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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 May 2013
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 2 May 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION'S BAR TABLE MOTION FOR
THE ADMISSION OF INTERCEPTS: SREBRENICA
SEGMENT**

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 2 October 2012, the Prosecution filed a motion requesting that the Chamber (1) grant addition of eight intercepts to its Rule 65 *ter* exhibit list; (2) take judicial notice of the authenticity of 280 intercepts related to the Srebrenica segment of its case,¹ as well as of formerly proposed adjudicated facts nos 1659-1663 and 1669 pursuant to Rule 94 (B) of the Rules of Procedure and Evidence (“Rules”); and (3) admit the Intercepts into evidence from the bar table.² The Defence filed a response on 15 October 2012 objecting to the Motion in its entirety.³ The Prosecution’s request for leave to reply to the Response, filed on 19 October 2012, was denied by the Chamber and communicated to the parties informally on 23 October 2012. On 28 November 2012, the Prosecution filed a corrigendum to its Motion, correcting certain mistakes contained in Confidential Annex A to the Motion (“Annex A”) and withdrawing a duplicate Rule 65 *ter* number.⁴ On 29 January 2013, the Prosecution informed the Chamber through informal communication that it withdraws Rule 65 *ter* number 21240C from consideration.

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution seeks to add eight intercepts to its Rule 65 *ter* exhibit list.⁵ It submits that seven were identified as a result of an ongoing analysis of the Prosecution’s intercept evidence and are corroborative of intercepts already on the exhibit list, and the eighth intercept is a new intercept identified by the Prosecution as being relevant to the case against Mr. Mladić (“the Accused”).⁶ The Prosecution avers that the eight intercepts are highly relevant and of probative value to the charges in the Indictment, and their addition to the Rule 65 *ter* exhibit list will not prejudice the Defence.⁷ In Response, the Defence contends that the Prosecution has failed to demonstrate good cause to request addition of these eight intercepts to the Rule 65 *ter* exhibit list at this late stage of the proceedings, submitting that their addition would result in prejudice.⁸

3. With respect to the authenticity and reliability of the intercepts, the Prosecution puts forth three main submissions. First, it submits that the intercepts carry independent indicia of reliability,

¹ This includes the eight intercepts for which addition to the Rule 65 *ter* exhibit list is being requested.

² Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment, 2 October 2012 (confidential with Confidential Annexes A, B and C)(“Motion”), para. 1. The Prosecution requested leave to exceed the usual word limit for motions (See Motion para. 3) which the Chamber hereby grants.

³ Defence Response to Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment, 15 October 2012 (confidential) (“Response”), Section III. Conclusion.

⁴ Corrigendum to Prosecution’s Bar Table Motion for the Admission of Intercepts: Srebrenica Segment, 28 November 2012 (confidential), para. 1 (i)-(x).

⁵ Motion, para. 26.

⁶ Motion, para. 27.

⁷ Motion, paras 27-28.

sufficient to meet the required threshold for admissibility from the bar table.⁹ Second, it resubmits its request for the Chamber to take judicial notice of proposed adjudicated facts nos 1659-1663 and 1669 which relate directly to the authenticity and reliability of Bosnian Muslim sourced intercepts.¹⁰ Third, it submits that each of the 280 intercepts was admitted in at least one of the following cases, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T; *Prosecutor v. Tolimir*, Case No. IT-02-88/2-T; and *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, and that as a collection, the intercepts were found to be authentic in all of the above-named cases.¹¹ The Prosecution contends that it would be in the interests of justice and judicial economy for the Chamber to take judicial notice of the authenticity of the Intercepts.¹²

4. The Defence argues that the intercepts do not bear the requisite indicia of reliability for admission from the bar table.¹³ It submits that, *inter alia*, this requirement can only be fulfilled if the Intercepts are put “under test of challenge in this specific case”, following the presentation of evidence on the manner in which these intercepts were taken.¹⁴ With respect to the Prosecution’s request to take judicial notice of proposed adjudicated facts nos 1659-1663 and 1669, the Defence contends that the Chamber denied them in an earlier decision and that the Prosecution, not having sought reconsideration or appealed this decision, is bound by it.¹⁵ Concerning the Prosecution’s request that the Chamber take judicial notice of the authenticity of the intercepts, the Defence submits that (1) the standard that should apply in this consideration is the same as for that of taking judicial notice of adjudicated facts; and (2) reincorporates its submissions with respect to the lack of independent authenticity and reliability of the intercepts.¹⁶ The Defence argues, further, that it should not be deprived of the same opportunity that other Defence teams have had in previous cases to dispute the reliability and authenticity of the Intercepts, adding that the argument of judicial economy should not outweigh the right of the Accused to a fair trial.¹⁷

5. With respect to admission, the Prosecution submits that the intercepts — comprising radio relay communications among officers and soldiers within the chain of command of the Army of Republika Srpska (“VRS”) — are collectively and individually highly relevant to and probative of the charges against the Accused, and critical to the understanding of the segment of its case relating

⁸ Response, paras 17-18.

⁹ Motion, paras 16-17.

¹⁰ Motion, paras 19-20.

¹¹ Motion, paras 21-22.

¹² Motion, para. 23.

¹³ Response, paras 4-8, 10.

¹⁴ Response, para. 9.

