



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-03-69-T
Date: 1 April 2011
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 1 April 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON NINETEENTH PROSECUTION MOTION FOR
LEAVE TO AMEND ITS RULE 65 *TER* EXHIBIT LIST
(MLADIĆ AUDIO FILES) AND MOTION FOR ADMISSION OF
EXCERPTS FROM MLADIĆ AUDIO FILES**

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I. PROCEDURAL HISTORY

1. On 19 January 2011, the Prosecution requested leave to add eight excerpts of audio recordings (“Proposed Excerpts”) to its Rule 65 *ter* exhibit list and to tender them into evidence from the bar table pursuant to Rule 89(C) of the Rules of Procedure and Evidence (“Rules”).¹ The Stanišić Defence requested that the time for Defence responses start running from the moment all English translations of the Proposed Excerpts were disclosed to the Defence, as suggested by the Prosecution in the Motion.² The Chamber subsequently requested the Prosecution to continue disclosing translations of the Proposed Excerpts as they became available and to inform the Chamber when all translations were completed and disclosed, at which time the Chamber would set a deadline for Defence responses.³ Through an informal communication on 9 February 2011, the Prosecution informed the Chamber that the remaining English translations of the Proposed Excerpts had been disclosed to the Defence on 8 February 2011, and it provided the Chamber and the Defence with a revised bar table chart setting out their relevance.⁴ The Chamber informed the Parties that the deadline for responses had been extended to 22 February 2011.⁵ The Stanišić Defence responded to the Motion (“Response”), requesting the Chamber to deny it in its entirety.⁶ The Simatović Defence did not respond to the Motion. The Prosecution requested leave to reply to the Response, which the Chamber denied.⁷

2. On 11 March 2011, the Chamber issued its “Decision on Second Prosecution Motion for Admission of Excerpts from Mladić Notebooks and Third Prosecution Notification of Excerpts from Mladić Notebooks” (“Second Mladić Notebooks Decision”), wherein it deferred its decision on the admissibility of three excerpts, on the basis that their relevance could not be established

¹ Nineteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Mladić Audio Files) and Motion for Admission of Excerpts from Mladić Audio Files, 19 January 2011 (Public with Public Annex) (“Motion”). The Prosecution did not file the relevant audio recordings with the Motion. Following an informal request from the Chamber on 11 March 2011, the Prosecution informally provided the Chamber with a disc containing the Proposed Excerpts on 17 March 2011.

² The Stanišić Defence’s request was made through an informal communication on 21 January 2011. The Prosecution had suggested in its Motion that in “light of the ongoing transcription and translation process, the Defence’s response time should run from the date that it receives the last translation”; see Motion, para. 15.

³ The Chamber made the request through an informal communication on 25 January 2011.

⁴ The revised bar table chart was an updated version of Annex A to the Motion. The Chamber notes that the revised bar table chart has not been filed formally. The Prosecution’s informal communication and revised bar table chart of 9 February 2011 indicated that the remaining translations had been disclosed to the Defence on 8 February 2011 in draft form, with final translations to be disclosed as soon as possible. On 17 March 2011, the Prosecution informed the Chamber in an informal communication that it had uploaded the remaining final translations of the transcripts of the Proposed Excerpts into e-Court. In addition, the Prosecution provided the 65 *ter* numbers for the last four Proposed Excerpts.

⁵ The parties were informed through an informal communication on 11 February 2011.

⁶ Stanišić Response to Prosecution Nineteenth Motion for Leave to Amend its 65 *ter* Exhibit List and for Admission of Excerpts from Mladić Audio Files, 22 February 2011.

without reference to the Proposed Excerpts tendered in the current Motion.⁸ The Chamber will therefore decide on the admissibility of those three excerpts (“Mladić Notebooks Excerpts”) in the current decision.⁹

II. SUBMISSIONS OF THE PARTIES

A. Motion

3. The Prosecution submits that the audio recordings from which the Proposed Excerpts are taken were seized by officers of the Ministry of Internal Affairs of the Republic of Serbia (“MUP of Serbia”) on 23 February 2010 from the apartment of Bosiljka Mladić, the wife of Ratko Mladić (“Mladić”), and contain contemporaneous conversations between Mladić and other members of the joint criminal enterprise alleged in the Indictment (“JCE”), including Jovica Stanišić (“Stanišić”), during the period relevant to the Indictment.¹⁰ In addition to the audio recordings (“Mladić Audio Files”), a large volume of material was seized including voice recorder tapes, VHS tapes, CDs, DVDs, and 18 military notebooks (“Mladić Notebooks”) (together, “Mladić materials”).¹¹

