UNITED
NATIONS

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: 16 December 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: **16 December 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S SECOND MOTION TO ADMIT DOCUMENTS 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 "Second Motion to Admit Documents Previously Marked For Identification", filed by the Accused on 19 November 2010 ("Second Motion"), and hereby issues its decision thereon.

1. On 8 October 2009, the Trial Chamber issued the "Order on the Procedure for the Conduct of the Trial" ("Order") in which it *inter alia* stated 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.[1]

2. On 19 November 2010, the Accused submitted the Second Motion in which he requests that five documents previously marked for identification during the testimony of David Harland now be admitted into evidence as exhibits.[2] At the time these documents were used in court, no full English translation was available.

3. On 24 November 2010, the Office of the Prosecutor ("Prosecution") filed the "Prosecution's Response to Karadžić's Second Motion to Admit Documents Previously Marked for Identification" ("Second Response"), opposing the admission of documents MFI D169 and MFI D171 because the Accused has failed to meet the relevant standards for their admission.[3] The Prosecution does not oppose the admission of documents MFI D163, MFI D164, or MFI D170.

4. In making its determination on the admission of documents previously marked for identification purposes, the Trial Chamber shall consider whether the proposed exhibits satisfy the requirements of Rule 89(C) of the Tribunal's Rules of Procedure and Evidence ("Rules"), which is to say whether they are relevant and of probative value. This duty applies regardless of any agreement by the parties: it remains the Chamber's province to ensure that all material tendered for admission meets the relevant standards for admission.[4] The Chamber has on several occasions clarified the circumstances in which documents or other proposed items of evidence can be admitted through a witness. On 6 May 2010, the presiding Judge stated that documents put to a witness but which the witness "has no knowledge of or cannot speak to"

[1] Order on the Procedure for the Conduct of the Trial, 8 October 2009, Appendix A, paras. O and Q.
[2] Second Motion, para. 1 (MFI numbers D163, D164, D169, D170, and D171).
[3] Second Response, para. 1.
[4] Decision on Guidelines for the Admission of Evidence Through a Witness ("Guidelines"), 19 May 2010, para. 10.

should not be admitted.[5] This is because: "[i]n addition to relevance and authenticity, the Chamber must be satisfied as to the probative value of a piece of proposed evidence, and this requires that the witness to whom it is shown is able to confirm its content or make some other positive comment about it."[6] Subsequently, in its "Decision on Guidelines for the Admission of Evidence Through a Witness" ("Guidelines"), the Chamber stated that it:

> must be able to assess the probative value of all tendered material, and, ultimately, it must be able to assess the weight to be ascribed to it. Neither will be possible unless the Chamber is satisfied of each agreed document's relevance, probative value, and place in either or both parties' cases. Similar considerations apply to any documents offered into evidence by either party in the courtroom and to which the opposing party does not object.[7]

However, for documents used in the courtroom, the Chamber's assessment of their relevance and probative value should, generally, be done at that time. Thus, when documents that have yet to be translated into English are put to a witness, the Chamber will assess their relevance and probative value, where possible, and if it is satisfied that they should be admitted, mark them for identification pending translation. Once the English translations of such documents have been uploaded into e-court and the tendering party has filed a request for them to be marked as admitted, the Chamber will not revisit the issue of relevance and probative value, absent special circumstances.

5. On the basis of the information provided by the Accused in the Motion, and having reviewed the documents themselves along with the relevant hearing transcripts, the Trial Chamber remains satisfied as to the relevance and probative value of the document marked for identification as MFI D164, MFI D170, and MFI D171 and it will admit these documents into evidence.

6. However, the documents marked for identification as MFI D163 and MFI D169 will not be admitted, for the following reasons:

> (a) MFI D163: This document is a three page publication from the Ministry of Defence of Bosnia and Herzegovina ("BiH") dated 3 April 1994, which *inter alia* records UNPROFOR General Michael Rose as stating "that the part of the city controlled by the Army has begun to live a different sort of life ('it is starting to wake up') and that it is receiving more supplies than Grbavica, which is abandoned and without food."[8] The document was put to the witness David

[5] Hearing, T. 1952 (6 May 2010).
[6] *See also* Guidelines, para. 10.
[7] Guidelines, para. 21.
[8] MFI D163, p. 2.

Harland on 10 May 2010, and the witness stated that he was not familiar with this type of document during the conflict, but has seen similar documents since.[9] He confirmed that Grbavica was under Serb control, but disagreed with the Accused when he suggested that in early 1994, the Serbs "were living much worse than the other part of Sarajevo."[10] The witness was asked no further questions about the contents of the document and made no comment on the document itself. Thus, the Chamber is of the view that a proper foundation for this document was not laid through this witness.

(b) MFI D169: This document is a statement given by Enes Haskić to the Security Administration of the Army of Bosnia and Herzegovina ("ABiH"), dated 6 November 1993. On 10 May 2010, the Accused read a portion of the document concerning the activities of General Briquemont to David Harland and questioned him on those activities.[11] The witness was unable to confirm the activity in question.[12] The Prosecution objected in court on the grounds of relevance, but the Chamber found the document to be "relevant to the general situation" and overruled the objection.[13] In its Response, the Prosecution objects to the admission of this document on the grounds that it is an unattested out-of-court statement and there has been no submission by the Accused that the relevant requirements for admission have been met.[14]

The Chamber recalls its Guidelines, in which it stated:

> The parties may confront a witness ("witness A") in court with the witness statement or the transcript of prior testimony of another witness ("witness B") from another case before this Tribunal. If witness A denies the content of the evidence put to him or her, or disputes it, witness B's witness statement or transcript of prior testimony will not be admitted unless and until witness B is brought to give evidence in this case.[15]

While the Guidelines refer only to witness statements or prior testimony of a witness before the Tribunal, the same principle would apply to a witness statement given to another court or entity, namely that if the witness to whom a witness statement of a third party is shown cannot confirm that statement in some

[9] Hearing, T. 2237 (10 May 2010).
[10] Hearing, T. 2238 (10 May 2010).
[11] Hearing, T. 2265-2266 (10 May 2010).
[12] Hearing, T. 2265-2266 (10 May 2010).
[13] Hearing, T. 2267 (10 May 2010).
[14] Response, para. 2.
[15] Guidelines, para. 25(e).

way, the statement can only be admitted if the person who actually made it is brought to testify before the Tribunal. Having considered the matter further in light of these Guidelines, and as Harland was unable to confirm or comment on the statement in question, it will not be admitted through him.

7. The Chamber notes that there remain a significant number of documents used by the Accused during the proceedings that have been marked for identification due to a lack of an English translation at the time of their use. As the Chamber has repeatedly stated, the lack of an English translation for a particular document should be exceptional, and it is the Accused's duty, as lead counsel in his defence, to ensure that English translations of all documents he wishes to use with a witness are available.

Disposition

8. Accordingly, for the reasons outlined above, pursuant to Rule 89 of the Rules, the Trial Chamber hereby **GRANTS** the Motion **IN PART**, and:

a) **ADMITS** into evidence the items currently marked for identification as MFI D164, MFI D170, and MFI D171

b) **INSTRUCTS** the Registry to mark MFI D163 and MFI D169 as not admitted, removing their MFI status.

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

Judge O-Gon Kwon
Presiding

Dated this sixteenth day of December 2010
At The Hague
The Netherlands

[Seal of the Tribunal]