¹⁵ Response, para. 14.

¹⁶ Response, paras 15-16.

to Srebrenica.¹⁸ It avers that the intercepts demonstrate a functioning VRS communication system and chain of command; a high level of coordination among officers of the VRS and the MUP; and a continuous flow and exchange of information among the lowest and highest ranking VRS officers, including the Accused, his assistant commanders, and other close associates.¹⁹ It submits, further, that the intercepts help identify relevant individuals, codenames and places, and assist in demonstrating the state of mind of VRS forces through, for example, their demonstration of ethnic hostility toward the Muslim population, and by revealing the intent to carry out and conceal the charged crimes.²⁰ The Defence does not submit specific challenges to the relevance of the intercepts.²¹

III. APPLICABLE LAW

6. The Chamber recalls and refers to the applicable law governing amendments to the Rule 65 *ter* exhibit list as set out in a previous decision.²²

7. Rule 89 provides, in relevant part:

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

8. The Chamber recalls that a party tendering documents for admission from the bar table pursuant to Rule 89 (C) must show that the tendered documents are relevant and probative and demonstrate, with clarity and specificity, where and how each document fits into its case.²³

9. Rule 94 (B) provides that:

At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

10. Under Rule 94 (B), the Chamber may take judicial notice of the authenticity of documentary evidence which has been admitted in prior proceedings. The moving party must demonstrate that the documents sought for judicial notice were tendered as evidence in another case before the

¹⁷ Response, paras 12-13.

¹⁸ Motion, paras 10, 12, 14.

¹⁹ Motion, para. 13.

²⁰ Motion, para. 13.

²¹ The Chamber notes, however, that in submitting that the standard for taking judicial notice of the authenticity of documents is the same as for taking judicial notice of adjudicated facts — relying on a finding by the Chamber in *Prosecutor v. Delić* — the Defence submission can be understood to implicitly suggest that the Intercepts are not sufficiently relevant to the case. See Response, para. 15.

²² Decision on Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 27 June 2012, paras 5-6.

Tribunal and were found to be authentic in the prior proceedings.²⁴ After creating a well-founded presumption of the authenticity of the documentary evidence by virtue of taking judicial notice, the moving party may tender this, not yet admitted, documentary evidence in question either through a witness or through a bar table motion by fulfilling the requirements of Rule 89 (C).²⁵

IV. DISCUSSION

A. Addition of intercepts to the Prosecution's Rule 65 *ter* exhibit list

11. The eight documents the Prosecution seeks to add to the Rule 65 *ter* exhibit list comprise intercepts dated between 12 and 17 July 1995 and make up part of the 278 intercepts that are the subject of the Prosecution's request for judicial notice and admission through the bar table ("Intercepts").²⁶ They relate, generally, to the alleged joint criminal enterprise ("JCE") to eliminate the Bosnian Muslim population of Srebrenica, commencing in July of 1995, and in particular, to the VRS takeover of Potočari by 12 July 1995, as well as communication between members of the alleged JCE, and the whereabouts of the Accused on the days of the charged crimes relating to Srebrenica.²⁷ The Chamber considers that they are *prima facie* relevant to, and probative of, issues arising from the Indictment.

12. The Prosecution has not argued good cause for adding these eight intercepts to its Rule 65 *ter* exhibit list at this stage of the proceedings. The Chamber recalls, however, that a showing of good cause is not a condition for addition, but merely one factor to be considered in determining whether, on balance, the addition is in the interests of justice.²⁸ The eight intercepts are similar to intercepts already on the Prosecution's Rule 65 *ter* exhibit list. They are no longer than up to a page each and do not raise novel issues of which the Defence has not already been on notice as forming part of the Prosecution's case. They were disclosed to the Defence months in advance of the anticipated start of the Prosecution's presentation of the Srebrenica segment of its case. The Chamber is of the view that their addition at this stage of the proceedings would not burden the Defence in the preparation of its case, and taking into account the Prosecution's obligation to

²³ Mladić Notebook Decision, para. 12.

²⁴ Decision on Prosecution First Motion to Admit Evidence from the Bar Table: Mladić Notebooks ("Mladić Notebook Decision"), 25 September 2012, para. 5.

²⁵ Mladić Notebook Decision, para. 5.

²⁶ Motion, Annex A, pp. 30, 45, 54, 60, 71, 73. The eight intercepts are attached to the Motion, in Confidential Annex C ("Annex C"). While the Motion requests the admission of 280 intercepts, the Chamber recalls here the withdrawal of a duplicate Rule 65 *ter* number through the Corrigendum, and the informal notification per email of 29 January 2013 withdrawing an additional Rule 65 *ter* number. See para. 1 of this decision.

²⁷ Indictment, paras 19, 45-46.

²⁸ Decision on Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 27 June 2012, para. 6.

present the available evidence to prove its case, concludes that it would therefore be in the interests of justice to grant their addition to the Prosecution's Rule 65 *ter* exhibit list.

