



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: 17 February 2011

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: 17 February 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S REQUESTS IN RELATION TO NOTES TAKEN BY
WITNESS ADRIANUS VAN BAAL**

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 “Supplemental Memorandum in Support of Motion for Order of Production of van Baal’s Notes” filed by the Accused on 9 November 2010 (“First Memorandum”) and of the “Second Supplemental Memorandum in Support of Motion for Order for Production of van Baal’s Notes” filed by the Accused on 7 February 2011 (“Second Memorandum”) and hereby issues its decision in relation thereto.

I. Background and Submissions

1. General Adrianus van Baal (“Witness”) gave evidence in these proceedings on 27 and 28 October 2010. During his testimony, the Witness testified that “General Milovanović said that he would see to it that the trams and any passengers on the trams would be targeted”.¹ The Witness also indicated that he had taken notes during his presence in Sarajevo between 24 February and 28 August 1994.²
2. On 28 October 2010, the Accused filed a “Motion for Order for Production of van Baal Notes”, wherein he requested an order directing the Witness to produce any contemporaneous notes he took during his period in Sarajevo, redacted to exclude matters of a personal nature.³ On 4 November 2010, the Witness provided the two pages of his notes which covered the meeting he had with General Milovanović on 16 March 1994, but which did not make any reference to threats that the Bosnian Serbs would start shooting at trams (“Two Pages”).
3. In the First Memorandum filed on 9 November 2010, the Accused requests either that the Witness be recalled to give him the opportunity to explain the absence of any reference to the trams in the Two Pages or that the Two Pages be admitted from the bar table.⁴ The Accused also maintains his request for an order to the Witness for the production of the remainder of his notes.⁵
4. On 11 November 2010, the Prosecution filed the “Prosecution’s Response to Motion for Order for Production of van Baal’s Notes and Supplemental Memorandum in Support of Motion for Order for Production of van Baal’s Notes”, wherein the Prosecution opposes the

¹ T. 8451 (27 October 2010).

² T. 8453 (27 October 2010).

³ Motion for Order for Production of van Baal Notes, 28 October 2010, paras. 1–9.

⁴ First Memorandum, para. 3.

⁵ First Memorandum, para. 5.

Accused's requests for an order to recall the Witness or to admit the Two Pages from the bar table, and to produce the remainder of the Witness's notes.⁶

5. On 18 November 2010, the Chamber sent the Witness a letter inviting him to provide the remainder of his notes voluntarily, which he did on 31 January 2011.

6. The Accused, in the Second Memorandum, having reviewed the entire collection of the Witness's notes, maintains his request to either recall the Witness to discuss matters relating to the Two Pages or to have these Two Pages admitted from the bar table.⁷

II. Applicable Law

A. Recalling a witness

7. As already mentioned in a recent decision, in determining whether or not to recall a witness, the Chamber considers whether good cause to recall that witness has been shown.⁸ Factors to be considered are i) the purpose of the evidence that the requesting party expects to elicit from the witness, and ii) the party's justification for not eliciting that evidence when the witness originally testified.⁹

8. The right to be tried without undue delay as well as concerns for judicial economy demand that a request to recall a witness only be granted when the evidence in question has considerable probative value and is not cumulative in nature.¹⁰ If the witness is to be recalled in order to show an inconsistency between the witness's testimony and his or her subsequent statements, the requesting party must demonstrate that prejudice was sustained due to its inability to put that inconsistency to the witness.¹¹ The witness will not be recalled if there is no need for the witness's explanation of the inconsistency because it is minor or its nature is self-evident.¹²

⁶ Prosecution's Response to Motion for Order for Production of van Baal's Notes and Supplemental Memorandum in Support of Motion for Order for Production of van Baal's Notes, 11 November 2009, paras. 1, 9.

⁷ Second Memorandum, paras. 3, 6.