4. The Prosecution submits that it has good cause to seek to add the Proposed Excerpts to its Rule 65 *ter* exhibit list. The Prosecution asserts that it received the Mladić materials well into its case, informed the Defence of their existence immediately thereafter, and alerted the Chamber and the Defence that it was in the process of making an inventory of the Mladić Notebooks and Mladić Audio Files when it sought leave to add the Mladić Notebooks to its Rule 65 *ter* exhibit list.¹² It

⁷ Prosecution Request to Reply to Stanišić Response to Prosecution Nineteenth Motion for Leave to Amend its Rule 65 *ter* Exhibit List and for Admission of Excerpts from Mladić Audio Files, 25 February 2011. The Chamber denied the Prosecution leave to reply through an informal communication on 2 March 2011.

⁸ See Second Mladić Notebooks Decision, paras 8 and 10: the three excerpts of the Mladić Notebooks in relation to which the Chamber deferred its decision are excerpts 12-14 (inclusive) of the “January 2011 Excerpts”. See also Second Mladić Notebooks Decision, paras 1 and 2, for the relevant procedural history of that decision. In addition, see Annex B to the Second Prosecution Motion for Admission of Excerpts from Mladić Notebooks and Third Prosecution Notification of Excerpts from Mladić Notebooks, 27 January 2011, which sets out the details of the excerpts and the Prosecution’s submissions in relation to their relevance.

⁹ The Chamber notes that in its Second Mladić Notebooks Decision it found excerpts 12-14 (inclusive) of the “January 2011 Excerpts” to be sufficiently probative for the purpose of their admission from the bar table; see para. 6. The Chamber will therefore consider only the relevance of these excerpts in the current decision.

¹⁰ Motion, paras 1, 5.

¹¹ See in relation to the Mladić Notebooks: Decision on Sixteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex (Mladić Notebooks), 7 October 2010 (“Decision on Sixteenth Prosecution Motion”); Decision on Prosecution Motion for Admission of Excerpts from Mladić Notebooks and Second Prosecution Notification of Excerpts from Mladić Notebooks, 10 March 2011 (“First Mladić Notebooks Decision”); Decision on Second Prosecution Motion for Admission of Excerpts from Mladić Notebooks and Third Prosecution Notification of Excerpts from Mladić Notebooks, 11 March 2011 (“Second Mladić Notebooks Decision”).

¹² Motion, para. 10; see also Sixteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex (Mladić Notebooks), 14 May 2010 (Public with Confidential Annex).

argues that it has acted diligently to ensure the Defence has had access to the same information as the Prosecution,¹³ firstly, by disclosing to the Defence an index containing summaries of the 120 seized audio and video files as soon as it was available,¹⁴ and secondly, by disclosing twelve of the Mladić Audio Files, including the Proposed Excerpts, in September 2010.¹⁵ At the time of filing the Motion, the Mladić Audio Files had not been fully transcribed and translated.¹⁶ However, the Prosecution submitted that it had a good faith basis to believe that the Mladić Audio Files not yet transcribed or translated would be relevant, based on the index of summaries it had prepared earlier.¹⁷ The Prosecution argues that addition of the Proposed Excerpts to its Rule 65 *ter* exhibit list will not prejudice the rights of Stanišić and Franko Simatović (together, “the Accused”) to a fair trial and adequate time and facilities for preparation of a defence.¹⁸ It submits that its request to add only eight excerpts is modest, and that assessment of this small volume of materials will not overly burden the Defence’s resources.¹⁹

5. The Prosecution asserts that the Mladić Audio Files are reliable because they were found in Mladić’s wife’s residence, where they had been hidden together with the Mladić Notebooks and other Mladić materials.²⁰ It submits that the presence of the Mladić Audio Files with the Mladić Notebooks, which have been admitted into evidence before the Tribunal, indicates that they are “a reliable source of contemporaneous information assembled by Mladić himself”.²¹ The Prosecution points to indications that Mladić himself made the recordings, including the facts that the speaker identified as Mladić is consistently the loudest and clearest of all the speakers, and that the speakers identify each other and Mladić by name.²² The Prosecution further submits that other evidence, including corresponding entries in the Mladić Notebooks; bolsters the reliability of the Mladić Audio Files.²³

6. The Prosecution submits that the Proposed Excerpts are relevant to and probative of important issues in the case.²⁴ It asserts that they contain contemporaneous recordings of conversations that took place during the Indictment period between and about members of the alleged JCE, including Stanišić, and further that they provide evidence of a common criminal

¹³ Motion, para. 11.