B. Admission of the intercepts

13. As a preliminary matter, the Chamber sets out that it interprets the Prosecution motion to be requesting the Chamber to take judicial notice of the proposed adjudicated facts relating to the authenticity of the Intercepts, to take judicial notice of the authenticity of the Intercepts, and to subsequently consider their admission from the bar table.²⁹ The Chamber considers, however, that the most appropriate approach is to dispose of the request for admission of the Intercepts from the bar table after a decision on the judicial notice of their authenticity. The Chamber shall not, in addition, consider the request to take judicial notice of the proposed adjudicated facts relating to the authenticity of the Intercepts.³⁰

a) Authenticity of Intercepts

14. First, the Chamber notes that the Defence reliance on a finding in a decision by the *Delić* Chamber concerning the standard for taking judicial notice of documentary evidence being the same as the standard of taking judicial notice of adjudicated facts is not on point. The *Delić* decision was issued before the amendment of the text of Rule 94 (B), adopted on 8 December 2010, whereby the Chamber's discretion became limited to taking judicial notice of the authenticity of documentary evidence, and not of documentary evidence as such. The requirements for taking judicial notice of adjudicated facts are therefore not applicable to taking judicial notice of the authenticity of documentary evidence.³¹ As a result, the Defence appears to have conflated its submissions with respect to, on the one hand, the standard for taking judicial notice of the authenticity of documentary evidence, and on the other, the standard for admission of intercepts from the bar table.

²⁹ The Chamber notes in this regard that while the Prosecution makes submissions concerning independent indicia of reliability which in and of itself, together with an assessment of relevance, would justify admission into evidence from the bar table, these submissions are not represented in the relief sought as expressed in the Motion. See Motion, paras 16-18, and para. 29.

³⁰ The Chamber recalls and adopts its position taken in its Second Decision on Judicial Notice of Adjudicated Facts issued on 21 March 2012 ("Second Decision on Adjudicated Facts") in that despite the fact that the adjudicated facts relate to the interception process by Bosnian officials, it remains unclear whether either the Bosnian government or the Prosecution's procedures referred to in these Proposed Facts apply to any or all of the proffered intercepts which are the subject of the Motion. See Second Decision on Adjudicated Facts, para. 10. It also notes, here, the Prosecution's request to the Chamber to take judicial notice of Adjudicated Fact 1659 "out of an abundance of caution", as the Prosecution was not entirely sure whether it was taken judicial notice of by the Second Decision on Adjudicated Facts. See Motion, footnote 2. The Chamber confirms that Adjudicated Fact 1659, included in para. 36 of the disposition of the Second Decision on Adjudicated Facts, was taken judicial notice of by that decision. The Prosecution's request with respect to Adjudicated Fact 1659 is therefore moot.

15. Second, the Chamber notes that in paragraph 16 of the Response, the Defence simply refers back to arguments it had raised in relation to the admission of evidence from the bar table in subchapter (i) of the Response, where it focused its submissions on evidentiary issues the Prosecution would be compelled to deal with when establishing the reliability and authenticity of the intercepts for purposes of admission pursuant to Rule 89 of the Rules.³² These submissions, however, do not address the applicable standard, or elements of it, for the test of taking judicial notice of the authenticity of the Intercepts. Such a test would necessarily focus on the manner in which their authenticity was established in the previous case, rather than how the authenticity is to be proven in the present case. The Defence has thus failed to provide the Chamber with any substantive submissions with respect to the Prosecution's request for taking judicial notice of the authenticity of the Intercepts.

16. Turning to its discussion, the Chamber notes that in order to take judicial notice of the authenticity of the Intercepts, it must assess whether the authenticity was sufficiently addressed in a previous trial.³³ The Chamber recalls its earlier decision that a finding of authenticity in a previous case should be explicit in that it should be clear from the record that the previous Chamber considered the relevant aspects of authenticity when determining the admissibility of the documents in question.³⁴ In instances where the previous Chamber did not make an explicit finding, this Chamber would nonetheless conclude that the previous Chamber had considered the relevant aspects of authenticity, if the decision on admission followed the testimony of a witness who was in a position to verify the authenticity of the intercept in question.

17. Applying the above standard, the Chamber shall take judicial notice of those intercepts discussed in decisions issued by Chambers in previous cases through which the particular intercept was admitted into evidence, where that Chamber made an explicit reference to a finding of authenticity of the intercept in question. It shall also take judicial notice of the authenticity of intercepts which were admitted by a Chamber in a previous case following the evidence of intercept operators or unit supervisors who verified the authenticity of intercepts either through having recorded the intercepts or being involved in the supervision of this process. On this basis, the Chamber is satisfied that the intercepts bearing the following Rule 65 *ter* numbers were sufficiently authenticated in one or more previous cases, and takes judicial notice of their authenticity:

³¹ Cf. *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on the Prosecution's Motion for Judicial Notice of Intercepts Related to the Sarajevo Component and Request for Leave to Add One Document to the Rule 65*ter* Exhibit List, 4 February 2011, paras 15-16.

³² See Response, para. 16.

³³ See *supra*, para. 11.

³⁴ Mladić Notebook Decision, para. 7.

