

4-09-92-T
D 77138 - D 77131
11 April 2014

77138 KB.

**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: 11 April 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: 11 April 2014

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**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 13 February 2014, the Chamber issued two decisions, one pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”) (“Babić Decision”) and the other pursuant to Rule 92 *bis* of the Rules (“Kirudja Decision”) (together, “Decisions”) denying the admission of a number of associated exhibits.¹ On 24 February 2014, the Prosecution filed a motion tendering 23 documents from the bar table (“Documents”) all of which had previously been denied admission in the Decisions (“Motion”).² On 10 March 2014, the Defence filed its response, objecting to the Motion in its entirety (“Response”).³

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution submits that the Documents are of significant importance to its case and therefore ought to be admitted into evidence.⁴ In relation to the documents described in Section I of Annex A to the Motion (“Babić Documents”), the Prosecution submits that they are pertinent to a number of issues the relevance of which has already been affirmed by the Chamber.⁵ As to the documents listed in Section II of Annex A to the Motion (“Kirudja Documents”), the Prosecution contends that they are pertinent to issues which the Chamber has previously ruled as relevant, as well as to the widespread and systematic nature of the campaign to forcibly remove non-Serbs from areas of Bosnia and Herzegovina.⁶ The Prosecution submits, moreover, that the Documents were denied admission on the basis that they did not form an inseparable and indispensable part of the testimonies of witnesses Milan Babić and Charles Kirudja, an altogether different test from that which is applicable to the admission of evidence from the bar table.⁷

3. The Defence submits that, in accordance with the Chamber’s findings in the Decisions, the Documents do not form an inseparable or indispensable part of the testimonies of witnesses Babić and Kirudja.⁸ The Defence further submits that many of the Documents are irrelevant or lack probative value as they concern matters that are temporally or geographically outside the scope of the Indictment, or that they concern “live issues”, which, without cross-examination, would be

¹ Decision on Prosecution’s Motion for Admission of the Evidence of RM-518 (Milan Babić) Pursuant to Rule 92 *quater*, 13 February 2014; Decision on Prosecution 31st Motion to Admit Evidence Pursuant to Rule 92 *bis*, 13 February 2014.

² Prosecution Second Residual Bar Table Motion, 24 February 2014; Babić Decision, para. 23; Kirudja Decision, para. 22.

³ Defense Response to Prosecution Second Residual Bar Table Motion, 10 March 2014.

⁴ Motion, para. 4.

⁵ Motion, para. 6; Babić Decision, para. 15.

⁶ Motion, para. 7; Kirudja Decision, paras 13, 17.

⁷ Motion, paras 3-4.

⁸ Response, Annex A, pp. 2-18.

potentially prejudicial to the Accused.⁹ In relation to the Babić Documents, the Defence submits that they should be denied admission as the Prosecution, in light of concerns regarding Babić's mental health at the time he gave his statement, has failed to prove the reliability of the tendered evidence.¹⁰

III. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law governing the admission of documents tendered from the bar table as set out in a previous decision.¹¹

IV. DISCUSSION

A. Preliminary Matters

5. In the Motion, the Prosecution asserts that in paragraph 20 of the Babić Decision the Chamber denied admission of the documents bearing Rule 65 *ter* numbers 7449 and 8727 whereas in the decision's disposition, these two documents were admitted into evidence.¹² The Chamber refers the Prosecution to paragraph 11 of the Second Omnibus Decision in which the Chamber clarified that although it had found the two documents to be inadmissible as associated exhibits in the Babić Decision, it had inadvertently admitted them in that decision's disposition.¹³

6. The Defence makes the general objection that the Documents do not form an indispensable and inseparable part of either witness Babić or witness Kirudja's testimonies and therefore should be denied admission. The Chamber notes, however, that the fact that the Documents do not form an inseparable and indispensable part of the testimonies of the witnesses is not dispositive of whether or not they satisfy the test for admission from the bar table. The standard for admission of a piece of evidence from the bar table is met when a party tendering that evidence shows that the evidence is relevant and probative and demonstrates, with clarity and specificity, where and how that evidence fits into its case.

B. Babić Documents

⁹ *Ibid.*

¹⁰ Response, para. 13.

¹¹ Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment, 2 May 2013, paras 7-8.

¹² Motion, para. 4, footnote 5.

¹³ Second Omnibus Decision, 26 February 2014.

7. The Babić Documents comprise eight intercepts (Rule 65 *ter* numbers 20112, 20229, 20231, 20235, 20243, 20298, 20351, and 20405, together “Babić Intercepts”) and five other documents (Rule 65 *ter* numbers 6874, 7420, 13925, 13960, and 13995, together “Other Babić Documents”).¹⁴

8. In the Motion, the Prosecution explains how the Babić Documents relate to various aspects of its case.¹⁵ Having reviewed those submissions, the Chamber is satisfied that the Prosecution has indicated, with sufficient clarity and specificity, how each of those documents fits into its case. The Chamber will now deal with the relevance and probative value of the Babić Documents.

