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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: 4 June 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: 4 June 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON THE PROSECUTION'S MOTION FOR
ADMISSION OF THE UTTERANCES OF THE ACCUSED**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 18 March 2013, the Prosecution filed a motion tendering utterances allegedly made by the Accused in court on 18 February 2013 (“Motion”).¹ The Prosecution tenders the alleged utterances of the Accused pursuant to Rule 89 (C) of the Rules of Procedure and Evidence (“Rules”), in the form of an attached investigator’s report (“Report”) recording the statements of two BCS-speaking Prosecution staff members who overheard the Accused’s alleged utterances while in court.² The alleged utterances are tendered as evidence of the knowledge and intent of the Accused with regard to the commission of crimes charged in the Indictment.³ The Prosecution also requests that the Chamber review, or allow the Prosecution to review, video footage from a camera focused on the Accused at the time of the alleged utterances and to admit into evidence any relevant video footage from this camera.⁴

2. On 2 April 2013, the Defence responded (“Response”), making several submissions opposing the Motion, including that the Report constitutes written evidence tendered in lieu of oral testimony and therefore subject to the provisions of Rules 92 *bis* or 92 *ter* of the Rules.⁵

II. APPLICABLE LAW

3. While Rule 89 (C) is the *lex generalis* allowing a Chamber to admit relevant evidence which it deems to have probative value, Rule 92 *bis* is the *lex specialis* for out-of-court statements prepared for the purpose of legal proceedings and tendered *in lieu* of oral testimony before the Tribunal.⁶ Rule 92 *bis* (A), however, excludes the admission of such statements which go to proof of the acts and conduct of an accused as charged in the indictment.⁷ Instead, the admission *in lieu* of oral testimony of statements that concern the acts and conduct of an accused are governed by Rule 92 *ter*, which allows admission of such statements if, *inter alia*, the witness is made available for cross-examination.

¹ Motion for Admission into Evidence the Utterances of the Accused, 18 March 2013 (Confidential), paras 1, 15.

² Motion, para. 1.

³ Motion, paras 7-11.

⁴ Motion, para. 12.

⁵ Defence Response to Prosecution Motion for Admission into Evidence the Utterances of the Accused, 2 April 2013 (Confidential), paras 19-20.

⁶ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (“Galić Decision”), 7 June 2002, para. 31; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the form of Written Statements, 30 September 2003, paras 9-10, 18.

⁷ *Galić Decision*, para. 9.

III. DISCUSSION

4. As a preliminary matter, the Chamber considers that just as Rule 92 *bis* is the *lex specialis* for the admission of out-of-court statements prepared for the purpose of legal proceedings and tendered *in lieu* of oral testimony, Rule 92 *ter* is the *lex specialis* for the admission of such statements that go to proof of the acts and conduct of an accused as charged in the indictment. The Chamber will now examine under which Rule the Report tendered by the Prosecution must be considered.

5. First, taking into account that the Report is a record of statements made by two witnesses to the Accused's alleged utterances, the Chamber finds that the Report comprises two out-of-court statements. Second, considering the format of the Report and the Prosecution's previous notifications that it would seek to introduce utterances of the Accused into evidence, the Chamber finds that the report was created for the purposes of this trial and tendered *in lieu* of the witnesses' oral testimony.⁸ Third, considering that the statements have the potential to be *prima facie* relevant to the Accused's knowledge of the alleged detention and mistreatment of Muslim women and girls, the Chamber finds that they concern the Accused's acts and conduct as charged in the Indictment. For these reasons, the Chamber finds that the evidence of these witnesses must be led *viva voce* or the statements reflected in the Report must be tendered pursuant to Rule 92 *ter*, requiring the witnesses to attest to their respective statements and be available for cross-examination and/or any questions by the Judges. Since the method of tendering the Report is a threshold procedural issue, the Chamber will not further consider the substantive submissions of the parties at this time.

6. In response to the Prosecution's request for review and tendering of relevant video footage taken during the time the Accused made the alleged utterances, the Chamber has reviewed the full video record from 18 February 2013. The Chamber considers that the video is closely related to the Report and to admit the video in isolation would not be of assistance to the Chamber. For this reason, the Chamber denies the admission of the video without prejudice.

⁸ Motion, para. 13. *See also*, T, 8830-8831.

IV. DISPOSITION

7. For the foregoing reasons, pursuant to Rules 54, 89, and 92 *ter* of the Rules, the Chamber **DENIES** the Motion without prejudice.

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



Judge Alphons Orié
Presiding Judge

Dated this fourth day of June 2013
At The Hague
The Netherlands

[Seal of the Tribunal]