20887A; 20887B; 20887C; 20892A, 20892B; 25115; 25116; 25051; 25118; 25052; 25147; 23387; 23388; 25054; 20896; 20900A; 20903; 20905C; 20905B; 23318; 20908; 25057; 25119; 25533; 20918; 20916B; 20915; 20912; 20913A; 20913B; 20938B; 20945; 20938D; 20926A; 20926B; 20927A; 20927B; 20928C; 20948A; 20948B; 20948E; 20948C; 20948D; 20923C; 20935; 20936A; 20936B; 20931A; 20931B; 20949B; 20949C; 20946; 20934B; 20929A; 20929B; 20939B; 20950; 20937A; 20951B; 20942; 20943B; 20048; 20924A; 20924B; 20941A; 20941C; 20952A; 22203; 22202; 26133; 20955A; 20955C; 20979; 20961B; 20974C; 20957A;³⁵ 20957B; 20969; 20959B; 20964; 20959C; 20980B; 20980C; 20980D; 20983; 20962B; 20984; 20962C; 20985A; 20985C; 20970A; 20970B; 20975A; 20975C; 20960C; 20960B; 20954A; 20954D; 20972B; 20972D; 20972C; 20987; 20973A; 23284; 20986A; 20986C; 20966A; 20966B; 20966D; 20967A; 20967E;³⁶ 20988B; 20988A; 20988D; 20981B; 20976C; 20971D; 20971C; 20982B; 21005B; 21000B; 20997A; 20997B; 21003A; 21003D; 20993A; 20993D; 23391; 20992A; 20992D; 20994A; 20994B; 20994C; 21002A; 21002D;³⁷ 20998A; 20998C; 21021A; 21021C; 21014B; 21009A; 21011D; 21011A; 21020; 21018B; 21045A; 21045E; 21015A; 25124; 21035D; 21027A; 21027C; 21029A; 21029D; 21032A; 21029B; 21032A; 21049C; 21041A; 21041D; 21028C; 21034A; 21034D; 21046A; 21046B 21040B; 21040C; 21033A; 21033C; 21043A; 21043C; 21031D; 21031B; 21039A; 21039D; 21047A; 21047C; 21067A; 21067C; 21053D; 21053C; 21075A; 21075C; 21077A; 21077C; 21082;³⁸ 21069A; 21051A; 21069D;³⁹ 21064C; 21060C; 21060A; 21055A; 21055D; 21070A; 21070C; 21054A;⁴⁰ 21054C; 21057A; 21057E; 21062C; 21091A; 21091B; 21083C; 21089C; 21087A; 21094A; 21094D; 21119C; 21167A; 21167D; 21168A; 21168B; 21168C; 21169C; 21169B;⁴¹ 21182A; 21182C; 21226B; 21228B; 21229B; 21235D; 21237B; 22256;⁴² 21232C; 21240A; 21240D; 21234A; 21234C;

³⁵ The Chamber notes that this Rule 65 *ter* number contains an intercept recorded in a notebook, the first few pages of which are stricken out. The same portion, however, is not stricken out in the attached English translation. The Prosecution is requested to make the necessary correction so the BCS and English versions fully correspond.

³⁶ This Rule 65 *ter* number is being proffered twice, for two separate intercepts (See Annex A, pp. 44 and 47, respectively). The Chamber takes judicial notice of the intercepts dated 13 July 1995 at 19:45 only.

³⁷ The Chamber notes that in Annex A of the Motion, the Prosecution refers to the proffered intercept as having been admitted in a decision in the *Popović* case as P01166. The relevant decision cited, however, admitted into evidence exhibits P01666c/d which the Chamber finds to correspond to the proffered intercept.

³⁸ The Chamber notes that there is no English translation for the proffered intercept uploaded into eCourt.

³⁹ This Rule 65 *ter* number is being proffered twice, for two separate intercepts (See Annex A, p. 78). The Chamber takes judicial notice of the intercept dated 17 July 1995 at 12:49 only.

⁴⁰ The Chamber notes that the notebook record of the intercept at 20:26 on 17 July 1995 being proffered through this Rule 65 *ter* number is not complete, as is evident from the corresponding English translation. The Prosecution is requested to make the necessary corrections.

⁴¹ This Rule 65 *ter* number is being proffered twice, for two separate intercepts (See Annex A, pp. 88 and 89). The Chamber takes judicial notice of the intercept dated 24 July 1995 at 12:50 only.

⁴² This Rule 65 *ter* number is being proffered twice, for two separate intercepts (See Annex A, pp. 92 and 94). The Chamber takes judicial notice of the intercept on 2 August 1995 at 13:00 only, noting that the English translation to the BCS version (P01395c in the *Popović* case) is hereby also taken judicial notice of. The Chamber instructs the Prosecution to assign unique Rule 65 *ter* numbers to each of the two intercepts proffered.

21250A; 21250B; 22034; intercept dated 12 July 1995, at 22:00, as identified in Annex A, p. 30; intercept dated 13 July 1995, at 18:22, as identified in Annex A, p. 45; intercept dated 14 July 1995, at 12:15, as identified in Annex A, p. 54.

18. Applying this same standard, the Chamber further considers as sufficiently authenticated five intercepts tendered through former OTP research officer Stephanie Frease in the *Tolimir* case following the completion of her testimony, where this is the only source referenced by the Prosecution of admission into evidence and authentication in a previous case. It does so, on the basis that the admission of these particular intercepts followed her extensive evidence concerning the authentication process of the collection of intercepts in the possession of the Prosecution. This concerns the intercepts bearing the following Rule 65 *ter* numbers, the authenticity of which the Chamber also takes judicial notice:

25118A; 25148; 26130; 25055; 25056.