¹⁴ Motion, paras 6, 11.

¹⁵ Motion, para. 7.

¹⁶ Motion, paras 7, 8; see also para. 15; The Chamber was notified by an informal communication on 9 February 2011 that this process had been completed on 8 February 2011, see *supra* para. 2.

¹⁷ Motion, para. 13.

¹⁸ Motion, para. 14.

¹⁹ *Ibid.*

²⁰ Motion, paras 16-17.

²¹ Motion, para. 17.

²² Motion, para. 18.

²³ Motion, paras 19-20.

²⁴ Motion, para. 21.

purpose and evidence that links the Accused to incidents charged in the Indictment.²⁵ The Prosecution sets out the specific relevance of each of the Proposed Excerpts in Annex A to the Motion.²⁶

B. Response

7. The Stanišić Defence submits that it is currently “unable to form any meaningful assessment of the prejudice that will be caused” by the addition of the Proposed Excerpts without being allowed sufficient time and resources to listen to and assess them within the context of the totality of the Mladić materials and the case as a whole.²⁷ It submits that the Mladić Audio Files are voluminous and themselves require careful analysis.²⁸ Moreover, some of the Mladić materials appear to cross-reference each other.²⁹ The Stanišić Defence asserts that some portions of the Mladić Audio Files recordings may be contemporaneous, while others may have been prepared years after the relevant events.³⁰ Further, some contemporaneous portions may be reliable whereas others may be “infected with inaccurate or deliberately self-serving recordings”.³¹ For these reasons, the Stanišić Defence argues that the reliability of the Mladić Audio Files cannot be assessed by reference only to the Proposed Excerpts upon which the Prosecution seeks to rely, but will require examination of other portions of the Mladić Audio Files that allow for comparison of those files with reliable and independent records.³²

8. The Stanišić Defence disputes the Prosecution’s assertion that granting the Motion would not overly burden the Defence’s resources.³³ It emphasises that the Prosecution has been working on the Mladić materials for a year without completing their transcription, translation or review,³⁴ while the Defence teams are only able to devote a “minute fraction” of the resources available to the Prosecution in reviewing the materials.³⁵ The Stanišić Defence submits that, in the two weeks granted for responses to the Motion, it has been able to study only a small portion of the relevant

²⁵ Motion, para. 21.

²⁶ Ibid; Public Annex A. As noted above, the Prosecution provided a revised bar table chart by informal communication on 9 February 2011; see supra, fn 4.

²⁷ Response, para. 2; see also para. 10.

²⁸ Response, para. 5.

²⁹ Ibid.

³⁰ Response, para. 6.

³¹ Ibid.

³² Ibid.

³³ Response, para. 9.

³⁴ Response, para. 7.

³⁵ Response, para. 8.

materials and is therefore not in a position to make further reasoned arguments concerning the admission of the Proposed Excerpts.³⁶

III. APPLICABLE LAW

9. The Chamber recalls the applicable law governing amendments to the Rule 65 *ter* exhibit list³⁷ and admission of evidence³⁸ as it has previously set out, and refers to it.

IV. DISCUSSION

A. Good cause

10. The Prosecution seeks to add the Proposed Excerpts to its Rule 65 *ter* exhibit list at a late stage in the proceedings, near the end of the Prosecution's case. However, the Chamber considers that the Prosecution has acted diligently in (i) immediately alerting the Defence to the existence of the Mladić materials; (ii) providing the Defence with an index of summaries as soon as it became available and thus informing the Defence of the general content of each segment of the Mladić Audio Files; (iii) disclosing the tapes containing the Proposed Excerpts to the Defence on 29 September 2010 (along with two available transcripts and an English translation); and (iv) subsequently disclosing transcripts and translations as soon as they became available. Accordingly, the Chamber finds that the Prosecution has shown good cause in seeking to add the Proposed Excerpts to its Rule 65 *ter* exhibit list at this stage of the trial.

11. In considering the addition of the Proposed Excerpts to the Prosecution's Rule 65 *ter* exhibit list, the Chamber must be satisfied that the rights of the Accused to a fair trial and to adequate time and facilities for the preparation of a defence are guaranteed. The Stanišić Defence requests the Chamber to deny the Motion because it has not had sufficient opportunity to assess the Proposed Excerpts in the context of the totality of the Mladić Audio Files and other Mladić materials, and therefore is not yet able to assess the prejudice that may be caused by their addition to the Rule 65 *ter* exhibit list. The Chamber considers that assessment of the Proposed Excerpts alone would not overly burden the Defence, given their small number and relatively small volume. The Chamber

³⁶ Response, para. 10.

