



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: 14 May 2012

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: 14 May 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION'S FIRST BAR TABLE MOTION FOR THE ADMISSION
OF INTERCEPTS**

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 First Bar Table Motion for the Admission of Intercepts with Public Appendix A and Confidential Appendix B”, filed on 19 April 2012 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Office of the Prosecutor (“Prosecution”) seeks the admission of 54 intercepts (“Intercepts”) from the bar table pursuant to Rule 89(C) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The Prosecution explains the relevance, probative value and reliability of each of the Intercepts and how they fit into its case.² The Prosecution notes that the Accused was given an opportunity to comment on each of the Intercepts and has outlined the Accused’s response in a separate column to its submissions in Appendix A.³

2. The Intercepts, with the exception of 65 *ter* 30919 and 65 *ter* 30928, were marked for identification on 28 March 2012 pending further orders by the Chamber.⁴ When these intercepts were marked for identification, the Chamber was satisfied in light of the evidence admitted with regard to the process and methodology for transcribing intercepts that they bore sufficient indicia of authenticity.

3. With respect to the Intercepts, the Accused objects to their admission by reiterating the challenge he has previously made to the reliability of Croatian intercepts with no audio recordings.⁵ The Prosecution contends that the issue of whether there is an audio recording goes to weight and not admissibility.⁶ In confidential Appendix B, the Prosecution notes that the Chamber has already ruled on the admissibility of intercepts without audio recordings and that this matter is therefore *res judicata* and that, in addition, the Chamber has received evidence relating to the methodology used for obtaining, transcribing, and storing the Croatian intercepts, the method used for identifying speakers, and the procedure adopted in handing over these intercepts to the Prosecution.⁷

¹ Motion, paras. 1, 17 and Appendix A.

² Motion, para. 2 and Appendix A and confidential Appendix B.

³ Motion, para. 2 and Appendix A.

⁴ T. 27097–27101, 27118–27119, 28 March 2012, Hearing (Closed Session).

⁵ Motion, para. 12. The Prosecution notes that the Accused erroneously assumes that 65 *ter* 30928 and MFI P4785 were Croatian intercepts, see confidential Appendix B., para. 2.

⁶ Motion, para. 13.

⁷ Motion, confidential Appendix B, paras. 2–4, 17.

4. The Accused also objects to the admission of seven of the Intercepts (“Milovanović Intercepts”) on the additional basis that they should have been put to General Milovanović during his testimony.⁸ The Prosecution argues that there is no rule against admitting documents which could have been commented upon by an earlier witness with a close connection to the document and that in fact the Chamber has previously denied a similar objection by the Accused in admitting an intercept after the conclusion of Momčilo Mandić’s testimony.⁹

5. In addition the Accused objects to the admission of MFI P4781 on the basis that the events discussed in the intercepted conversation “did not occur in the municipalities charged in the indictment”.¹⁰ The Prosecution contends that this objection is misconceived as the Third Amended Indictment (“Indictment”) alleges that Bosnian Muslims were forcibly displaced from their homes in Eastern Bosnia and Herzegovina (“BiH”) during and after 1992 and specifically that Bosnian Muslims fled after attacks between January and March 1993 on Cerska (Vlasenica municipality) and Konjević Polje (Bratunac Municipality).¹¹ In the Prosecution’s submission, the contemporaneous conversations in MFI P4781 are directly relevant to the destruction of Bosnian Muslim houses by the VRS “as one of the tactics deployed in order to forcibly displace the non-Serb population of eastern BiH” and these conversations are corroborated by a number of other documents.¹²

6. The Accused also objects to the admission of MFI P4823 on the basis that it is cumulative.¹³ The Prosecution disagrees that MFI P4823 is cumulative but rather contends that it is corroborative and “supports the reliability of transcribed intercepts generally”.¹⁴

7. The Accused filed his “Response to First Bar Table Motion for the Admission of Intercepts” on 23 April 2012 (“Response”), wherein he details arguments already incorporated in Appendix A to the Motion. He submits that the Intercepts are “not sufficiently reliable for admission” given that they are summaries of conversations intercepted by the Croatian