19. The Chamber shall not take judicial notice of the authenticity of the following intercepts, due to the fact that the Prosecution has either (1) provided no references to admission in one or more previous cases; (2) failed to provide sufficiently specific or correct references to transcript pages or a decision whereby the exhibit was admitted;⁴³ or (3) provided references to transcript pages or decisions which do not include a discussion of authentication or the previous Chamber's finding thereof.⁴⁴ This concerns the intercepts proffered through the following Rule 65 *ter* numbers:

25116A; 23387A; 20900B; 20904A;⁴⁵ 25058; 20923D; 20951C;⁴⁶ 26132; 20967E;⁴⁷
20966C; 20976A; 21011C; 27536; 21028A; 21028B; 21039C; 28027; 27948; 27618;

⁴³ This includes instances where the Prosecution provided only the case number, the date of admission and the exhibit number. The Chamber considers this information to be insufficient for purposes of demonstrating that a particular exhibit was admitted into evidence and sufficiently authenticated. This category also concerns instances where the Prosecution submits that an intercept was admitted into evidence by a specifically identified decision, but in which instances the Chamber did not find this to be the case.

⁴⁴ This includes instances where the transcript page referred to deals with admission of the document as a matter of housekeeping, having been earlier MFId pending an available translation, or instances where an intercept was admitted into evidence days after the relevant witness who authenticated it discussed the intercept, without any reference to that particular previous testimony. It also concerns instances where a document was discussed with a witness who was able to provide context to the contents of an intercept, but did not testify in relation to authentication of the intercept in question.

⁴⁵ This Rule 65 *ter* number is being proffered twice, for two separate intercepts (See Annex A, pp. 10 and 12, respectively). The Chamber does not take judicial notice of the authenticity of either at this time.

⁴⁶ Apart from the fact that the Prosecution has not referenced a previous case in which this intercept was purportedly admitted and sufficiently authenticated, the Chamber notes that the attached English translation is not of the same intercept as being proffered by the Prosecution through this particular Rule 65 *ter* number. The intercept in the English translation is one between Krstić and Ognjenović at 12:05, and not, as proffered, between Krstić and Krsmanović, at 12:10.

⁴⁷ This Rule 65 *ter* number is being proffered twice, for two separate intercepts (See Annex A, pp. 44 and p. 47, respectively). The Chamber does not take judicial notice of the authenticity of the intercept at 13 July 1995, at 17:30.

21037B;⁴⁸ 21063C; 21062B; 21085A; 21169B;⁴⁹ 21235A; 21235C; 21235B; 21232A; 22256;⁵⁰ 25072; 25077; two intercepts dated 16 July 1995, 8:30 from different sources, as identified in Annex A, p. 60; intercept dated 16 July 1995, at 9:26, as identified in Annex A, p. 60; intercept dated 16 July 1995, 22:30, as identified in Annex A, p. 71; intercept dated 16 July 1995, 22:50, as identified in Annex A, p. 73 (“Remaining Intercepts”).

20. Recalling the Chamber’s above stated approach with respect to disposing of the Prosecution’s request in relation to the proffered intercepts, the Chamber shall not at this stage decide on the admission of the Remaining Intercepts.⁵¹

b) Admission of Intercepts from the bar table

21. On 3 May 2012, the Chamber provided the Prosecution with guidance in relation to the filing of a bar table motion with respect to intercept evidence, whereby (1) it accepted the Prosecution’s proposal to file such a motion in advance of calling witnesses on the particular portion of the case to which the intercepts relate, with a view to reducing the number of witnesses that needed to be called in relation to this evidence; and (2) instructed the Prosecution to include a request for the Chamber to take judicial notice of the authenticity of “documents it is seeking in relation to its intercept evidence”.⁵² The Prosecution’s request is in accordance with this guidance.⁵³

22. The Prosecution has made specific submissions explaining how each intercept fits into its case.⁵⁴ Having reviewed the Prosecution’s submissions in this regard, the Chamber is satisfied that it has done so with sufficient clarity and specificity.

23. Turning to the relevance of the Intercepts, the Chamber notes that they comprise of handwritten notes, transcripts and summaries of conversations recorded by the Army of Bosnia and

⁴⁸ This Rule 65 *ter* number is being proffered twice, for two separate intercepts (See Annex A, pp. 71 and 73, respectively). The Chamber does not take judicial notice of the authenticity of either.

⁴⁹ This Rule 65 *ter* number is being proffered twice, for two separate intercepts (See Annex A, pp. 88 and 89, respectively). The Chamber does not take judicial notice of the authenticity of the intercept on 24 July 1995, at 11:32.

⁵⁰ This Rule 65 *ter* number is being proffered twice, for two separate intercepts (See Annex A, pp. 92 and 94). The Chamber does not take judicial notice of the authenticity of the intercept on 2 August 1995, at 9:50. As pointed out by the Prosecution in Annex A, p. 92, this intercept was admitted in the *Popović* case as P01387e and P1387f, but neither appears in Appendix I of the *Popović* decision as submitted by the Prosecution.

⁵¹ See *supra*, para. 13.

⁵² T. 372.

