



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-95-5/18-T

Date: 28 February 2014

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 28 February 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTIONS TO ADMIT
INTERCEPTS PREVIOUSLY MARKED FOR IDENTIFICATION**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the 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 (“Tribunal”) is seised of the Accused’s “Motion to Admit Intercepts Previously Marked for Identification”, filed on 13 February 2014 (“First Motion”), and the Accused’s “Motion to Admit Bosnian Army Intercepts Previously Marked for Identification”, filed confidentially on 18 February 2014 (“Second Motion”) (together, “Motions”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motions, the Accused requests that the Chamber admit into evidence six transcripts of intercepted conversations previously marked for identification (“MFI”) or marked as not admitted (“MNA”)—MNA D1037, MNA D2019, MFI D3267, MFI D3269, MFI D3278, and MFI D3280 (“Intercepts”).¹ The Accused submits that the Intercepts were admitted into evidence in previous trials and accordingly, requests the Chamber to take judicial notice of their authenticity pursuant to Rule 94(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and admit them into evidence in this case.²

2. On 20 February 2014, the Office of the Prosecutor (“Prosecution”) filed both the “Consolidated Response to Karadžić’s Motions to Admit Documents and Intercepts Previously Marked for Identification” (“First Response”) and the confidential “Prosecution Response to Defence Motion to Admit Bosnian Army Intercepts Previously Marked for Identification” (“Second Response”), in which it submits, *inter alia*, that it does not object to the admission of three of the Intercepts—MFI D3267, D3278, and D3280. The Prosecution submits that despite the Accused’s failure to provide sufficient information as to their prior admission for the purpose of judicial notice, it does not dispute their authenticity.³ The Prosecution also does not object to the admission of MNA D2019 but requests that it be admitted under seal to avoid revealing confidential information, and thus asks the Chamber to separately admit a public redacted version, as proposed in the confidential appendix to the Second Response.⁴

3. However, the Prosecution objects to the admission of two of the Intercepts—MNA D1037 and MFI D3269—on the basis that (i) MNA D1037 is a duplicate of two intercepted conversations

¹ First Motion, paras. 1, 3–6; Second Motion, paras. 1, 3–4.

² First Motion, paras. 2, 7; Second Motion, paras. 2, 5.

³ First Response, para. 6.

⁴ Second Response, paras. 1, 2, Confidential Appendix.

which have already been admitted into evidence as P4629 and P4632;⁵ and (ii) MFI D3269 is a Croatian intercept for which the Prosecution submits it is not in a position to stipulate to the authenticity and therefore, it requires authentication through an appropriate witness.⁶

4. On 24 February 2014, the Accused filed the “Supplement to Motion to Admit Intercepts Previously Marked for Identification” (“Supplemental Submission”), providing further information in relation to MFI D3269 and indicating that the Prosecution no longer objects to its admission.⁷ Also on 24 February 2014, the Prosecution notified the Chamber *via* email that it did not wish to respond to the Supplemental Submission.

5. Moreover, during the hearing of 18 February 2014, the parties informed the Chamber of an agreement reached between them regarding the authentication of transcripts of intercepted conversations which the Accused intended to tender through two intercept operators whom he had planned to call to testify in his case.⁸ On the same day, the Chamber found that based on the fact that it has admitted a number of intercepts pursuant to the evidence of intercept operators, as well as numerous interlocutors, and moreover that the Prosecution can authenticate those intercepts based upon its “evidence collection”, and that there is a “genuine agreement between the parties as to their authenticity”, it now has a basis to establish their authenticity.⁹

II. Applicable Law

6. The Chamber recalls the “Order on the Procedure for the Conduct of the Trial,” issued on 8 October 2009 (“Order on Procedure”), in which it stated, *inter alia*, that any item marked for identification in the course of the proceedings, either because there is no English translation or for any other reason, will not be admitted into evidence until such time as an order to that effect is issued by the Chamber.¹⁰

7. In addition, Rule 94(B) of the Rules allows a Chamber to take judicial notice of the authenticity of documentary evidence which has been admitted in prior proceedings. Accordingly, in order to take judicial notice, the Chamber should be satisfied that the documentary evidence in question was sufficiently authenticated and admitted into evidence in a previous trial.¹¹ Moreover,

⁵ Second Response, para. 1.

⁶ First Response, para. 7.

⁷ Supplemental Submission, para. 3, Annex “A”.

⁸ Hearing, T. 47255–47258 (18 February 2014).

⁹ Hearing, T. 47258–47259 (18 February 2014).

¹⁰ Order on Procedure, Appendix A, paras. O, Q.