⁸ Motion, para. 14, Response, para. 5. The Chamber notes that in his Response, the Accused objects to seven of the Intercepts on the grounds that Milovanović was a speaker and that those intercepts should have been introduced during his testimony. However, for two of the Intercepts in which Milovanović was an interlocutor, the Accused explicitly states that he has no objections save for his general objection to the reliability of Croatian intercepts, even though it is clear from the Motion that Milovanović was an interlocutor. See MFI P4793 and MFI P4806. Under these circumstances, the Chamber considers that the Accused’s objection to the admission of intercepts in which Milovanović is an interlocutor does not cover MFI P4793 and MFI P4806. The Milovanović Intercepts therefore are MFI P4794, MFI P4782, MFI P4797, MFI P4800, MFI P4801, MFI P4807 and MFI P4818.

⁹ Motion, paras. 15–16.

¹⁰ Motion, paras. 6–7.

¹¹ Motion, para. 8 citing Indictment, paras. 56, 72–73.

¹² Motion, paras. 6–10.

¹³ Motion, para. 11.

¹⁴ Motion, para. 11 and confidential Appendix B, paras. 5–11.

government and that the underlying audio recordings of the conversations were destroyed.¹⁵ The Accused acknowledges that the Chamber has already rejected this argument in closed session and requests that it make its reasoning public in ruling on the Motion.¹⁶

8. With respect to the Milovanović Intercepts the Accused reiterates in more detail that since Milovanović was a participant in the intercepted conversations, the summary of these conversations should have been introduced during his testimony or through an amalgamated statement to determine whether such conversations actually took place.¹⁷ According to the Accused this would also have allowed the genuine nature and meaning of the Milovanović Intercepts to be explored during cross-examination.¹⁸ He contends that while the Chamber has previously admitted an intercepted conversation of Mandić after he testified, this should not “provide a license to introduce records of intercepted conversations of witnesses who testified through the bar table”.¹⁹ In that regard he emphasises the Chamber’s guidance that documents should be admitted through witnesses when possible and that bar table motions should only be used on an exceptional basis so as to ensure a proper contextualisation of the evidence.²⁰

9. The Accused submits that if the Milovanović Intercepts are admitted by the Chamber, he would move to have Milovanović recalled which would defeat the time-saving rationale for the admission of such documents from the bar table.²¹

II. Applicable Law

10. Rule 89 of the Rules 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.
- (E) A Chamber may request verification of the authenticity of evidence obtained out of court.

11. The Chamber recalls that while the most appropriate method for the admission of a document is through a witness who can speak to it and answer questions in relation thereto, the

¹⁵ Response, paras. 2–3.

¹⁶ Response, para. 4.

¹⁷ Response, paras. 5–9.

¹⁸ Response, para. 10.

¹⁹ Response, para. 11.

²⁰ Response, paras. 13–15.

²¹ Response, para. 17.

admission of evidence from the bar table is a practice established in the case-law of the Tribunal.²² Evidence may be admitted from the bar table if it is considered to fulfil the requirements of Rule 89, namely that it is relevant, of probative value, and bears sufficient indicia of authenticity.²³ Once these requirements 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.²⁴ Admission from the bar table is a mechanism to be used on an exceptional basis since it does not necessarily allow for the proper contextualisation of the evidence in question.²⁵

12. The Chamber also recalls its “Order on Procedure for Conduct of Trial” filed on 8 October 2009 (“Order”), which states with regard to any request for the admission of evidence from the bar table that:

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 how it fits into the party’s case, and (iv) provide the indicators of the document’s authenticity.²⁶

III. Discussion

13. While introducing a document through a witness is the preferred method for the admission of evidence, a bar table motion can be “a supplementary method of introducing evidence, which should be used *sparingly* to assist the requesting party to fill specific gaps in its case at a later stage in the proceedings”.²⁷ This remains the view of the Chamber and should continue to be the general practice in this case.