³⁷ See Decision on Sixteenth Prosecution Motion, paras 10-12.

notes that it granted the Stanišić Defence's request to allow the time for responses to the Motion to run from the date of when the last of the English translations had been disclosed by the Prosecution, and that the Stanišić Defence had been in possession of some of the transcripts and translations before this time. Further, it had been in possession of copies of the original (B/C/S) Proposed Excerpts since September 2010. The Chamber acknowledges that the Defence may be better able to assess the reliability of the Proposed Excerpts once it has had the opportunity to review them in the context of the Mladić Audio Files and other Mladić materials. However, it does not consider that the Defence will be prejudiced by the addition of the Proposed Excerpts to the Prosecution's Rule 65 *ter* exhibit list.

B. Reliability

12. The Mladić Audio Files were found in the apartment of Mladić's wife, together with the Mladić Notebooks and other Mladić materials. The Chamber previously considered the presence of the Mladić Notebooks in Mladić's wife's residence to be a positive indication that Mladić may have authored them,³⁹ and subsequently admitted them into evidence in this case.⁴⁰ Similarly, the Chamber considers that the discovery of the Mladić Audio Files in the same location and circumstances provides them with a measure of reliability, serving as a positive indication that they may have been compiled or recorded by Mladić himself.

13. The Chamber notes that it has heard no evidence – whether from a voice recognition expert or other witness – that the voice in the Mladić Audio Files said by the Prosecution to be that of Mladić is in fact his.⁴¹ Similarly, it has received no evidence in relation to the other voices on the tapes. However, the Chamber notes from the translated transcripts of the Proposed Excerpts that the speakers often appear to identify themselves and each other by name or nickname, and that Mladić is named on numerous occasions. Further, the Chamber considers that the contents of the recorded conversations,⁴² including the type of information exchanged therein, also point to their authenticity as conversations involving Mladić and other members of the alleged JCE. When considered together with the circumstances and location in which the Mladić Audio Files were found, the Chamber is of the view that these features are further positive indications that the recordings are reliable and authentic. For the above reasons, the Chamber finds that the Proposed Excerpts have

³⁸ See Decision on the Prosecution's Second Motion for Admission of Exhibits from the Bar Table, 10 March 2011, paras 10-11.

³⁹ Decision on Sixteenth Prosecution Motion, para. 13; See also First Mladić Notebooks Decision, para. 12; and Second Mladić Notebooks Decision, para. 6.

⁴⁰ First Mladić Notebooks Decision, para. 22; Second Mladić Notebooks Decision, para. 10.

⁴¹ The Chamber notes that, in relation to the Mladić Notebooks, it heard testimony from a witness who recognised the handwriting contained therein to be that of Mladić, and it considered that evidence to be a further positive indication of the authenticity of the notebooks; see Decision on Sixteenth Prosecution Motion, para. 13.

sufficient indicia of reliability to be added to the Prosecution's Rule 65 *ter* exhibit list and admitted into evidence under Rule 89(C).

14. The Chamber emphasises that the weight, if any, to be attached to the Proposed Excerpts is currently unknown and will be determined in the context of an assessment by the Trial Chamber of all the evidence in the case.⁴³ Bearing this in mind, the Chamber considers that the Defence will have sufficient time before and/or during the Defence case, if any, to review all the relevant materials and adduce evidence to challenge the reliability of the Proposed Excerpts. The Chamber will carefully and continuously assess all evidence that comes before it that may contradict the reliability of the Proposed Excerpts, and further will allow the Defence to make submissions in future regarding their reliability and the weight to be accorded to them. In the Chamber's opinion, this approach will sufficiently safeguard the rights of the Accused.

C. Relevance and Probative Value

15. The Mladić Audio Files purportedly contain recordings of conversations between Mladić and other members of the alleged JCE that took place during the period relevant to the Indictment.

