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02 June 2014

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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: 2 June 2014
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 2 June 2014

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR CERTIFICATION
TO APPEAL THE DECISION ON PROSECUTION'S SECOND
RESIDUAL BAR TABLE MOTION**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 11 April 2014, the Chamber issued a decision admitting into evidence 23 documents (“Impugned Decision”).¹ On 17 April 2014, the Defence filed a motion seeking certification to appeal the Impugned Decision (“Motion”).² The Prosecution did not file a response to the Motion.

II. SUBMISSIONS

2. The Defence seeks certification to appeal the Impugned Decision on the basis of two grounds. The first ground is the Chamber’s finding in paragraph 9 of the Impugned Decision in respect of documents that, in the Defence’s view, relate to events outside of the Indictment’s scope.³ The second ground is the Chamber’s finding in paragraphs 11 and 12 of the Impugned Decision, in respect of evidence which, according to the Defence, concerns live issues.⁴ In connection with the test under Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”), the Defence submits that the first prong thereof is met because the evidence in question relates to “allegations of criminal conduct through a JCE that are directly charged against the Accused.”⁵ The Defence further submits that the opportunity to stage a “confrontation and rebuttal of the origin of the evidence” is critical for upholding the rights of the Accused and for ensuring a fair trial.⁶ The Defence submits, moreover, that the second prong of the test under Rule 73 (B) of the Rules is met because the Defence is at the stage of presenting its case and, if evidence outside of the scope of the Indictment needs to be rebutted, it will not only greatly expand and prolong the complexity and duration of the Defence case, but will also result in an “unfair resource drain”.⁷ The Defence also submits that the evidence in question is of such importance and significance that its admission, if deemed wrong, will affect all evidence to follow and necessarily influence the deliberations and the outcome of the trial.⁸ On this basis, the Defence makes the assertion that a determination by the Appeals Chamber is now necessary to materially advance the proceedings.⁹ Lastly, the Defence raises arguments which concern alleged judicial errors.¹⁰

III. APPLICABLE LAW

¹ Decision on the Prosecution’s Second Residual Bar Table Motion, 11 April 2014.

² Defence Motion for Certification to Appeal the Decision on Prosecution’s Second Residual Bar Table Motion, 17 April 2014.

³ Motion, para. 3.

⁴ *Ibid.*

⁵ Motion, para. 8.

⁶ *Ibid.*

⁷ Motion, para. 9.

⁸ Motion, para. 4.

⁹ *Ibid.*

¹⁰ Motion, paras 10-13.

3. Pursuant to Rule 73 (B) of the Rules, a trial chamber may grant certification of an interlocutory appeal if the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of a trial chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The purpose of a request for certification to appeal is not to show that an impugned decision is incorrectly reasoned, but rather to demonstrate that the two cumulative conditions set out in Rule 73 (B) of the Rules have been met.¹¹ The Chamber further notes the permissive language of Rule 73 (B) of the Rules, whereby even when both requirements of the rule are satisfied, certification is not automatic and remains at the discretion of the trial chamber.

IV. DISCUSSION

4. As the first preliminary matter, the Chamber notes that it understands the Defence's references to paragraphs 9, 11, and 12 of the Impugned Decision to mean that the Defence is seeking certification to appeal the admission into evidence of 8 documents from the 23 documents that were admitted into evidence in the Impugned Decision. In the Impugned Decision, the eight documents in question were referred to as the "Babić Intercepts" and currently bear the exhibit numbers P6499 up to and including P6506.¹²

5. As the second preliminary matter, the Chamber notes that the Defence, although having correctly set out the applicable law, incorrectly premises many of its arguments for certification to appeal on alleged judicial errors.¹³ The Trial Chamber reminds the Defence, as it has done on a number of occasions,¹⁴ that the appropriate stage for presenting arguments concerning judicial errors is in an appeal itself, not in a request for certification to appeal. Accordingly, the parts of the Motion concerned with alleged judicial errors will not be considered in this decision.

6. The Defence submits that the two cumulative criteria for granting certification are met, yet fails to provide detailed arguments or reasons to support this proposition. The Chamber notes that merely reciting the language of Rule 73 (B) is insufficient. Moreover, the Defence considers the allegations of criminal conduct by the Accused through his participation in a joint criminal

¹¹ Decision on the Defence Motion for Certification to Appeal the Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 13 August 2012 ("EDS Certification Decision"), para. 3.

¹² See Impugned Decision, para. 7. Throughout the Motion, the Defence refers to the Babić Intercepts as "Babić Documents".

¹³ See Motion, paras 10-13.

¹⁴ See e.g. Decision on the Defence Motions for Certification to Appeal the Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 June 2012, para. 15; EDS Certification Decision, para. 4; Decision on Defence Motions for Reconsideration and Certification to Appeal the Decision on Defence Motion Seeking Adjustment of the Trial Schedule, 22 August 2013, para. 4; Decision on Defence Motion for Certification to Appeal Oral Decision Admitting Witness van der Weijden's Expert Report, 13 September 2013, para. 7.

enterprise to amount to a live issue. The Chamber, however, emphasizes that it is insufficient to argue that simply because the evidence that was found admissible in an impugned decision relates to a live issue, that decision is one involving a matter which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

7. With respect to the first prong of the test under Rule 73 (B) of the Rules, the Chamber considers that the issue at hand is whether the admission of the Babić Intercepts would significantly affect the fairness of the proceedings or the outcome of the trial. In general, this issue cannot be reasonably expected to be determined at this stage, as the Chamber will have to evaluate all of the evidence it has received at the end of the trial.¹⁵ With respect to certain pieces of evidence, for example those obtained in the manner described under Rule 95 of the Rules, a decision on admission in itself may significantly affect the fairness of the proceedings.¹⁶ However, the Defence has not made specific submissions in this respect. For this reason, the Impugned Decision cannot be considered to significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

8. As the first prong of Rule 73 (B) of the Rules has not been met, and the requirements of this provision being cumulative in nature, there is no need to determine whether the second prong thereof has been met.

¹⁵ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Simatović Defence Request for Certification to Appeal (Babić), 17 February 2011, para. 9; see also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Application for Certification to Appeal Decision on Rule 92 quater, (Witness KDZ198), 31 August 2009, para. 12.

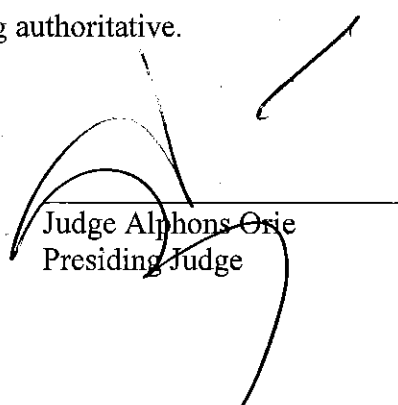
¹⁶ Under certain conditions, a decision on the admission of evidence in itself may also significantly affect the outcome of the trial. See e.g. *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Čermak and Markač Defence Requests for Certification to Appeal the Trial Chamber Decision of 21 April 2010 to Reopen the Prosecution's Case, 10 May 2010, para. 7.

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V. DISPOSITION

9. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this second day of June 2014
At The Hague
The Netherlands

[Seal of the Tribunal]