⁵³ In this regard, the Chamber notes the Prosecution’s submission that the admission of the intercepts from the bar table at this stage of the proceedings would enable it to confine the presentation of intercept testimony to four unit supervisors and the evidence of one former OTP research officer, on the question of weight to be attributed to the Intercepts. See Motion, paras 2, 24. These are unit supervisors RM-279, RM-243, RM-316 (with respect to Bosnian recorded intercepts), RM-506 (with respect to intercepts recorded by the Croatian government), and former OTP research officer Stephanie Frease (RM-238).

⁵⁴ Motion, Annex A.

Herzegovina (“ABiH”), in particular, its 2nd Corps Anti-Electronic Warfare Units, as well as by the BiH State Security Services, and the Croatian army. The vast majority of the Intercepts are dated July and early August 1995. They record conversations among VRS officers, including the Accused and other high-ranking officers, in the days of the alleged VRS attack against Srebrenica in early July and throughout the period of the alleged crimes against Bosnian Muslim civilians, into August 1995.

24. The Chamber finds that collectively, the intercepts dated July and August are generally relevant to the charged JCE to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the women, young children and some of the elderly men. They are, in particular, relevant to establishing the activities of Serb forces before the fall of Srebrenica, during the crimes alleged in the Indictment, and in the aftermath of these crimes. In addition, they are relevant to the nature and degree of control exercised down the VRS chain of command and to the Accused’s involvement in the charged crimes, either through personal interaction with other alleged JCE members, or through the interactions between those alleged to have been under his effective control. The Chamber is cognizant of the fact that the relevance of several intercepts, when considered individually, may be questionable on the basis of their ambiguous and/or cryptic content. The Chamber has, however, taken a comprehensive approach and considered the intercepts dated July and August 1995 as constituting a contemporaneous, chronological record of events on the ground, demonstrating a network of interaction and exchange of information during these two crucial months of alleged crimes charged in the Indictment. It therefore finds these intercepts, as a collection, sufficiently relevant for admission.

25. Six intercepted conversations relate to the period leading up to the crimes charged in relation to Srebrenica, or to the period immediately thereafter. They are dated April, June, September, November, and December of 1995 respectively.⁵⁵ The Prosecution submits that the intercepted conversation dated 20 April 1995 is relevant to the charges of genocide and persecution, as it concerns an expression of bias by one member of the alleged JCE to his superior, also an alleged member of the JCE.⁵⁶ The Chamber notes, however, that the ethnic bias that is purportedly being expressed by a man identified as “Nikolić” concerns two Polish Catholics, referred to as “volunteers”. “Nikolić” appears to express dissatisfaction with the “personnel guy” having sent him these “volunteers”, asks, *inter alia*, whether checks have been done on them, states that he does not know what to do with “these Catholic peasants” and states that he will be forced to “slit their throats

⁵⁵ These are Rule 65 *ter* nos 20887A, 20887B and 20887C (20 April 1995); Rule 65 *ter* nos 20892A and 20892B (25 June 1995); Rule 65 *ter* nos 21250A and 21250B (22 September 1995); Rule 65 *ter* no. 25072 (18 November 1995); Rule 65 *ter* no. 22034 (20 November 1995); and Rule 65 *ter* no. 25077 (13 December 1995).

⁵⁶ Annex A, p. 1.

and dump them in the Drina". The alleged JCE in question concerns the elimination of Bosnian Muslims from Srebrenica. The Chamber considers that the Prosecution has not sufficiently explained how this intercept fits into its case.

26. With respect to the intercept dated 25 June 1995, the Prosecution ascribes relevance on the basis that the participants of the conversation — identified as "Popović" and "Gen. Krstić"— mention a commander of a unit that allegedly participated in the execution of Bosnian Muslim prisoners at Branjevo Military Farm and the Pilica Cultural Centre on 16 July 1995. This concerns scheduled incidents E.9.2 and E.10.1 of the Indictment. The Prosecution submits that there is evidence suggesting that Popović and Krstić had a role in these charged executions.⁵⁷ This relevance is not self-evident from the content of the intercept. Nonetheless, it touches upon issues relating to command structure and the alleged involvement of VRS forces in the charged crimes near Srebrenica. The Chamber therefore considers this intercept sufficiently relevant for admission, noting that without further contextualization, the relevance will, however, remain limited.

27. Concerning the proffered intercept dated 22 September 1995, the Prosecution submits it is relevant in that it demonstrates the detailed exchange of information between VRS Main Staff members and their level of involvement in the transfer of Bosnian Muslims from Srebrenica.⁵⁸ Upon review of the content of this intercept, the Chamber finds, however, that the Prosecution's submission of relevance does not appear to relate to the 22 September 1995 intercept.⁵⁹ The Chamber shall therefore deny admission of this intercept without prejudice on the basis of a lack of demonstrated relevance.

28. The Chamber has reviewed the remaining three intercepts, two dated November 1995 and one from December 1995, respectively. The two intercepts dated November 1995 appear to contain discussions amongst high-ranking political and military leaders, including Karadžić, the Accused, and members of the VRS Main Staff, expressing concerns over the possible outcome of negotiations held in Dayton concerning the plight of the Serbian people, in particular with respect to territory remaining under Serb control. The December 1995 intercept appears to record a conversation between Main Staff member General Zdravko Tolimir and Budo Košutić discussing, *inter alia*, the importance of retrieving information which lends support to the position that the "evacuations" of Bosnian Muslims from Srebrenica and Žepa were carried out in accordance with the Geneva Conventions and by agreement with the Bosnian Muslims, in the context of a discussion

⁵⁷ Annex A, p. 2.

