



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: 9 July 2010

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: 9 July 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION'S SUBMISSION ON THE RELEVANCY OF
CERTAIN DOCUMENTS RELATING TO THE TESTIMONY
OF RICHARD PHILIPPS WITH APPENDIX A**

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 “Prosecution’s Submission on the Relevancy of Certain Documents Relating to the Testimony of Richard Philipps with Appendix A”, filed on 23 June 2010 (“Submission”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 15 and 16 June 2010, Richard Philipps testified as an expert military analyst for the Office of the Prosecutor (“Prosecution”). In its 28 May 2010 notification of the written evidence that would be tendered in relation to Philipps, the Prosecution noted that it would tender exhibits for him under both Rule 94 *bis* and Rule 92 *ter* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ On 15 June 2010, the Prosecution tendered 48 documents into evidence, which were listed in an appendix to Philipps’s amalgamated statement. These were classified by the Prosecution in its notification as associated exhibits, and were offered in addition to other documents tendered under Rule 94 *bis*. Although the Chamber did not consider these documents to be associated exhibits, it found that it was “satisfied with the relevance and the context” of 25 of those documents, and admitted them as “source” documents in relation to Philipps’s expert report. However, it denied the admission of the remaining 23,² noting that it was not satisfied as to the relevance of the documents, the necessity of admitting them, or the context in which they were used in Philipps’s report,³ and invited the Prosecution to make a submission in writing regarding the relevance of the remaining documents.⁴

2. The Submission was filed following the Chamber’s invitation. In the Submission, the Prosecution requests that the Chamber admit the remaining 23 documents, and explains their relevance in a table in Appendix A to the Submission.

3. On 28 June 2010, the Accused filed the “Response to Prosecution Submission on Richard Phillips [*sic*] Documents” (“Response”). In it, he does not oppose the admission of most of the 23 documents, agreeing that they are “relevant to the testimony” of Philipps. He

¹ Prosecution Notification of Submission of Written Evidence Pursuant to Rule 92 *ter* with Appendix A – Expert Witness Richard Philipps, 28 May 2010.

² Hearing, T. 3758–3759 (15 June 2010).

³ Hearing, T. 3758–3759 (15 June 2010). The Chamber stated that “there are certain documents as to which the Chamber is not quite satisfied as to its relevance or necessity or in what context it is used in his report [...] the Chamber does not admit them at this moment”.

⁴ Hearing, T. 3759 (15 June 2010).

does, however, oppose the admission of those documents that relate to modified air bombs as outside the scope of the witness's testimony.⁵

4. On 29 June 2010, the Prosecution filed a request for leave to reply to the Response.⁶ The Chamber granted leave to reply orally on 30 June 2010.⁷ Thus, on 1 July 2010, the Prosecution filed the "Prosecution's Reply to Karadžić's Response to Prosecution Submission on Richard Philipps Documents" ("Reply"). In the Reply, the Prosecution argues that the Accused's objection to the admission into evidence of the documents relating to modified air bombs is "misplaced", because Philipps testified about the chain of command and control of the Sarajevo Romanija Corps ("SRK"), and the documents are reports and orders that were passed along the SRK chain of command.⁸ The Prosecution further submits that "Philipps's testimony was concerned with the fact that information was ably passed up and down the chain of command, but was not concerned *per se* with the substance of that information."⁹

II. Applicable Law

5. Rule 94 *bis* of the Rules governs the procedure that must be followed when a party wishes to call an expert witness. In addition to Rule 94 *bis*, the Chamber has provided guidelines pertaining to the admission of expert reports, and the sources used by an expert in compiling his or her report. With regard to the latter, the Chamber stated: "[t]he sources used by an expert in compiling his or her report will not be admitted as a matter of course".¹⁰ In the Order on Prosecution Request for Clarification and Proposal Concerning Guidelines for Conduct of Trial, issued on 20 October 2009 ("Order on Clarification"), the Chamber provided further explanation of when it would consider admitting sources to an expert report:

Expert reports generally should be complete and understandable in themselves, such that there is no need to tender for admission into evidence the sources used by the expert. However, should the presenting party wish to tender certain sources used by an expert in compiling his or her report, it can apply to the Chamber for their admission, either orally or in writing. The Chamber notes that the presenting party should be very selective in the sources that it tenders for admission into evidence and provide clear reasons as to why these sources should be admitted in addition to the expert report itself.¹¹

⁵ Specifically, the Accused objects to the admission of documents with Rule 65 *ter* numbers 12400, 12402, 09383, 10693, 09273, 10932, and 10931.

⁶ Prosecution's Request for Leave to Reply to Karadžić's Response to Prosecution Submission on Richard Philipps Documents, 29 June 2010.

⁷ Hearing, T. 4402 (30 June 2010).

⁸ Reply, paras. 1–3.

⁹ Reply, para. 2.

¹⁰ Order on Procedure for the Conduct of Trial, 8 October 2009 ("Order on Procedure"), Appendix A, para. P. The Chamber further stated that, "[e]xpert reports should, however, be fully referenced in order to facilitate the Trial Chamber's determination of their probative value and, ultimately, the weight to be ascribed to them."

¹¹ Order on Clarification, para. 5.