16. The Chamber notes that Proposed Excerpts 1, 2, 5, 6, 7, and 8⁴⁴ feature discussion of the activities and roles of members of the alleged JCE, including Mladić and Stanišić, and appear to focus on events and operations occurring, *inter alia*, in Bosnia and Herzegovina ("BiH") and "Krajina". These recordings involve discussion of, *inter alia*: the movements of forces and the mobilisation of volunteers;⁴⁵ the goal of Serbian unity;⁴⁶ the involvement of the MUP of Serbia in BiH in supplying ammunition and weapons⁴⁷ and providing assistance in battle;⁴⁸ links between the MUP of Serbia and persons including Arkan;⁴⁹ and links between the MUP of Serbia and crimes committed in "Krajina".⁵⁰

17. Proposed Excerpts 3 and 4⁵¹ purportedly involve conversations between Mladić and other persons that indicate his close relationship with Stanišić. Proposed Excerpt 3 is a recording of a conversation apparently between Mladić and one Sučević of the MUP of Serbia, during which

⁴² See *infra*, paras 16, 17.

⁴³ See Decision on Simatović Defence Request for Certification to Appeal (Babić), 17 February 2011, para. 9; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Application for Certification to Appeal Decision on Rule 92 *quater*, (Witness KDZ198), 31 August 2009, para. 12.

⁴⁴ Respectively, 65 *ter* numbers 6122, 6123, 6126, 6127, 6128 and 6194.

⁴⁵ 65 *ter* number 6122, being Proposed Excerpt No. 1.

⁴⁶ 65 *ter* numbers 6123, 6127 and 6128, being Proposed Excerpts Nos. 2, 6 and 7.

⁴⁷ 65 *ter* numbers 6123 and 6128, being Proposed Excerpts Nos. 2 and 7.

⁴⁸ 65 *ter* number 6127, being Proposed Excerpt No. 6.

⁴⁹ 65 *ter* number 6128, being Proposed Excerpt No. 7.

⁵⁰ 65 *ter* number 6194, being Proposed Excerpt No. 8.

Mladić requests and is given the home phone number of Stanišić, and in turn provides a number on which he (Mladić) can be reached. Proposed Excerpt 4 is a recorded conversation allegedly between Mladić and Stanišić, during which the speakers wish each other happy holidays and one speaker requests the other's help in retrieving equipment seized by customs. The Chamber considers these excerpts sufficiently relevant to the relationship and level of communication and cooperation between specific members of the alleged JCE. As with all the Proposed Excerpts, the Chamber will later assess the weight to be given to Proposed Excerpts 3 and 4. In doing so, it will consider whether it is able to determine the identity of the speakers.

18. Based on the above, and noting that their relevance is not challenged by the Defence, the Chamber finds that all of the Proposed Exhibits meet the *prima facie* requirements of relevance and probative value for addition to the Rule 65 *ter* exhibit list, and furthermore are sufficiently relevant and probative to warrant admission into evidence pursuant to Rule 89(C).

19. The Chamber will now consider the relevance of the Mladić Notebooks Excerpts.⁵² The Prosecution submits that these excerpts are relevant because they corroborate the authenticity of the recorded conversation in Proposed Excerpt 3 as well as the identity of Mladić as one of the participants therein.⁵³ The Chamber notes that the Mladić Notebooks Excerpts apparently contain phone numbers, one of which appears to match a number referred to in Proposed Excerpt 3. The Chamber considers that the Mladić Notebooks Excerpts are therefore relevant to corroborating Proposed Excerpt 3 and of probative value, and will admit them into evidence.

V. DISPOSITION

20. For the reasons set out above, and pursuant to Rules 65 and 89(C) of the Rules, the Chamber **GRANTS** the Motion;

ADMITS into evidence the Proposed Excerpts, and transcripts and English translations thereof, corresponding to 65 *ter* numbers 6122, 6123, 6124, 6125, 6126, 6127, 6128 and 6194;

⁵¹ Respectively, 65 *ter* numbers 6124 and 6125.


⁵² See *supra*, para. 2.

⁵³ See Annex B to Second Prosecution Motion for Admission of Excerpts from Mladić Notebooks and Third Prosecution Notification of Excerpts from Mladić Notebooks, *supra* fn 8.

ADMITS into evidence the Mladić Notebooks Excerpts, being excerpts 12-14 identified in Annex B to the Second Prosecution Motion for Admission of Excerpts from Mladić Notebooks and Third Prosecution Notification of Excerpts from Mladić Notebooks of 27 January 2011; and

REQUESTS the Registry to assign exhibit numbers to the audio recordings and documents admitted and to inform the Chamber and the Parties of the numbers so assigned.

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



Judge Alphons Orie
Presiding Judge

Dated this first day of April 2011
At The Hague
The Netherlands