⁸ Decision on Accused's Motion to Recall Harry Konings for Further Cross-Examination, 11 February 2011, para. 8; *Prosecutor v Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution Motion to Recall Marko Rajčić, 24 April 2009 ("*Gotovina Decision*"), para. 10; *Prosecutor v Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to recall Prosecution Witness OAB for Cross-examination, 19 September 2005 ("*Bagosora Decision*"), para.2

⁹ *Gotovina Decision*, para. 10; *Bagosora Decision*, para. 2.

¹⁰ *Gotovina Decision*, para. 10; *Bagosora Decision*, para. 2.

¹¹ *Bagosora Decision*, para. 3.

¹² *Bagosora Decision*, para. 3.

B. Admission from the bar table

9. The admission of evidence from the bar table is a practice well established in the case-law of the Tribunal.¹³ As specified by the Chamber, when requesting that a document be admitted from the bar table, “the requesting party shall: (i) provide a short description of the document of which it seeks admission; (ii) clearly specify the relevance and probative value of each document; (iii) explain with clarity and specificity how it fits into the party’s case; and (iv) provide the indicators of the document’s authenticity.”¹⁴ Furthermore, the Chamber has made it clear that “the use of bar table motions shall be kept to a minimum.”¹⁵

10. Thus, while evidence may be admitted from the bar table if the relevance and probative value requirements of Rule 89(C) are met, even when “the requirements of the Rule are satisfied, the Chamber maintains discretionary power over the admission of the evidence, including by way of Rule 89(D), which provides that it may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”¹⁶

III. Discussion

A. Recalling the Witness

11. The Accused requests that the Witness be recalled to provide him with an opportunity to explain why the Two Pages do not contain a reference to Milovanović’s threat to shoot at the trams.¹⁷ The Chamber notes, however, that during his testimony the Witness already explained that he only took notes at some meetings and that he would have to see his notebook to verify whether he had recorded Milovanović’s threat to shoot at trams in writing.¹⁸ The Chamber therefore does not see how recalling the Witness would further assist as he has already had the opportunity to provide his own explanation as to the absence of a reference to the Milovanović threat in his notebook. It is likely that, if recalled, the Witness would give cumulative evidence. The Chamber therefore does not consider that the Accused has demonstrated good cause to recall the Witness.

B. Admission of the Two Pages from the bar table

¹³ Decision on the Prosecution’s First Bar Table Motion, 13 April 2010, para. 5 (footnotes omitted).

¹⁴ Order on the Procedure for the Conduct of Trial, 8 October 2009, Appendix A, para. R; Decision on the Prosecution’s First Bar Table Motion, 13 April 2010 (“First Bar Table Decision”), para. 6 (footnotes omitted).

¹⁵ Order on Procedure, Appendix A, para. R.

¹⁶ First Bar Table Decision, para. 5.

¹⁷ First Memorandum, paras. 3, 4.

¹⁸ T. 8451–8452 (27 October 2010): “In general terms, I took notes from some meetings”.

12. The Accused submits that the Two Pages fulfil the requirements for admission from the bar table in that they are authentic, relevant and they advance his case.¹⁹ The Chamber has no reason to question the authenticity of the Two Pages which have been authored by the Witness. The Chamber also finds that the Two Pages are relevant and of probative value for the purpose of Rule 89(C) in that the Witness referred to them during his testimony in these proceedings and they pertain to the charges against the Accused in relation to Sarajevo. The Chamber further considers that admitting the Two Pages into evidence is warranted in order to properly assess the Witness's testimony in respect of Milovanović's threat to shoot at trams and to attribute appropriate weight to that testimony when the Chamber reaches its final conclusions in the case.

IV. Disposition

13. Accordingly, the Trial Chamber, pursuant to Rule 89 of the Rules, hereby **DECIDES TO ADMIT** the Two Pages into evidence, and **REQUESTS** the Registry

1. to upload the Two Pages into e-court; and
2. to assign an exhibit number to the Two Pages.

14. The Chamber **DENIES** the request to recall the Witness.

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



Judge O-Gon Kwon
Presiding

Dated this seventeenth day of February 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁹ First Memorandum, para. 4.