14. More specifically in relation to intercepts generally the Chamber has held that “in the absence of any previous showing regarding their authenticity or reliability, the Chamber considers that the bar table is not an appropriate means by which intercepts may be tendered into evidence”.²⁸ However, as it became clear that the Prosecution would be tendering a number of

²² Decision on the Prosecution’s First Bar Table Motion, 13 April 2010 (“First Bar Table Decision”), para. 5; Decision on Prosecution Bar Table Motion for the Admission of Bosnian Serb Assembly Session Records, 22 July 2010 (“Second Bar Table Decision”), para. 4; Decision on Prosecution’s Motion for Admission of Evidence from the Bar Table (Hostages), 1 May 2012 (“Hostages Bar Table Decision”), para. 4.

²³ Rule 89(C), (E).

²⁴ Hostages Bar Table Decision, para. 4, citing First Bar Table Decision, para. 5. *See also*, Decision on Prosecution’s Motion for Admission of Evidence from the Bar Table and for Leave to Add Exhibits to the Rule 65 *ter* Exhibit List, 21 February 2012, para. 5.

²⁵ Hostages Bar Table Decision, para. 4, citing First Bar Table Decision, paras. 9, 15.

²⁶ Order, Appendix A, Part VII, para. R.

²⁷ First Bar Table Decision, para. 9 (emphasis added).

²⁸ First Bar Table Decision, para. 13.

intercepts by way of bar table motions at the end of its case,²⁹ the Chamber indicated that intercepts which were authenticated by intercept operators but the content of which had not been discussed with a witness would be marked for identification pending anticipated bar table motions which properly contextualised those documents.³⁰

15. With respect to the Accused's general objection to the admission of the Intercepts on the basis that they are unreliable, the Chamber observes that this objection was first raised in closed session on 28 March 2012.³¹ The Chamber, having considered the submissions of the parties, ruled that the objections raised by the Accused's legal adviser were matters which went to the weight to be attributed to the Intercepts.³² The Chamber has also received evidence relating to the methodology used for obtaining, transcribing and storing the Intercepts, the method used for identifying speakers, and the procedure adopted in handing over the Intercepts to the Prosecution.³³ The Chamber is therefore satisfied that there are sufficient indicia of reliability to negate the Accused's submission that this category of documents is "not sufficiently reliable to be admitted in general".³⁴ The Chamber reiterates that the Accused's submissions regarding the summary nature of the Intercepts and the absence of audio recordings are issues which the Chamber will keep in mind in attributing appropriate weight to these documents and are not an obstacle to their admission at this stage of the proceedings.

16. In relation to the Milovanović Intercepts, the Chamber notes that it has recently held that the failure to tender a document through General Rupert Smith during his testimony did not, in and of itself, prevent it from subsequently tendering the document from the bar table provided that the requirements of Rule 89(C) are met and if the Chamber is satisfied that pursuant to Rule 89(D), its probative value is not substantially outweighed by the need to ensure a fair trial.³⁵ Furthermore, on two occasions, two intercepts in which Momčilo Mandić was an interlocutor have been tendered through witnesses who testified after the conclusion of his testimony.³⁶ As the Chamber has previously held, while it is preferable for documents to be admitted during the testimony of a witness who can speak to their contents, "admitting evidence through the bar table may be used sparingly as a method of introducing evidence to fill in

²⁹ Prosecution's Motion for Admission of Intercepts Marked for Identification with Confidential Appendices A and B, 19 March 2012, para. 5.

³⁰ Hearing, T. 26378 (15 March 2012), T. 27104 (28 March 2012) (Closed Session).

³¹ Hearing, T. 27102–27103 (28 March 2012) (Closed Session).

³² Hearing, T. 27104 (28 March 2012) (Closed Session).

³³ P4779 (under seal) and closed session testimony of KDZ584: Hearing, T. 27094–27172 (28 and 29 March 2012) (Closed Session).

³⁴ Hearing, T. 27101 (28 March 2012) (Closed Session).

³⁵ Hostages Bar Table Decision, para. 11.

³⁶ Hearing, T. 16552 (13 July 2011) which refers to an intercept tendered by the Prosecution, and T. 13797–13800 (21 March 2011) which refers to an intercept tendered by the Accused.

specific gaps in the requesting party's case at a later stage of the proceedings".³⁷ While the Chamber may on an exceptional basis allow for the admission of isolated documents from the bar table which could have been tendered through a witness, this should not be the default position.

