

IT-09-92-T
DT1169-DT1166
18 September 2013

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**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: 18 September 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: 18 September 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADMIT
EVIDENCE FROM THE BAR TABLE: EXCERPTS FROM
MLADIĆ'S AUDIO TAPES**

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 July 2013, the Prosecution filed a motion (“Motion”) requesting the Chamber to (1) take judicial notice of the authenticity of ten excerpts of audio recordings pursuant to Rule 94 (B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), (2) admit these recordings into evidence from the bar table, and (3) admit nine additional documents into evidence from the bar table.¹ On 25 July 2013, the Defence requested 14 additional days to file its Response, which the Chamber granted the following day.² On 9 August 2013, the Defence filed its response (“Response”), objecting to the Motion in its entirety.³ On 16 August 2013, the Prosecution requested leave to reply to the Response, and attached its reply (“Reply”) to its request.⁴

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution submits that the Chamber should take judicial notice of the authenticity of ten excerpts of audio recordings seized from the Mladić family residence (“Audio Tapes”), bearing Rule 65 *ter* numbers 1624a, 1627a, 1656a, 1691b, 1691c, 1711a, 1719a, 1722a, 1723a, and 1724b, and submits that these were deemed reliable and authentic and were admitted into evidence in the *Stanišić and Simatović* case.⁵ The Prosecution further requests admission into evidence of the Audio Tapes, as well as the admission of nine additional documents (“Additional Documents”), bearing Rule 65 *ter* numbers 1126, 4043, 9379, 13122, 13162, 17699, 19168, 19561, and 24524.⁶ The Prosecution submits that the Audio Tapes contain conversations between Mladić and other members of the alleged Joint Criminal Enterprise (“JCE”) recorded during the Indictment period.⁷ It further submits that the Audio Tapes are relevant to, and probative of, the crimes charged in the Indictment and that their admission into evidence will save court time and streamline the presentation of the Prosecution case.⁸ In particular, the Prosecution argues that the Audio Tapes provide evidence of a common criminal purpose, namely, the creation of a single Serb nation coupled with an anti-Muslim policy, and of the Accused’s state of mind, including his willingness

¹ Motion to Admit Evidence from the Bar Table: Excerpts from Mladić’s Audio Tapes, 11 July 2013, paras 1, 7-13.

² Defence Motion to Enlarge Time to Respond [sic] to Prosecution Motion to Admit Evidence from the Bar Table: Excerpts from Mladić’s Audio Tapes, 25 July 2013; T. 15216-15217.

³ Defence Response to Prosecution Motion to Admit Evidence from the Bar Table: Excerpts from Mladić’s Audio Tapes, 9 August 2013. The Chamber notes that the Response was submitted on 8 August, which was a UN holiday, and that the Response was therefore filed timely.

⁴ Prosecution Request for Leave to Reply to Defence Response to Prosecution Motion to Admit Evidence from the Bar Table: Excerpts from Mladić’s Audio Tapes with annexed Prosecution Reply to Defence Response to Prosecution Motion to Admit Evidence from the Bar Table: Excerpts from Mladić’s Audio Tapes, 16 August 2013.

⁵ Motion, para. 7; Motion, Annex A.

⁶ Motion, paras 1, 12-13; Motion, Annexes A and B.

⁷ Motion, para. 1.

⁸ Motion, paras 1-2.

to use force indiscriminately against civilians and to create obstacles to humanitarian aid workers.⁹ With regard to the Additional Documents, the Prosecution submits that they corroborate the content of the conversations included in the Audio Tapes and will assist the Chamber in authenticating and contextualising them.¹⁰

3. The Defence accepts the Prosecution's submission that the recordings were seized from the Mladić family residence, but disputes that the recordings were assembled by the Accused himself.¹¹ The Defence opposes the admission of the Audio Tapes and the Additional Documents.¹² First, it submits that some of the Audio Tapes relate to subject matter outside the scope of the Indictment.¹³ Second, the Defence objects to the relevance of the Audio Tapes, arguing that the Prosecution is unable to provide accurate dates of the recorded conversations.¹⁴ Third, the Defence submits that the Prosecution's arguments misstate the conclusions that can be drawn from some of the Audio Tapes, and argues that these conclusions render them inappropriate for admission.¹⁵ Fourth, the Defence submits that the english translation of one of the Audio Tapes suggests that "Turks" is a derogatory term for Bosnian Muslims, and argues that for this reason it is inappropriate for admission.¹⁶ The Defence further submits that the Prosecution makes no specific submissions regarding the authenticity, provenance, relevance or reliability of the Additional Documents.¹⁷

III. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law governing the admission of documents from the bar table, and to the applicable law governing taking judicial notice of the authenticity of documentary evidence admitted in prior proceedings, as set out in previous decisions.¹⁸

IV. DISCUSSION

(a) Preliminary matters

5. The Chamber considers the Prosecution's request for leave to reply meritorious and grants the same. The Chamber further notes that one of the Audio Tapes, bearing Rule 65 *ter* number

⁹ Motion, para. 11.

¹⁰ Motion, para. 12; Reply, para. 3.

¹¹ Response, paras 11-12.

¹² Response, para. 6.

¹³ Response, para. 13.

¹⁴ Response, para. 10.

¹⁵ Response, para. 13.

¹⁶ Ibid.

¹⁷ Response, para. 8.

1624a, has already been admitted as exhibit P788 and considers the Motion moot in so far as this excerpt is concerned.¹⁹

(b) Judicial notice under Rule 94 (B)

6. With respect to the first condition for judicial notice pursuant to Rule 94 (B) of the Rules, that the evidence in question must have been found to be authentic and admitted in prior cases before the Tribunal, the Chamber observes that the full recordings from which the excerpts in question were taken were admitted into evidence in the *Stanišić and Simatović* case.²⁰ It further notes that in that case the recordings were explicitly found to be authentic based on the type of information exchanged therein, the circumstances and location where they were found, and the apparent reciprocal identification of the speakers in the recordings.²¹ Finally it notes that the authenticity of the recordings was not subject to any specific challenge by the Defence, even not where the Accused is identified as one of the interlocutors. The Chamber therefore finds the first condition for judicial notice is met.

7. With respect to the second condition for judicial notice, that the evidence in question must be relevant to the present case, the Chamber notes that the conversations on the Audio Tapes deal with the Accused's role in the chain of command,²² appear to concern his involvement in the fall of Srebrenica,²³ and his interactions with UN personnel.²⁴ With regard to the latter aspect and the Defence submission that one of the Audio Tapes addresses locations outside Bosnia and, therefore, outside the geographical scope of the Indictment, the Chamber observes that the relevant excerpt²⁵ nevertheless provides contextual information to understand the events charged in Counts 8 and 11 of the Indictment. The Chamber further notes that the speakers in all but one of the Audio Tapes appear to include members of the alleged JCE, including the Accused²⁶ and Radovan Karadžić,²⁷ who seem to identify themselves or are apparently identified by their interlocutors. For these reasons, the Chamber concludes that all nine Audio Tapes are relevant to the Indictment, namely to Counts 2, 3, 6, 8, and 11.

¹⁸ Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment, 2 May 2013, paras 7-10; Decision on Prosecution First Motion to Admit Evidence from the Bar Table: Mladić Notebooks, 25 September 2012 ("Mladić Notebooks Decision"), para. 5.

¹⁹ T. 15107.

²⁰ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Nineteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Mladić Audio Files) and Motion for Admission of Excerpts from Mladić Audio Files, 1 April 2011, para. 13.

²¹ *Ibid.*

²² Rule 65 *ter* nos 1656a, 1711a, 1723a, and 1724b.

²³ Rule 65 *ter* nos 1719a and 1722a.

²⁴ Rule 65 *ter* nos 1627a, 1691b, 1691c, and 1723a.

²⁵ Rule 65 *ter* no. 1627a.

8. Having found that the conditions of Rule 94 (B) of the Rules have been met, the Chamber takes judicial notice of the authenticity of the Audio Tapes.

