UNITED NATIONS	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 January 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: **19 January 2016**

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

DECISION ON THE ADMISSIBILITY OF A POLYGRAPH REPORT

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 22 January 2015, the Defence filed a motion ("Motion") seeking to have admitted into evidence the Polygraph Test Report ("Report") referenced by witness Novica Andrić during his testimony on 30 September 2014.[1] On 5 February 2015, the Prosecution filed its response ("Response") opposing the admission of the Report.[2]

II. SUBMISSIONS OF THE PARTIES

2. Pursuant to Rule 89(C) of the Rules, the Defence seeks the admission into evidence of the Report of Novica Andrić, administered on 23 May 2006 at the *Republika Srpska* MUP laboratory for polygraph testing by qualified polygraph Examiner Darko Jokić.[3] The admission of the Report is sought for the purpose of "provid[ing] probative assistance to the Chamber in determining witness credibility".[4] As per the Report, the polygraph examiner opines that by virtue of the fact that Andrić had no marked reactions to questions regarding the disappearance of Avdo Palić or to his possible murder and burial site, Andrić may be eliminated as the perpetrator of the aforementioned crime.[5] Accordingly, the Defence submits that the Report is capable of corroborating Andrić's testimony which denies his involvement in the death of Palić.[6] It is on this basis that the Defence advances that the Report constitutes a significant component of the witness's evidence which is integral to the Defence's case and which should be admitted into evidence in the interests of justice.[7] As regards the admissibility of polygraph evidence generally, the Defence discusses domestic and international jurisprudence which it deems to be authority for the proposition that polygraph evidence should be admitted in this case.[8] Further, the Defence references academic opinion which it deems to support the reliability and admissibility of polygraph evidence.[9]

3. The Prosecution objects to the admission of the Report on the grounds that polygraph evidence will not be of material assistance to the Chamber in assessing Novica Andrić's credibility. In response to the jurisprudence proffered by the Defence, the Prosecution contends that the Defence has failed to delineate the restrictive circumstances under which polygraph evidence has

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1 Defence Motion regarding the Admissibility of Polygraph Evidence, 22 January 2015.
2 Prosecution Response to Defence Motion regarding the Admissibility of Polygraph Evidence, 5 February 2015.
3 Motion, para. 3; Annex A, p. 12.
4 Motion, para. 6.
5 Motion, para. 6 (a); Annex A, p. 2.
6 Motion, paras 5 (a), 7, 10(b); Novica Andrić, T. 26386, 26391, 26417.
7 Motion, para. 6,
8 Motion, paras 2, 8, 9-11.
9 Motion, para. 13 (b)(ii), footnotes 13, 23, 33, 35-37, 59-60.

previously been deemed admissible in the jurisdictions and courts cited.[10] The Prosecution further submits contradictory jurisprudence negating the admissibility of polygraph evidence in the jurisdictions of Romania, Russia, and the USA.[11] As regards the reliability of the Report, the Prosecution advances submissions contesting the reliability of the "Control Questions Test" method used in the production of the Report.

III. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law governing the admission of evidence pursuant to Rule 89(C) of the Rules.

IV. DISCUSSION

5. The Report relates to the charges in the Municipalities component of the case, specifically acts of persecution carried out in the Rogatica Municipality. The Chamber finds the proffered evidence relevant to Counts 1 and 3 through 8 of the Indictment.

6. The Chamber reaffirms its role as the ultimate arbiter of witness credibility at trial and notes that the parties have had an opportunity to fully explore the witness's knowledge and test his evidence as to its credibility and reliability in open court. To this end, Novica Andrić was cross-examined during his testimony as regards events relevant to the death of Avdo Palić; including the capture of Avdo Palić, his detention in an apartment in Rogatica, his transfer by the witness to a prison in Bijeljina and as to the death and subsequent exhumation of Avdo Palić's body from a mass grave ten kilometres from Rogatica town.[12] Andrić testified that he had no knowledge of events surrounding the death of Palić.[13] On re-direct examination, Andrić testified that the results of a polygraph test, which he underwent in 2006, implied that responses given by him denying knowledge of the disappearance, possible murder or burial site of Avdo Palić after his transfer to Bijeljina were not untruthful.[14]

7. The Chamber has thoroughly analysed the sources of authority proffered by the parties. The sources demonstrate great divergence amongst legal systems as to the admissibility of polygraph evidence. The interpretation of such evidence and the reliability of any conclusions drawn from it are further subject to controversy amongst experts from various disciplines.

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[10] Response, para. 4 and footnote 9.
[11] Response, para. 4.
[12] Novica Andrić, T. 26386-26391.
[13] Novica Andrić, T. 26391.
[14] Novica Andrić, T. 26416-26421.

8. The Report purports to issue a determination as to the knowledge of the witness of events surrounding the death of Palić and is unrelated to the remainder of the witness's evidence. The absence of knowledge of said circumstances is not vital to the case of either party and is unrelated to the evidence the Defence elicited from the witness in his examination-in-chief. Accordingly, the Chamber considers that the probative value of the report is not at such a level as to assist the Chamber in determining any matter before it. In light of this, considerations as to whether the Report should have been more properly tendered as an expert report under Rule 94*bis* are moot at this juncture.

V. DISPOSITION

9. For the foregoing reasons, pursuant to Rule 89 (C) 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 nineteenth day of January 2016
At The Hague
The Netherlands

[Seal of the Tribunal]