p. viii.

contemporaneous material (such as a directive, a newspaper article, or minutes of a meeting). The Prosecution argues that they indicate the Accused's discriminatory intent during the Indictment period. The Defence argues that the Documents are not probative as (i) some are excerpted in a manner which divorces them from the context in which the Accused's alleged statements were made, and; (ii) they are not corroborated by other evidence. Lastly, it submits that the use of derogatory language does not demonstrate the requisite intent for the crimes charged. The Chamber notes that, in spite of the Chamber's guidance of 10 November 2011, the Defence did not make specific submissions regarding each of the 30 Documents listed in Annex A to the Motion.²³ The Chamber can therefore only address the Defence general submissions in determining whether the standard for admission of the Documents from the bar table has been met.

11. In relation to the first Defence argument, the Chamber does not consider that the tendering of extracts from documents is a factor weighing against their admission into evidence, provided the full document is available to both Parties. In this respect, the Chamber emphasizes that the Defence may request the admission into evidence of other extracts from the same materials tendered by the Prosecution. In relation to the second Defence argument, the Chamber notes that corroboration is not required for the admission of evidence pursuant to Rule 89 (C). Corroboration is required for evidence already admitted pursuant to Rule 92 *quater* if used in order to support a conviction.²⁴ In relation to the last Defence argument, the Chamber considers that the question to what extent the Documents may be relied upon to establish the requisite intent is relevant to the weight, if any, that the Chamber will ultimately attribute to the Documents in light of the trial record. However, it is not relevant to determine their admission into evidence pursuant to Rule 89 (C).

12. The Chamber finds that the remaining Documents are relevant and probative to the present case, and that the Prosecution has sufficiently demonstrated with the required specificity how they fit into its case. Furthermore, despite any specific submissions by the Defence contesting the authenticity or reliability of individual documents, the Chamber considered whether the probative value of the Documents is outweighed by the need to ensure a fair trial pursuant to Rule 89 (D). In its *proprio motu* exercise pursuant to Rule 89 (D), the Chamber gave special consideration to the intercept evidence tendered through the Motion. Specifically, it considered that documents bearing

²² Two of the Documents relate to the alleged conduct of the Accused which are dated shortly after the Indictment period. These are documents bearing Rule 65 *ter* nos 04428 (28 December 1995), and 02114 (14 January 1996).

²³ T. 110-111. As a result, the column in Annex A to the Motion indicating the "Defence comments" has been left blank.

²⁴ See e.g. *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgement, 4 December 2012, para. 570.

Rule 65 *ter* nos 20779, 20799A (MFI P327) and 27580 are intercepts received from the Bosnia and Herzegovina Agency for Investigation and Documentation. For these intercepts, the Chamber considered that the Prosecution has tendered the original audio recordings, the BCS transcription and the corresponding English translation. Additionally, it considered that document bearing Rule 65 *ter* no. 20799A (MFI P327) had been put to witness John Wilson, who confirmed some of the information contained therein.²⁵ The Chamber further examined documents bearing Rule 65 *ter* nos 01643A and 01643B, which are intercepts recovered by the MUP of Serbia following a seizure of the Accused's house in 2010.²⁶ For these intercepts, the Chamber considered that the Prosecution has tendered the original audio recordings, the BCS transcription and the corresponding English translation. It observed that the Prosecution specifically indicated that "[t]he voices on the audio tape recordings have been identified as the Accused by OTP staff. If the Defence challenges this identification the Prosecution will tender corroborative evidence".²⁷ The Chamber considered, however, that the Defence made no such challenge and based on the representations made by the Prosecution, the Chamber is satisfied with the authenticity of the document. Lastly, the Chamber examined Rule 65 *ter* no. 27782, a book from which an intercept was excerpted, but for which no audio was available. Nonetheless, the Chamber considered that this particular book originated from the Drina Corps collection, a collection of materials for which the Prosecution explained in court that it was seized from the Republika Srpska Ministry of Interior in December 2004.²⁸ The Chamber considered that, thus far, the Defence has not raised any objections regarding documents that originated from this collection.²⁹ In conclusion, on the basis of the Chamber's review of the Documents, and absent any specific submissions by the Defence contesting the authenticity or reliability of individual documents, the Chamber does not find that their probative value is outweighed by the need to ensure a fair trial pursuant to Rule 89 (D).