⁵⁸ Annex A, p. 95.

within the UN Security Council. These three intercepts generally relate to the command structure of, and interactions between, high-ranking VRS officials alleged to have been members of a JCE to remove Bosnian Muslims from Bosnian Serb-claimed territory in BiH, as well as relating to the aftermath of the alleged crimes that were committed in the implementation of the criminal enterprise to eliminate the Bosnian Muslims from Srebrenica. As such, the Chamber considers these intercepts sufficiently relevant for admission into evidence.

29. The Chamber concludes that save for the 20 April 1995 and 22 September 1995 intercepts, the intercepts identified as meeting the test for taking judicial notice of authenticity in paragraphs 17 and 18 of this decision are sufficiently relevant and probative to be admitted into evidence. Therefore, with the exception of Rule 65 *ter* no. 21054A (which shall be marked for identification pending the provision of the complete BCS original), Rule 65 *ter* no. 20957A (which shall be marked for identification pending the necessary corrections to the BCS and English versions to ensure they fully correspond), Rule 65 *ter* no. 21082 (which shall be marked for identification pending the provision of the English translation) and the intercepts dated 20 April and 22 September 1995 as discussed above, the Chamber will admit the intercepts identified in paragraphs 17 and 18 of this decision into evidence. It emphasizes that the relevance and weight the Chamber will ultimately attribute to every individual intercept it admits into evidence can only fully be assessed following further contextualization by witnesses who were either participants in the intercepts, or otherwise have a sufficient basis to provide such contextual testimony. Moreover, it is open to the Defence to challenge the authenticity of intercepts the Chamber has taken judicial notice of.⁶⁰

30. Finally, the Chamber notes that in many instances, multiple intercepts appear to be uploaded under the same Rule 65 *ter* number, sometimes with English translations of one or more of the originals attached, while the Prosecution's submissions with respect to authenticity and relevance relate only to one of these intercepts.⁶¹ In other instances, there are more intercepts translated in

⁵⁹ See Annex A, p. 95, Rule 65 *ter* number 21250A. Further, the Prosecution submits that the use of the word "Turks" in this intercept is an indication of the ethnic bias of the speakers. The Chamber notes, however, that the word "Turks" does not appear in the English translation of this particular intercept.

⁶⁰ In this respect, bearing in mind the Defence's challenges to the authenticity of the intercepts, and its submission concerning the need for audio-recordings of the intercepts to establish such authenticity (see Response, para. 10), the Chamber instructs the Prosecution to provide the Defence with all relevant audio-recordings in its possession with a view to facilitating the Defence preparation of its case. It notes, however, that the absence of audio-recordings is an issue which the Chamber will bear in mind when attributing weight to the intercepts and does not stand in the way of their admission. The Chamber concurs with the finding made by previous Chambers in this regard. See *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's First Bar Table Motion for the Admission of Intercepts, 14 May 2012, para. 15; *Prosecutor v. Blagojević*, Case No. IT-02-60-T, Decision on Admission into Evidence of Intercept Related Materials, 18 December 2003, para. 25.

⁶¹ See e.g., Rule 65 *ter* nos 25119, 20988D, 20926A, 20948E, 20951C, 21047C, 21167D. In addition, in one particular instance, the Chamber identified two separate Rule 65 *ter* numbers, being proffered for two distinct intercepts, which contain identical intercepts and corresponding English translations. See Rule 65 *ter* no. 20957B,

English than contained in the BCS.⁶² The Chamber instructs the Prosecution to ensure that each Rule 65 *ter* number clearly identifies only the specific intercept being proffered and the corresponding English translation, by means of, for example, redacting portions of intercepts or entire intercepts that the Prosecution does not intend to rely upon.

V. DISPOSITION

31. For the foregoing reasons, pursuant to Rule 89, and 94 (B) of the Rules, the Chamber **GRANTS** the Motion in part;

GRANTS the addition of eight intercepts to the Prosecution's Rule 65 *ter* exhibit list and requests the Prosecution to assign unique Rule 65 *ter* numbers to each;

DENIES the request to take judicial notice of proposed adjudicated facts 1660-1663 and 1669;

DECLARES MOOT the request to take judicial notice of adjudicated fact 1659;

TAKES judicial notice of the authenticity of the intercepts identified in paragraphs 17 and 18 of this decision;

DENIES, without prejudice, the request to take judicial notice of the authenticity of the Remaining Intercepts identified in paragraph 19 of this decision;

ADMITS into evidence, under seal, the following intercepts;

Rule 65 *ter* nos 20892A; 20892B; 25115; 25116; 25051; 25118; 25052; 25147; 23387; 23388; 25054; 20896; 20900A; 20903; 20905C; 20905B; 23318; 20908; 25057; 25119; 25533; 20918; 20916B; 20915; 20912; 20913A; 20913B; 20938B; 20945; 20938D; 20926A; 20926B; 20927A; 20927B; 20928C; 20948A; 20948B; 20948E; 20948C; 20948D; 20923C; 20935; 20936A; 20936B; 20931A; 20931B; 20949B; 20949C; 20946; 20934B; 20929A; 20929B; 20939B; 20950; 20937A; 20951B; 20942; 20943B; 20048; 20924A; 20924B; 20941A; 20941C; 20952A; 22203; 22202; 26133; 20955A; 20955C; 20979; 20961B; 20974C; 20957B; 20969; 20959B; 20964; 20959C; 20980B; 20980C; 20980D; 20983; 20962B; 20984; 20962C; 20985A; 20985C; 20970A; 20970B; 20975A; 20975C; 20960C; 20960B; 20954A; 20954D; 20972B; 20972D; 20972C; 20987; 20973A; 23284;

proffered for an intercept at 10:09 on 13 July 1995, and Rule 65 *ter* no. 20959C, proffered for an intercept at 10:30 on 13 July 1995 (Annex A, pp. 34 and 35, respectively).