(i) Babić Intercepts

9. The Defence objects to the admission of seven of the Babić Intercepts, namely those bearing Rule 65 *ter* numbers 20112, 20229, 20231, 20235, 20243, 20298, and 20351 on the basis that they concern matters that are temporally or geographically outside the scope of the Indictment and are therefore neither relevant nor probative.¹⁶ The Chamber recalls that reference to matters that are outside the temporal, geographical or subject-matter scope of the Indictment does not *per se* render that document irrelevant to the Indictment.¹⁷ For example, historical and background information may be important to understand, or to contextualize, the events that are alleged to have transpired during the Indictment period. Moreover, evidence that appears to relate to events prior to the Indictment period or in areas outside of the geographical scope of the Indictment may be relevant to allegations about the existence of a widespread and systematic campaign to commit the crimes charged in the Indictment.

10. Having reviewed the Babić Intercepts, the Chamber finds that they involve, either directly or indirectly, various members of the alleged over-arching joint criminal enterprise (JCE) including Radovan Karadžić, Slobodan Milošević, Nikola Koljević, Momčilo Krajišnik, and Jovica Stanišić.¹⁸ As for content, the intercepted conversations pertain, *inter alia*, to the alleged (1) relationship, cooperation, and coordination between high-ranking Bosnian-Serb and Serbian officials for the purpose of creating a Serb state; (2) transformation of the Yugoslav People’s Army “into a mainly Serb force”; and (3) intention on the part of Bosnian-Serb leadership to effect the take-over of power in the municipalities.¹⁹

¹⁴ Motion, Annex A, pp. 2-10.

¹⁵ *Ibid.*

¹⁶ Response, Annex A, pp. 2-12.

¹⁷ Decision on Prosecution Motion for admission of Documents from the Bar Table (Military and Residual Documents), 13 February 2014, para. 21; T. 20320-20323.

¹⁸ Motion, Annex A, pp. 2-10.

¹⁹ *Ibid.*

11. The Defence has not raised any objections regarding the provenance of the Babić Intercepts. The Chamber notes that the intercepts in question originate from either the BiH Agency for Investigation and Documentation or the Sarajevo Agency for Investigation and Documentation. Furthermore, the Chamber recalls that in prior evidentiary decisions it has considered evidence pertaining to: (1) the procedure and methods for intercepting, transcribing and storing communications, including the accuracy of the process and the protocols in place for the identification of interlocutors; and (2) comparisons of audio recordings with the corresponding transcripts. The Chamber has admitted into evidence intercepts which have originated from these two sources.²⁰

12. The Defence further objects to the admission of six of the Babić Intercepts, namely those bearing Rule 65 *ter* numbers 20229, 20231, 20243, 20298, 20351, and 20405 on the basis that, in the absence of cross-examination of witness Babić, their probative value is outweighed by their prejudicial effect.²¹ As noted by the Defence, the Chamber has already determined that Babić is unavailable within the meaning of Rule 92 *quater*.²² When attributing weight to the Babić Intercepts the Chamber will (1) note Babić's unavailability; and (2) evaluate the entirety of the evidence before making any findings. On this basis, the Chamber concludes that the probative value of the Babić Intercepts is not outweighed by their prejudicial effect.

13. Based on the above, the Chamber finds the Babić Intercepts to be both relevant and probative and accordingly will admit them into evidence.

(ii) Other Babić Documents

14. Save for the document bearing Rule 65 *ter* number 7420, the Defence objects to the admission of the Other Babić Documents on the basis that they concern matters that are temporally or geographically outside the scope of the Indictment and are therefore not relevant and have no probative value.²³ With regard to this objection, the Chamber reiterates its earlier observation, as set out in paragraph 9 of this decision.

15. Having reviewed the Other Babić Documents, the Chamber determines that they concern, *inter alia*, (1) allegations that Babić cooperated with and tolerated the actions of Martić's police geared towards the forcible transfer of non-Serb populations; (2) the alleged operations and the structure of the armed forces of the Republic of Serbia, the parallels between the defence structures

²⁰ See e.g. Decision on Prosecution Bar Table Motion (Sarajevo and general relevance), 28 January 2014; Decision on the Admission of Intercepts and Authentication Charts, 6 February 2014.

²¹ Response, Annex A, pp. 2-8.

²² Response, para. 8.

adopted by the Bosnian-Serb leadership and the Serbian leadership as well as the alleged authority of Serbian JCE members over production industries; and (3) Babić's alleged role in the establishment, support, and maintenance of the government bodies of the SAO Krajina and the RSK.