13. The Chamber observes with regard to document bearing Rule 65 *ter* no. 02114 that only an English translation has been uploaded into eCourt. The Chamber will therefore instruct the Prosecution to upload the original BCS version of this document in eCourt within one week of the date of this Decision.

14. Lastly, the Chamber notes that in a footnote to the Motion, the Prosecution indicates with regard to 12 documents that they have been admitted in other cases, and generally states that the

²⁵ T. 3963-3965.

²⁶ Motion, Confidential Annex A, page (i).

²⁷ Motion, Confidential Annex A, page (i), footnote 42.

²⁸ T. 9432-9433.

Chamber “should take judicial notice of the exhibits’ authenticity pursuant to Rule 94 (B)”.³⁰ However, the Prosecution ultimately does not include this in its request to the Chamber, nor does it provide any further information that is normally required to determine such requests.³¹ The Chamber has therefore not further considered this part of the Motion.

15. In conclusion, the Chamber is satisfied that the documents bearing Rule 65 *ter* nos 01643A, 01643B, 20779, 20799A (MFI P327), 27782, 27524A, 03747, 18730, 00634, 03877, 19789, 03782, 01724A, 00936, 22883A, 01728A, 10682A, 22658A, 11753, 27580, 25430B, 09899, 01737A, 01737B, 04428, and 02114 are relevant and probative to the case, and that the Prosecution has shown with sufficient clarity and specificity how each of these fits into its case. For these reasons, it will allow their admission into evidence from the bar table.

IV. DISPOSITION

16. For the foregoing reasons, pursuant to Rule 89 of the Rules, the Chamber

- (i) **GRANTS** the Request to Reply;
- (ii) **GRANTS** the Motion **IN PART**;
- (iii) **ADMITS** into evidence the following documents: Rule 65 *ter* nos 01643A, 01643B, 20779, 20799A (MFI P327), 27782, 27524A, 03747, 18730, 00634, 03877, 19789, 03782, 01724A, 00936, 22883A, 01728A, 10682A, 22658A, 11753, 27580, 25430B, 09899, 01737A, 01737B, and 04428;
- (iv) **DENIES** admission into evidence of documents bearing Rule 65 *ter* nos 20781, 20782, 20784, and 02388, without prejudice;
- (v) **INSTRUCTS** the Prosecution to upload the BCS version of document bearing Rule 65 *ter* no. 02114 in eCourt within one week of the date of this Decision;

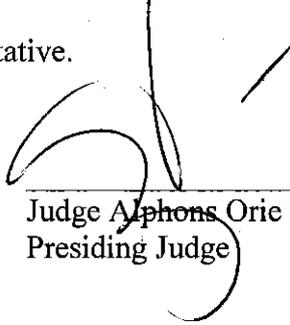
²⁹ T. 6709-6710, 9432-9433, 12831-12832.

³⁰ Motion, para. 1 and footnote 1; see column entitled “origin and previous admissions” of Annex A to the Motion; see also Decision on Prosecution First Motion to Admit Evidence from the Bar Table: Mladić Notebooks, 25 September 2012, para. 7.

³¹ Motion, para. 14.

- (vi) **ADMITS** document bearing Rule 65 *ter* no. 02114 into evidence, once the Prosecution has uploaded the BCS version of this document in eCourt in accordance with the instruction in (v);
- (vii) **REQUESTS** the Registry to link the BCS version of the document bearing Rule 65 *ter* no. 02114, once the document has been uploaded in eCourt, to the English version in eCourt;
- (viii) **REQUESTS** the Registry to assign numbers to the exhibits admitted by this decision and inform the parties and the Chamber of the numbers so assigned; and
- (ix) **DENIES** the remainder of the Motion

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



Judge Alphons Orie
Presiding Judge

Dated this nineteenth day of July 2013
At The Hague
The Netherlands

[Seal of the Tribunal]