

IT-09-92-T
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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: 25 September 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 25 September 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION FIRST MOTION TO ADMIT
EVIDENCE FROM THE BAR TABLE: MLADIĆ NOTEBOOKS**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSION OF THE PARTIES

1. On 21 June 2012, the Prosecution filed a motion asking the Chamber to take judicial notice of the authenticity of twenty-two notebooks allegedly authored by the Accused (“Mladić Notebooks”) and admit them into evidence from the bar table (“Motion”).¹ On 5 July 2012, the Defence responded to the Motion (“Response”).² On 12 July 2012, the Prosecution requested leave to reply to the Defence’s Response (“Request to Reply”),³ which was granted by the Chamber on 16 July 2012 and the parties were informed accordingly through an informal communication.⁴ As the Request to Reply already contained the reply in the form of a public annex, the Chamber considered the reply as validly filed (“Reply”) on the same day.

2. In its Motion, the Prosecution requests that the Chamber takes judicial notice of the authenticity of the Mladić Notebooks pursuant to Rule 94(B) of the Rules of Procedure and Evidence (“Rules”).⁵ The Prosecution submits that the Mladić Notebooks have been admitted in several cases before this Tribunal and they “clearly fit into the Prosecution case in their entirety and are directly relevant to the Accused”.⁶ The Prosecution further submits that taking judicial notice of the authenticity of the Mladić Notebooks at this stage of the proceedings would save considerable use of court time, and obviate the need to adduce evidence to establish their authenticity.⁷ The Prosecution requests the admission of the Mladić Notebooks into evidence in advance of witness testimony and in its entirety, since it considers that this would streamline the presentation of evidence at trial.⁸ According to the Prosecution, the complete documents are *prima facie* relevant because they are authored by the Accused and “each entry in the notebooks equally represents a contemporaneous record of the acts, conducts and state of mind of the accused during the relevant time period”.⁹ In light of the information provided in a statement by the Conference and Language Service Section (“CLSS”) attached to its Reply, the Prosecution withdraws its request to tender some pages of the document bearing Rule 65ter no. 19590 for which the English translation is

¹ Prosecution First Motion to Admit Evidence from the Bar Table: Mladić Notebooks, 21 June 2012.

² Defence Response to Prosecution First Motion to admit Evidence from the Bar Table: Mladić Notebooks, 5 July 2012.

³ Prosecution Request for Leave to Reply to Defence Response to Prosecution Motion to admit the Mladić Notebooks, 12 July 2012.

⁴ That decision is hereby put on the record.

⁵ Motion, paras 1, 25. The Mladić Notebooks have been uploaded into e-Court as documents bearing Rule 65ter nos 13014, 13046, 13048, 17502, and 19577 through 19594.

⁶ Motion, paras 14, 20, 24.

⁷ Motion, paras 14-16.

⁸ Motion, para. 12, 15-16.

⁹ Motion, paras 18, 21.

missing.¹⁰ The Prosecution further confirms that the translations of the notebooks are made by CLSS.

3. The Defence does not object to the admission of the Mladić Notebooks, but submits that it cannot verify or comment on the authenticity of the Mladić Notebooks in their entirety and reserves the right to object and raise issues in relation to the Mladić Notebooks during trial.¹¹ The Defence agrees that “certain of the handwritten text contained in the notebooks (the greater part) is Mr. Mladić’s own handwriting”.¹² It further recognizes that they are “in general relevant and probative to issues in this case”.¹³ Further, the Defence submits that the translations provided by the Prosecution are “draft translations by OTP staff”, and therefore seeks the Trial Chamber to defer its decision on the Motion until an official translation of the Mladić Notebooks has been provided by CLSS or, alternatively, that only the originals be admitted into evidence at this stage.¹⁴ Lastly, the Defence requests the Chamber to strike from the record parts of the Motion allegedly expanding the scope of the Indictment.¹⁵

II. APPLICABLE LAW

4. Rule 89 provides, in relevant part:

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

5. Rule 94(B) allows a Chamber to take judicial notice of the authenticity of documentary evidence which has been admitted in prior proceedings. The moving party must demonstrate that the documents sought for judicial notice were tendered as evidence in another case before the Tribunal and were found to be authentic in the prior proceedings.¹⁶ This means that the documents must have already passed the test of reliability, relevancy and authenticity under Rule 89(C).¹⁷ After creating a well-founded presumption of the authenticity of the documentary evidence by virtue of taking judicial notice, the moving party may tender this, not yet admitted, documentary evidence in

¹⁰ Reply, paras 7, 14.