(c) Admission from the bar table

With respect to the first two conditions for admission from the bar table pursuant to Rule 89 (C) of the Rules, that the Prosecution must show that the tendered material is relevant and probative, the Chamber observes that it has already found that the Audio Tapes are relevant to the case when taking judicial notice of their authenticity. As for their probative value, the Chamber observes in addition that the Defence itself stated that the Audio Tapes appear to be excerpts of recordings that were recovered by the Serbian authorities from the residence of the Mladić family.²⁸ In this context the Chamber notes that the fact that the intercepts contain no direct and precise date and time references does not deprive them from their relevance and probative value, although – as demonstrated by the additional exhibits tendered – an additional evidentiary effort may be required to give the excerpts of the intercepts the full weight the Prosecution wishes to attach to them. As to the Defence argument that one of the Audio Tapes was not accurately translated, the Chamber recalls that a literal translation of a word often does not give the real meaning of that word in context and that, in the case of the word “Turks”, the provided explanation that the term is derogatory for Bosnian Muslims is commonly used.²⁹ Having reviewed the Audio Tapes and taking the aforementioned into account, the Chamber finds the Audio Tapes to have probative value and to be relevant to the Prosecution case. As to the Additional Documents, the Chamber notes that they seem to provide an approximate date for five of the Audio Tapes³⁰ and appear to contextualise the same, and, therefore, finds them also relevant and probative to the Prosecution case.

9. With respect to the third condition for admission from the bar table, that the Prosecution must show, with clarity and specificity, where and how the tendered material fits into its case, the Chamber notes that the Prosecution’s annexed lists A and B contain detailed descriptions of all nine Audio Tapes and their relevance, and, when read together, also of the Additional Documents. In that context, and with regard to the Defence argument that the Prosecution draws the wrong conclusions from some of the Audio Tapes, the Chamber recalls that even if the parties may disagree on how to interpret the words spoken, this does not deprive these conversations of their relevance for the Prosecution case. The argument goes to weight, not to admissibility, which will be

²⁶ See e.g. Rule 65 *ter* nos 1627a at 00:02:19; 1691b at 00:01:35 and 00:02:00 (fn. 1); 1691c at 00:23:02 (the interlocutor addresses his counterpart as “General”).

²⁷ See e.g. Rule 65 *ter* nos 1656a, fn. 1; 1723a (interlocutor addresses his counterpart as “President”).

²⁸ Response, para. 11.

²⁹ T. 11846. For the discussion on the term see also T. 11816-11818, 12013-12014, and 16268-16269.

³⁰ Rule 65 *ter* nos 1627a, 1656a, 1691b, 1711a, and 1724b.

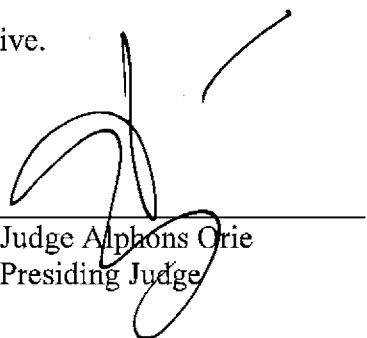
assessed at a later stage against the totality of the evidence. The Chamber is, therefore, satisfied that the Prosecution has demonstrated, with sufficient clarity and specificity, where and how each excerpt and each document fits into its case.

V. DISPOSITION

10. For the foregoing reasons, pursuant to Rules 54, 89, 94 (B), and 126 *bis* of the Rules, the Chamber

- (i) **GRANTS** the Prosecution request for leave to reply;
- (ii) **GRANTS** the Motion **IN PART**;
- (iii) **DECLARES MOOT** the request to take judicial notice of and admit into evidence the excerpt bearing Rule 65 *ter* number 1624a;
- (iv) **DECIDES** to take judicial notice of the authenticity of the Audio Tapes bearing Rule 65 *ter* numbers 1627a, 1656a, 1691b, 1691c, 1711a, 1719a, 1722a, 1723a, and 1724b;
- (v) **ADMITS** into evidence the documents bearing Rule 65 *ter* numbers 1126, 1627a, 1656a, 1691b, 1691c, 1711a, 1719a, 1722a, 1723a, 1724b, 4043, 9379, 13122, 13162, 17699, 19168, 19561, and 24524; and
- (vi) **REQUESTS** the Registry to assign exhibit numbers to the recordings and documents admitted and to 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 eighteenth day of September 2013
At The Hague
The Netherlands

[Seal of the Tribunal]