¹¹ Decision on the Prosecution’s First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component, 31 March 2010 (“First Decision”), para. 11; Decision on the Prosecution’s Motion for Judicial Notice of

the Chamber recalls its prior practice of treating intercepts as a “special category” of evidence given that they bear no indicia of authenticity or reliability on their face and accordingly, may only be admitted into evidence after the Chamber has heard from the relevant intercept operators or the participants in the intercepted conversation.¹² The Chamber also recalls that it has considered that it is in the interests of judicial economy to apply Rule 94(B) to intercepts.¹³

III. Discussion

8. Preliminarily, the Chamber notes that MFI D3267 has now been admitted into evidence.¹⁴

9. In relation to MNA D2019, the Chamber notes that it was originally marked for identification through witness Robert Franken following the Chamber’s practice regarding intercepts—*i.e.* pending the Chamber being satisfied of its authenticity¹⁵—and was later marked as not admitted on 7 December 2012.¹⁶ Having reviewed the intercept and the information provided by the Accused in the Second Motion regarding the document’s prior admission in the *Mladić* case,¹⁷ the Chamber considers that the authenticity of MNA D2019 has been sufficiently established and will therefore take judicial notice of its authenticity. The Chamber notes the Prosecution’s submissions regarding the confidential status of MNA D2019 and is satisfied that it should be admitted under seal. The Chamber shall also admit a public redacted version of MNA D2019, in the form proposed by the Prosecution in the confidential appendix to the Second Response, and instructs the Accused to liaise with the Prosecution to upload it accordingly.

10. Second, the Chamber notes that MNA D1037 was originally marked for identification through witness Rupert Smith following the Chamber’s practice regarding intercepts—*i.e.* pending the Chamber being satisfied of its authenticity¹⁸—and was later marked as not admitted on 7 December 2012.¹⁹ The Chamber notes the Prosecution’s submission that MNA D1037 is a

Intercepts Related to the Sarajevo Component and Request for Leave to Add One Document to the Rule 65 *ter* Exhibit List, 4 February 2011 (“Second Decision”), paras. 12–17; Decision on the Accused’s Bar Table Motion (Sarajevo Intercepts), 9 October 2012, para. 6.

¹² See, *e.g.*, First Decision, para. 9; Decision on Prosecution’s First Bar Table Motion, 13 April 2010, para. 13.

¹³ First Decision, para. 9. The Chamber has found that the recording of an intercepted conversation is covered by the term “documentary evidence”. See Second Decision, para. 17.

¹⁴ Decision on Accused’s Motions to Admit Intercepts from Bosnia and Herzegovina Previously Marked for Identification or as Not Admitted, 26 February 2014, paras. 8, 12(a).

¹⁵ Robert Franken, T. 23148–23150 (17 January 2012).

¹⁶ See Decision on Accused’s Motions to Admit Documents Previously Marked for Identification and Public Redacted Version of D1938, 7 December 2012 (“7 December 2012 MFI Decision”), paras. 26, 28(h).

¹⁷ See Second Motion, para. 4, Confidential Annex “B”; *Prosecutor v. Mladić*, Case No. IT-09-92-T, Decision on Prosecution’s Bar Table Motion for the Admission of Intercepts: Srebrenica Segment, 2 May 2013, paras. 17, 31.

¹⁸ Rupert Smith, T. 11686–11690 (11 February 2011).

¹⁹ See 7 December 2012 MFI Decision, paras. 26, 28(h).

duplicate of two conversations already admitted into evidence as P4629 and P4632²⁰ and the Chamber is satisfied as such based upon its own review of the documents. Therefore, the Chamber will deny the admission of MNA D1037.

11. Finally, the Chamber notes that MFI D3269, D3278, and D3280 were marked for identification as associated exhibits to Slavko Kralj's Rule 92 *ter* testimony pending the Chamber being satisfied of their authenticity.²¹ In the First Motion, the Accused requests that the Chamber take judicial notice of their authenticity pursuant to Rule 94(B); however, the Accused does not provide the Chamber with any transcript references or with the title and date of the written decision through which these intercepts may have been admitted. Thus, the Chamber is unable to be satisfied that MFI D3269, D3278, and D3280 were sufficiently authenticated and admitted in prior cases for the purposes of taking judicial notice of their authenticity pursuant to Rule 94(B).

12. However, in light of the parties' agreement as to the authenticity of MFI D3278 and D3280, as well as the further factors noted by the Chamber during the hearing on 18 February 2014,²² and the fact that the Prosecution no longer disputes the authenticity of MFI D3269,²³ the Chamber considers that the authenticity of MFI D3269, D3278, and D3280 can now be sufficiently established for the purposes of their admission into evidence.

²⁰ See Second Response, para. 1. See also Prosecution Response to Motion to Admit Documents Previously Marked for Identification with Confidential Appendix A", 8 October 2012, para. 5.

²¹ Slavko Kralj, T. 36534 (4 April 2013).

²² Hearing, T. 47258–47259 (18 February 2014).

IV. Disposition

13. Accordingly, for the reasons outlined above and pursuant to Rules 89 and 94(B) of the Rules, the Chamber hereby **GRANTS** the Motions, in part, and:

- a) **ADMITS** into evidence the documents currently marked for identification as MFI D3269, D3278, and D3280;
- b) **ADMITS** into evidence, under seal, the document currently marked as MNA D2019, **INSTRUCTS** the Accused to upload the public redacted version of MNA D2019 by 5 March 2014, as set out in paragraph 9 above, and **REQUESTS** the Registry to assign it an exhibit number; and
- c) **DENIES** the remainder of the Motions.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-eighth day of February 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

²³ See Supplemental Submission, para. 3.