¹¹ Response, paras 6-9.

¹² Response, para. 10.

¹³ Response, para. 11.

¹⁴ Response, paras 7, 9, Conclusion.

¹⁵ Response, paras 12-15, Conclusion.

¹⁶ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on the Prosecution’s Motion for Judicial Notice of Intercepts Related to the Sarajevo Component and Request for Leave to Add One Document to the Rule 65ter Exhibit List, 4 February 2011 (“Karadžić 4 February 2011 Decision”), paras 15-16.

¹⁷ *Ibid*, para. 15.

question either through a witness or through a bar table motion by fulfilling the requirements of Rule 89(C).¹⁸

III. DISCUSSION

Preliminary matters

6. Based on the submissions made by the Prosecution, the Chamber is satisfied that the translations of the Mladić Notebooks are made by the CLSS and will therefore not further deal with the Defence objection in this respect. With regard to the Defence submission that certain submissions made by the Prosecution in its Motion seek to improperly broaden the scope and time frame of the Indictment, the Chamber recalls its previous statement that

the indictment is the primary accusatory instrument, and any other accusatory instrument cannot add charges or material facts amounting to charges. [...] References to matters that are outside the temporal, geographic, and/or subject-matter scope of the indictment are not per se irrelevant to the indictment.¹⁹

Judicial notice under Rule 94(B)

7. Before taking judicial notice of the authenticity of documentary evidence pursuant to Rule 94(B), the Chamber must be satisfied the documents have been admitted into evidence in prior cases before the Tribunal, where they were found to be authentic, and that the documents are relevant to the present case.²⁰ The Chamber considers that such a finding on authenticity in a previous case should be explicit; it should be clear from the record that the previous Chamber considered the relevant aspects of authenticity when determining the admissibility of the document(s) in question.

8. With respect to the first condition, the Chamber observes that the Mladić Notebooks have been admitted into evidence in their entirety in only two previous cases.²¹ In both the *Tolimir* and *Karadžić* cases, the Chambers were satisfied of the relevance and probative value required for admission.²² While the authenticity of the Mladić Notebooks as such was not challenged in the *Karadžić* case, the *Tolimir* Chamber was requested to make a finding in this respect.²³ In determining admission of the Mladić Notebooks, it examined evidence presented on provenance,

¹⁸ Ibid. paras 12, 15.

¹⁹ T. 326-327.

²⁰ See para. 5 of this Decision.

²¹ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, T. 8142-8143; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, T. 6104-6105.

²² Ibid.

²³ Ibid.

chain of custody and corroboration of sampling of the Mladić Notebooks.²⁴ Other Chambers have admitted only excerpts of the Mladić Notebooks; in determining their probative value, these Chambers similarly addressed aspects regarding the authenticity of the Mladić Notebooks.²⁵

9. In addition, the Defence itself stated that the Mladić Notebooks “do indeed appear to be 22 notebooks that were recovered by the Serbian authorities from the residence of the Mladic family”.²⁶ However, it also stated that it wished to “reserve the right” to challenge the authenticity of portions of the Mladić Notebooks, arguing that they contain entries by “unknown third parties”.²⁷ The Chamber observes that the Defence did not specify which portions of the Mladić Notebooks this objection relates to.

10. With respect to the second condition, the Chamber agrees with the parties that it is clear that the Mladić Notebooks are relevant to the present case in their entirety.²⁸

11. Having found that conditions for judicial notice of the authenticity of the Mladić Notebooks under Rule 94(B) have been satisfied, the Chamber accordingly takes judicial notice of the authenticity of the Mladić Notebooks. The Chamber expects the Defence to produce any evidence challenging the authenticity of the Mladić Notebooks during the proceedings.