17. The Chamber observes that the Prosecution had ample opportunity to present some of the Milovanović Intercepts during its direct examination of Milovanović which lasted over five hours or during its re-examination which lasted one and a half hours, but failed to use or tender a single intercept in which he was an interlocutor. The Chamber is not satisfied that this amounts to a reasonable and limited use of the bar table motion to fill in specific gaps but amounts to a conscious decision not to put a specific category of documents to a witness who could have contextualised these conversations which simply appear in summary form. For example, the Chamber is of the view that given the significance of the content of MFI P4782, which refers to a conversation where Milovanović himself in the context of Sarajevo, advised General Galić in May 1993 to "reply to each attack with a force five times greater", this should have been put directly to Milovanović during his testimony and the Accused should have been given an opportunity to cross-examine Milovanović on it. Given that the Milovanović Intercepts are not verbatim transcripts but summaries of intercepted conversations, and having reviewed the content of those summaries, the Chamber finds that they should have been put to Milovanović during his testimony to ensure proper contextualisation and also to allow Milovanović an opportunity to explain his words, as well as an opportunity for the Accused to cross-examine Milovanović on these conversations. The Chamber therefore denies admission of the Milovanović Intercepts as their probative value would be substantially outweighed by the need to ensure a fair trial if tendered through the bar table.

18. The Chamber notes that the English translation for the document with Rule 65 *ter* number 30919 has not been uploaded into e-court. As such, the Chamber cannot assess the relevance, probative value, or authenticity of this document or whether it may be admitted. While the Chamber notes that the Prosecution is tendering 65 *ter* 30928 as an intercept which corroborates the content of other intercepts, given that it has yet to be authenticated, the Chamber will not admit it at this stage.

19. The Chamber observes with respect to MFI P4781 that, contrary to the Accused's submission, the events discussed in the third conversation do in fact fall within the scope of the Indictment.³⁸ The Chamber finds that the first two conversations may be of assistance in

³⁷ Hostages Bar Table Decision, para.11, citing First Bar Table Decision, para. 9.

³⁸ See Indictment paras. 56, 72–73.

contextualising the third conversation. On this basis and having conducted its own review of the document, the Chamber finds that MFI P4781 is of relevance to the case and has probative value and will therefore be admitted into evidence.

20. Having reviewed MFI P4823 in light of the Prosecution's submission and similar intercepts,³⁹ the Chamber is satisfied that contrary to the Accused's suggestion, it is not cumulative and is being tendered to support the reliability of transcripts of intercepts by showing the similarity between contemporaneous intercepts of the same events. The Chamber therefore finds that MFI P4823 is of relevance, has probative value, is not cumulative and will therefore be admitted into evidence.

21. It remains for the Chamber to assess whether the intercepts not discussed in the preceding paragraphs ("Remaining Intercepts") fulfil the requirements of Rule 89(C).⁴⁰ The Chamber has therefore reviewed the Remaining Intercepts in order to satisfy itself as to their relevance and probative value. In addition, the Chamber has been mindful that in seeking the admission of evidence from the bar table it is incumbent upon the offering party to demonstrate, with sufficient clarity and specificity, where and how each of the documents fits into its case.⁴¹

22. The Chamber notes that, in the Motion, the Prosecution has explained how each of the Remaining Intercepts fits into its case and finds that they have been sufficiently contextualised for the purposes of admission from the bar table.⁴² Having reviewed the Remaining Intercepts and the Prosecution's submissions in that regard, the Chamber finds that they are relevant to a number of issues arising from the Indictment including: (1) Bosnian Serb military strategy and operations including operations in and around Srebrenica in April 1993 and July 1995; (2) the chain of command and communication within the VRS; (3) restrictions and control over the free movement of humanitarian convoys; (4) the Accused's role in international negotiations and the territorial objectives in those negotiations; (5) the Accused's knowledge of events in the field through his contact with VRS personnel and commanders; (6) the Accused's involvement with and effective control over the VRS at an operational and tactical level and his authority over high ranking VRS personnel; (7) Ratko Mladić's effective control over the VRS; (8) the Accused's involvement in the shelling of, and modulating of essential services such as gas, electricity and water to, Sarajevo; and (9) the Accused's role in the implementation of ceasefires. The Chamber also finds that the Remaining Intercepts have probative value.