16. As regards the objection raised by the Defence with respect to the reliability of the Babić Documents, the Chamber notes that the documents bearing Rule 65 *ter* numbers 13925 and 13960 are the only two Babić Documents that originate from witness Babić himself. The former is an order, dated 9 October 1991, and the latter is a report, dated 10 October 1991. Given that the two documents pre-date the period during which Babić gave evidence in the cases of *Prosecutor v. Martić* and *Prosecutor v. Milošević* by more than ten years, the Chamber considers that any doubts about witness Babić's mental health during his testimonies, even if they are found to be substantiated, do not constitute a relevant circumstance when considering the reliability of those documents for the purpose of admission from the bar table.

17. The Chamber notes, moreover, that the documents bearing Rule 65 *ter* numbers 6874, 7420, 13925, and 13960 originate from official sources, namely the government of the Republic of Croatia, and the government of the Republic of Bosnia and Herzegovina. Furthermore, each of the four documents is dated, stamped and/or signed. Lastly, the document bearing Rule 65 *ter* number 13995 is an open source document, dated 27 July 1991, and appears in an official format, namely that of the Official Gazette of the Republic of Serbia.

18. Based on the above, the Chamber finds the Other Babić Documents to be both relevant and have probative value and accordingly will admit them into evidence.

C. Kirudja Documents

19. The Kirudja Documents comprise ten memoranda, notes, and reports and bear the following Rule 65 *ter* numbers: 6371, 7023, 8003, 8018, 8046, 8048, 8049, 8052, 15769, and 15793. In its Motion, the Prosecution made submissions in order to explain how these ten documents connect with the various aspects of its case.²⁴ Having reviewed those submissions, the Chamber is satisfied that the Prosecution has indicated, with sufficient clarity and specificity, how each of the Kirudja Documents fits into its case.

20. The Defence objects to the admission of many of the Kirudja Documents on the basis that they concern matters that are temporally or geographically outside the scope of the Indictment and

²³ Response, Annex A, pp. 8-12.

are therefore neither relevant nor probative.²⁵ With regard to this objection, the Chamber refers to its observation in paragraph 9 of this decision.

21. Having reviewed the Kirudja Documents, the Chamber finds that they relate, *inter alia*, to (1) the alleged forcible transfer of Bosnian Muslims out of Bosanski Novi and other territories controlled by the Serb Democratic Party (“SDS”) and Republika Srpska (“RS”) authorities; (2) the humanitarian crisis that resulted from such alleged deportations and forcible transfers; and (3) the allegations of persecution to the Bosnian Muslim population in the territories controlled by SDS and RS authorities.

22. As to the authenticity and reliability of the Kirudja Documents, the Chamber notes that seven were drafted by witness Kirudja himself, one was drafted by UNPROFOR Civil Affairs Officer Paolo Raffone and released by Kirudja, and for the remaining two documents, one was drafted by another UNPROFOR official, Mikael Magnusson, and one by a DANBAT official whose name is not legible on the document itself. All ten documents are signed and appear in an official UNPROFOR format. Moreover, all ten documents have been authenticated by witness Kirudja in his amalgamated statement, which was admitted into evidence in the Kirudja Decision and subsequently assigned the exhibit number P3587.²⁶

23. Based on the above, the Chamber finds the Kirudja Documents to be both relevant and probative and accordingly will admit them into evidence.

V. DISPOSITION

24. For the foregoing reasons, pursuant to Rule 89 (C) of the Rules, the Chamber

GRANTS the Motion;

²⁴ Motion, Annex A, pp. 11-17.

²⁵ Response, Annex A, pp. 13-18.

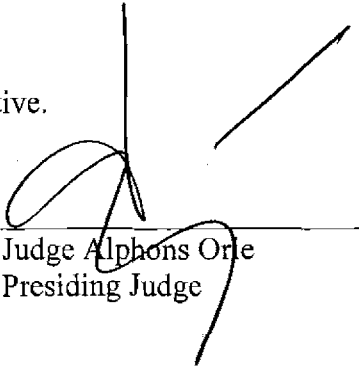
²⁶ Kirudja Decision, para. 22 (iv).

7131

ADMITS into evidence the documents bearing Rule 65 *ter* numbers 6371, 6874, 7023, 7420, 8003, 8018, 8046, 8048, 8049, 8052, 13925, 13960, 13995, 15769, 15793, 20112, 20229, 20231, 20235, 20243, 20298, 20351, and 20405; and

INSTRUCTS the Registry to assign exhibit numbers to the documents that are admitted into evidence in this decision and inform the Chamber, the Prosecution, and the Defence of the exhibit numbers so assigned.

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



Judge Alphons Orie
Presiding Judge

Dated this eleventh day of April 2014
At The Hague
The Netherlands

[Seal of the Tribunal]