

IT-09-92-T
D73182-D73179
21 October 2013

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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: 21 October 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: 21 October 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE REQUEST FOR CERTIFICATION
TO APPEAL ORAL DECISION OF 12 SEPTEMBER 2013**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. BACKGROUND

1. On 18 February 2013, the Prosecution informed the Chamber that the Accused had uttered certain offensive words during one of the court breaks of that day but while he was still inside the courtroom.¹ His words were overheard by Prosecution staff member Maria Karall and the Prosecution indicated that it would tender these utterances into evidence as proof of the Accused's *mens rea*.²

2. On 18 March 2013, the Prosecution tendered into evidence under Rule 89 (C) of the Rules of Procedure and Evidence ("Rules") a report drafted by a Prosecution investigator setting out what Maria Karall had heard the Accused say in court.³ On 2 April 2013, the Defence objected to the motion.⁴ On 4 June 2013, the Chamber denied the motion *in limine*, holding that the proffered report was inadmissible under Rule 89 (C).⁵

3. On 20 June 2013, the Prosecution filed a motion seeking leave to amend its Rule 65 *ter* witness list to add Maria Karall as a *viva voce* witness ("Addition Motion").⁶ On 4 July 2013, the Defence responded, requesting that the motion be denied ("Addition Response").⁷ On 22 August 2013, the Chamber allowed the addition of Maria Karall to the Prosecution's Rule 65 *ter* witness list ("Addition Decision").⁸ The Chamber held that "by incorporating in its Second Response the submissions made in its First Response, the Defence appears to be repeating its objections to the *admission* of the report which was tendered in the First Motion rather than responding to the request made in the Second Motion to add the Witnesses to the Prosecution's Rule 65 *ter* witness list".⁹ The Chamber considered the Defence arguments to "insufficiently focus on the criteria to be considered for adding witnesses to the witness list and that they therefore fail to successfully oppose the request".¹⁰

4. On 12 September 2013, the day of the scheduled testimony of Maria Karall, the Defence reiterated its objections stated in the Addition Response and argued that the Chamber had failed to

¹ T. 8830.

² T. 8830-8831.

³ Motion for Admission into Evidence the Utterances of the Accused, 18 March 2013 (Confidential).

⁴ Defence Response to Prosecution Motion for Admission into Evidence [of] the Utterances of the Accused, 2 April 2013 (Confidential).

⁵ Decision on the Prosecution's Motion for Admission of the Utterances of the Accused, 4 June 2013.

⁶ Motion for Leave to Amend its Rule 65 *ter* Witness List, 20 June 2013. As of 19 June 2013 Maria Karall appeared as a witness on the Prosecution's informally communicated witness schedules.

⁷ Defence Response to Prosecution Motion to Amend its Rule 65 *ter* Witness List, 4 July 2013.

⁸ Decision on the Prosecution's Motion for Leave to Amend its Rule 65 *ter* Witness List, 22 August 2013.

⁹ Addition Decision, para. 6.

¹⁰ *Ibid.*

rule on its objections.¹¹ On the same day, the Chamber denied these objections (“Impugned Decision”).¹² On 16 September 2013, the Defence requested certification to appeal the Impugned Decision (“Request”).¹³ The Prosecution responded on 20 September 2013.¹⁴

II. DISCUSSION

5. The Defence submits that the requirements for granting certification are met, yet generally fails to provide arguments or reasons to support these assertions. Merely reciting the language of Rule 73 (B) is insufficient. The Chamber also emphasizes that it is insufficient to argue that simply because an impugned decision relates to a right of the Accused, the decision is one that “the Appeals Chamber must consider at this juncture in order to materially advance the proceedings”.¹⁵ The Defence argues that if communications with counsel can be used as evidence against the Accused, this “prevents the right to consult with counsel and forces [the Accused] to be a witness against himself”.¹⁶ The Defence does not provide any reasoning to clarify these very broad claims in the context of Rule 73 (B) of the Rules.

6. The Defence also appears to misconceive the legal standard under Rule 73 (B). The Defence states that a *delay in granting immediate certification* to appeal will materially affect the proceedings as the outcome could have an impact on the ability of the Accused to materially participate in the proceedings.¹⁷ Rule 73 (B) of the Rules is concerned, however, with whether an *impugned decision* involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.

7. The Chamber also notes that the Defence’s 12 September 2013 request indicates procedural confusion on the part of the Defence. To begin with, the Defence appeared to suggest that the Addition Motion was still pending on 12 September 2013.¹⁸ The Defence also appeared to suggest that the utterances at issue happened outside of the courtroom.¹⁹ The Defence appeared unable to address the issue of a potential lawyer-client privilege with a sufficient level of legal analysis for the Chamber to properly understand the outline of the issue at stake. It simply made vague

¹¹ T. 16585-16589.

¹² T. 16589-16590.

¹³ Defence Motion for Certification to Appeal Oral Decision of 12 September 2013 as to Witness Maria Karall, 16 September 2013.

¹⁴ Prosecution Response to Defence Motion for Certification to Appeal Oral Decision of 12 September 2013 as to Witness Maria Karall, 20 September 2013.

¹⁵ Request, para. 7.

¹⁶ Request, para. 6.

¹⁷ Request, para. 6.

¹⁸ See T. 16586.

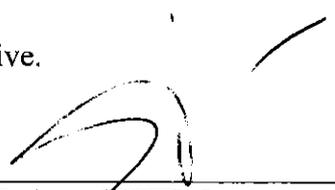
references to its domestic procedures and situations in the United Nations Detention Unit.²⁰ Further, the Defence - without presenting any support - appeared to suggest that it is not in dispute that the Accused's medical condition requires him to speak at a high volume.²¹ Moreover, the Defence did not request reconsideration or certification to appeal the Addition Decision but waited until the day of the witness's scheduled testimony to reiterate its previous objections.²²

8. Considering all these circumstances, the Chamber finds that the Defence has not demonstrated that the criteria of Rule 73 (B) have been met.

III. DISPOSITION

9. For the foregoing reasons, pursuant to Rules 73 (B) of the Rules, the Chamber **DENIES** the Request.

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



Judge Alphons Orie
Presiding Judge

Dated this Twenty-first day of October 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁹ See T. 16587:9-10.

²⁰ See T. 16588.

²¹ Ibid.

²² This approach also demonstrates a mistaken assumption on the part of the Defence that every submission made in response to a motion needs to be addressed by the Chamber. The arguments presented by the Defence in its Addition Response were explicitly geared towards a denial of the Addition Motion, not seeking an explicit ruling on certain of its objections. The Chamber made a *prima facie* determination on the probative value of Witness Karall's proposed testimony when it decided to add her to the Prosecution's witness list and addressed the Defence's submission when it held that the Defence's arguments "fail to successfully oppose the request". Furthermore, on 12 September 2013, the Defence also reiterated its objection to having the Prosecution present its own staff as witnesses. This argument had been rejected explicitly in the Addition Decision.