⁶² See e.g., Rule 65 *ter* nos 25054, 20971C, 21064C.

20986A; 20986C; 20966A; 20966B; 20966D; 20967A; 20967E;⁶³ 20988B; 20988A; 20988D; 20981B; 20976C; 20971D; 20971C; 20982B; 21005B; 21000B; 20997A; 20997B; 21003A; 21003D; 20993A; 20993D; 23391; 20992A; 20992D; 20994A; 20994B; 20994C; 21002A; 21002D; 20998A; 20998C; 21021A; 21021C; 21014B; 21009A; 21011D; 21011A; 21020; 21018B; 21045A; 21045E; 21015A; 25124; 21035D; 21027A; 21027C; 21029A; 21029D; 21032A; 21029B; 21032A; 21049C; 21041A; 21041D; 21028C; 21034A; 21034D; 21046A; 21046B; 21040B; 21040C; 21033A; 21033C; 21043A; 21043C; 21031D; 21031B; 21039A; 21039D; 21047A; 21047C; 21067A; 21067C; 21053D; 21053C; 21075A; 21075C; 21077A; 21077C; 21069A; 21051A; 21069D;⁶⁴ 21064C; 21060C; 21060A; 21055A; 21055D; 21070A; 21070C; 21054C; 21057A; 21057E; 21062C; 21091A; 21091B; 21083C; 21089C; 21087A; 21094A; 21094D; 21119C; 21167A; 21167D; 21168A; 21168B; 21168C; 21169C; 21169B;⁶⁵ 21182A; 21182C; 21226B; 21228B; 21229B; 21235D; 21237B; 22256;⁶⁶ 21232C; 21240A; 21240D; 21234A; 21234C; 22034; 25118A; 25148; 26130; 25055; 25056; intercept dated 12 July 1995, at 22:00, as identified in Annex A, p. 30; intercept dated 13 July 1995, at 18:22, as identified in Annex A, p. 45; intercept dated 14 July 1995, at 12:15, as identified in Annex A, p. 54.

INSTRUCTS the Registry to mark for identification Rule 65 *ter* no. 21054A pending the upload by the Prosecution of the complete BCS version;

INSTRUCTS the Registry to mark for identification Rule 65 *ter* no. 20957A pending the necessary corrections to the BCS and English versions to ensure they fully correspond;

INSTRUCTS the Registry to mark for identification Rule 65 *ter* no. 21082 pending the upload by the Prosecution of the corresponding English translation;

DENIES the remainder of the Motion;

INSTRUCTS the Prosecution to review its witness list and make any reductions thereto as a consequence of this decision and in accordance with its stated intention, and inform the Chamber of such reductions no later than 16 May 2013;

⁶³ The Chamber admits into evidence the intercept dated 13 July 1995 at 19:45 only, which shall remain under this Rule 65 *ter* number.

⁶⁴ The Chamber admits into evidence the intercept dated 17 July 1995 at 12:49 only, which shall remain under this Rule 65 *ter* number.

⁶⁵ The Chamber admits into evidence the intercept dated 24 July 1995 at 12:50 only, which shall remain under this Rule 65 *ter* number.

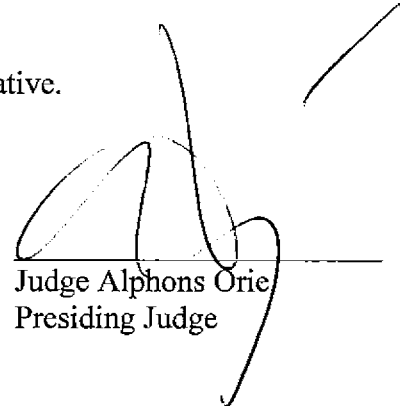
⁶⁶ The Chamber admits into evidence both the intercept proffered through this Rule 65 *ter* number, dated 1 August 1995 at 9:50 (which shall remain under the existing Rule 65 *ter* number), and the intercept dated 2 August 1995 at 13:00 (for which the Prosecution is instructed to assign unique Rule 65 *ter* numbers), respectively.

INSTRUCTS the Prosecution to properly upload all intercepts admitted by this decision and to notify the Registry and Chamber once having done so;

INSTRUCTS the Prosecution to identify admitted intercepts that may be made public and make a request to that effect;

INSTRUCTS the Registry to assign exhibit numbers to the intercepts admitted by this decision and inform the parties and the Chamber of the numbers so assigned.

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



Judge Alphons Orie
Presiding Judge

Dated this second day of May 2013
At The Hague
The Netherlands

[Seal of the Tribunal]