Admission from the bar table and translation issues

12. A party tendering documents for admission from the bar table pursuant to Rule 89 (C) must show that the tendered documents are relevant and probative and demonstrate, with clarity and specificity, where and how each document fits into its case.²⁹

13. First, the Chamber notes that, in taking judicial notice of the authenticity of the complete Mladić Notebooks, it has already found that the Mladić Notebooks are relevant to the case in their entirety.³⁰ As for the probative value, the Chamber observes that it has taken judicial notice of the authenticity of the Mladić Notebooks. In addition, the Chamber considers the Defence’s position

²⁴ Ibid.

²⁵ Response, para. 14. For example, for admission of the Mladić Notebooks in the Stanišić and Simatović case, see *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution Motion for Admission of Excerpts from Mladić Notebooks and Second Prosecution Notification of Excerpts from Mladić Notebooks, 10 March 2011, para. 12, referring to *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Sixteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex (Mladić Notebooks), 7 October 2010.

²⁶ Reply, para.7.

²⁷ Response, paras 9-10.

²⁸ See also Reply, para. 11.

²⁹ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, First Decision on the Defence Bar Table Motion of 17 February 2012, para. 10; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 18; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008, para. 9.

that the Mladić Notebooks are probative “in general” and that “the greater part” of the handwritten text in the Mladić Notebooks belongs to the Accused.³¹ Based on the foregoing, the Chamber finds that the Mladić Notebooks have probative value.

14. In relation to Prosecution’s request to admit into evidence the Mladić Notebooks in advance of witness testimony on the matter, the Chamber first recalls its guidance on the admission of evidence from the bar table, which sets out that bar table motions should be filed at a late stage of the tendering party’s case.³² The Chamber has considered the nature and the content of the Mladić Notebooks, as well as the fact that both parties have indicated they will use them throughout the course of proceedings with a number of witnesses, and considers that an exception to the guidance is warranted.³³

15. With respect to the Mladić Notebook bearing Rule 65*ter* no. 19594, the Chamber notes that on e-Court there is one page, numbered respectively page 157 in the B/C/S version and page 161 in the English translation, which does not appear to be present in the original handwritten version of the document. The Chamber instructs the Prosecution to remove that page from the respective B/C/S and English versions or, alternatively, to provide the Chamber with the original of the corresponding handwritten page.

16. Having found that the Mladić Notebooks are probative and relevant, the Chamber decides to admit the Mladić Notebooks into evidence in their entirety. Given the voluminous nature of the Mladić Notebooks, the Chamber considers that it would not be useful to require the Prosecution to now indicate, with clarity and specificity, how each entry of the notebooks fits into its case. The Chamber expects the Prosecution to provide this information when it will decide to use or rely on the Mladić Notebooks in the course of the proceedings.

IV. DISPOSITION

17. For the foregoing reasons, pursuant to Rules 89 and 94(B) of the Rules, the Chamber **GRANTS** the Motion and

- i. **INSTRUCTS** the Prosecution to modify document bearing Rule 65*ter* no. 19594 in accordance with paragraph 15 of this Decision;

³⁰ See para. 10 of this Decision.

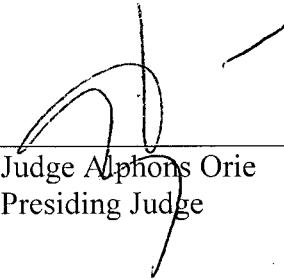
³¹ Response, paras 10-11.

³² T. 109-110.

³³ Motion, paras 15-17.

- ii. **DECIDES** to take judicial notice of the authenticity of the Mladić Notebooks bearing Rule 65ter nos 13014, 13046, 13048, 17502, and 19577 through 19594;
- iii. **ADMITS** the Mladić Notebooks, as enumerated under (ii), into evidence;
- iv. **REQUESTS** the Registry to assign exhibit numbers to the documents admitted and 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 twenty-fifth day of September 2012
At The Hague
The Netherlands

[Seal of the Tribunal]