³⁹ See 65 *ter* 30928 and P4630.

⁴⁰ Second Bar Table Decision, para. 8.

⁴¹ Hostages Bar Table Decision, para. 6, citing First Bar Table Decision, para. 6.

⁴² Motion, Appendix A.

23. The Chamber notes that it has previously admitted documents from the bar table which showed the position of authority and control of the Accused over the VRS and other institutions in Republika Srpska and found that the relevance of such documents was unaffected by the fact that multiple other documents also spoke to this issue.⁴³ The Chamber has also held that the probative value of documents may be outweighed by the need to ensure a fair trial if through a bar table motion “the Accused would be overly-burdened as the result of the admission of large numbers of items which go directly to his responsibility as charged in the Indictment”.⁴⁴ The Chamber does not consider that the volume of material being tendered in the Motion which goes directly to the Accused’s responsibility would be overly-burdensome.

24. The Chamber further notes that several of the Remaining Intercepts relate to the Dayton Peace negotiations and that it has previously admitted documents which relate to these negotiations and the implementation of the agreement reached.⁴⁵

25. The Chamber notes that, with the exception of MFI P4835, all the Remaining Intercepts fall within the period covered by the Indictment, namely October 1991 to 30 November 1995. MFI P4835 relates to a conversation the Accused had in April 1996 but the Chamber finds that it is relevant and has probative value as it refers to events in 1992 and also indicates that the Accused suggested giving the Tribunal only selective excerpts of their official files.

26. Consequently the Chamber finds that the requirements of Rule 89(C) of the Rules have been met with respect to the Remaining Intercepts, which are relevant, have probative value, and bear sufficient indicia of authenticity for the purposes of admission.⁴⁶ The Chamber is also satisfied that pursuant to Rule 89(D) the probative value of the Remaining Intercepts, as well as MFI P4781 and MFI P4823, is not substantially outweighed by the need to ensure a fair trial and that therefore they all may be admitted into evidence.

⁴³ Decision on Prosecution’s Motion for the Admission of 68 Sarajevo Romanija Corps Documents from the Bar Table, 16 June 2011, paras. 11–12.

⁴⁴ First Bar Table Motion, para. 14.

⁴⁵ Decision on Prosecution Bar Table Motion for the Admission of Records of Bosnian Serb Organs, 18 July 2011, para. 12 referring to Second Bar Table Decision, para. 10.

⁴⁶ The Chamber observes that according to the Prosecution’s submission in Appendix A, MFI P4794 includes a summary of two conversations, but that the version uploaded on e-court only includes the conversation dated 12 April 1993 at 2255 hours with the second conversation redacted.

IV. Disposition

27. Accordingly, the Trial Chamber, pursuant to Rule 89 of the Rules, hereby **GRANTS** the Motion **IN PART** and:

- 1) **ADMITS** into evidence the documents currently marked for identification as:

MFI P4781, MFI P4789, MFI P4790, MFI P4791, MFI P4792,
 MFI P4793, MFI P4795, MFI P4798, MFI P4799, MFI P4796,
 MFI P4802, MFI P4803, MFI P4804, MFI P4805, MFI P4806,
 MFI P4783, MFI P4808, MFI P4809, MFI P4810, MFI P4811,
 MFI P4812, MFI P4813, MFI P4814, MFI P4815, MFI P4816,
 MFI P4817, MFI P4787, MFI P4788, MFI P4821, MFI P4820,
 MFI P4822, MFI P4784, MFI P4785, MFI P4823, MFI P4825,
 MFI P4824, MFI P4827, MFI P4828, MFI P4829, MFI P4830,
 MFI P4831, MFI P4832, MFI P4833, MFI P4834, and MFI P4835.

- 2) **INSTRUCTS** the Registry to mark as admitted the documents admitted into evidence by this decision.

- 3) **DENIES** the remainder of the Motion and instructs the Registry to mark documents MFI P4794, MFI P4782, MFI P4797, MFI P4800, MFI P4801, MFI P4807, and MFI P4818 as not admitted.

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



Judge O-Gon Kwon
Presiding

Dated this fourteenth day of May 2012
At The Hague
The Netherlands

[Seal of the Tribunal]