6. Where a party calls a witness pursuant to Rule 92 *ter*, it may also tender for admission into evidence documents that have been discussed by the witness in his or her witness statement or previous testimony.¹² In addition to meeting the fundamental requirements for admission under Rule 89 of the Rules, these “associated exhibits” must form an “inseparable and indispensable” part of the witness’s written evidence, as the Chamber has previously explained:

[D]ocuments accompanying the written statements or transcripts which “form an inseparable and indispensable part of the testimony” can also be admitted pursuant to Rule 92 *bis*. Not every document referred to in a witness’s written statement and/or transcript from a prior proceeding automatically forms an “inseparable and indispensable part” of the witness’s testimony. Rather, a document falls into this category if the witness discusses the document in his or her written statement or transcript, and if that written statement or transcript would become incomprehensible or have lesser probative value without the admission of the document.¹³

III. Discussion

7. The Chamber notes that it appeared from the 28 May 2010 notification that the Prosecution was tendering the 48 documents contained in Appendix A to Richard Philipps’s amalgamated statement as associated exhibits. The Chamber determined that the documents could not be associated exhibits because they were not discussed in the amalgamated statement, and the either minimal or non-existent discussion of them in Appendix A was not sufficient to make them an “inseparable and indispensable part” of his statement. However, where the discussion in Appendix A clearly linked the documents to the substance of Philipps’s expert evidence, the Chamber concluded that those documents were admissible as source documents to that expert evidence. On this basis, on 15 June 2010, it admitted into evidence 23 of the documents listed in Appendix A.¹⁴

8. The Chamber will consider the remaining 23 documents on the same basis. Before it does so, however, it reiterates that, should a party wish to tender source documents to the expert report of one of its expert witnesses, the Chamber expects that only a select few of the source

¹² See, for example, Decision on Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality), 15 October 2009 (“Decision on Third Rule 92 *bis* Motion”), para. 11; Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits pursuant to Rule 92 *quater*, 20 August 2009, paras. 4-10; Decision on Prosecution Request for Reconsideration and/or Certification of Parts of the “Decision on Prosecution’s Motion for the Admission of the Evidence of KDZ172 (Milan Babić) Pursuant to Rule 92 *quater*”, 3 June 2010, paras. 24-25.

¹³ Decision on Third Rule 92 *bis* Motion, para. 11. See also *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses pursuant to Rule 92 *ter*, 9 July 2008, para. 15.

¹⁴ The Chamber notes that two of the 48 documents in Appendix A to Philipps’s statement were admitted during his testimony and given exhibit numbers P991 and P992. As such, they were admitted as exhibits for all purposes, and not only as source material. Consequently, they were not considered for admission by the Chamber at the end of Philipps’s direct examination.

documents will be tendered, for the purpose of assisting the Chamber in determining the weight to be ascribed to the expert report itself. This has been clearly laid out in the Order on Clarification. Moreover, the presenting party must provide clear reasons as to why the particular tendered source materials should be admitted in addition to the expert evidence already proffered.

9. Having reviewed Appendix A to the Submission, the Chamber is of the view that the remaining 23 documents are admissible as source documents to Philipps's expert report. While the Prosecution did not specifically address the issue of why these materials should be admitted into evidence in addition to Philipps's expert evidence, the Chamber notes that it did provide information as to the relevance of each of the documents, as requested by the Chamber. In setting out the relevance of each document to its case, the Prosecution clearly linked the document to Philipps's report. The Chamber expects that in any future instances where the Prosecution, or the Accused, wishes to tender source material to expert evidence, it will follow the Chamber's guidelines.

10. Expert reports provide the Chamber with synthesis and analysis of voluminous and often complex technical material by a suitably qualified expert, thus ensuring that the Chamber is not required to undertake the same task. As such, documents and other items that are source material are not admitted for their substantive content. Rather, the purpose of admitting source material is to enable the Chamber to verify, if necessary, the basis upon which the expert reached his or her conclusions, as well as how the relevant analysis was conducted. These documents are only, therefore, of assistance to the Chamber in determining the weight to be ascribed to the expert report. The Chamber notes, however, that if, at a later date, a witness discusses the content of a document previously admitted as a source document in such a way that renders that document admissible for its content, its status can be changed to reflect its admission for all purposes.

11. The Chamber considers that admitting source material solely as a reference tool addresses the Accused's concerns about the content of the documents relating to modified air bombs, and thus his opposition to the admission of these documents. As source material, the substance of these documents will not be considered by the Chamber and, again, may only be used to assist the Chamber in assessing the probative value of Philipps's expert report, if necessary.

IV. Disposition

12. Accordingly, the Trial Chamber, pursuant to Rules 89 and 94 *bis* of the Rules, hereby **GRANTS** the Prosecution's request in the Submission, and:

- a) **ORDERS** that the documents listed in Appendix A to the Submission with the following Rule 65 *ter* numbers are admitted into evidence as source documents to Richard Philipps's expert report: 1643, 1864, 9035, 9273, 9383, 9469, 10693, 10931, 10932, 11286, 11657, 12178, 12182, 12199, 12202, 12377, 12380, 12383, 12400, 12402, 12407, 12409, and 12418;
- b) **REQUESTS** the Registry to assign exhibit numbers to the exhibits that have been admitted into evidence, and to include a note in court on each of the exhibits stating that they have been admitted as source documents for reference purposes only.

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



Judge O-Gon Kwon
Presiding

Dated this ninth day of July 2010
At The Hague
The Netherlands

[Seal of the Tribunal]