



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 October 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: 9 October 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S BAR TABLE MOTION
(SARAJEVO 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 Accused’s “Bar Table Motion: Sarajevo Intercepts”, filed on 3 October 2012 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused moves, pursuant to Rule 89(C) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), for an order admitting into evidence from the bar table 15 intercepts related to the Sarajevo component of the case (“Intercepts”).¹ The Intercepts are listed in Annex A of the Motion, which contains the Accused’s submissions on the “relevance, authenticity, and value to the [Accused’s] case” of each intercept.² Annex A also contains the position of the Office of the Prosecutor (“Prosecution”) on the Intercepts, including both a commentary to their relevance, as well as an indication that the Prosecution does not object to their admission.³ The Accused submits that the admission of the Intercepts would be consistent with the standards set forth in the Chamber’s earlier decisions on similar Prosecution motions.⁴

2. Also on 3 October 2012, the Prosecution informed the Chamber, *via* email, that it did not wish to respond to the Motion as its position in relation to each of the Intercepts has already been stated in the Motion itself.

II. Applicable Law

3. Rule 89 of the Rules provides, in relevant parts, that:

- (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.

¹ Motion, para. 1.

² Motion, para. 2; Annex A.

³ Motion, para. 2; Annex A.

⁴ Motion, para. 3.

4. 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, admission of evidence from the bar table is a practice established in the case-law of the Tribunal.⁵ Evidence may be admitted from the bar table if it fulfils the requirements of Rule 89, namely that it is relevant, of probative value, and bears sufficient indicia of authenticity. 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.⁶ 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.⁷

5. The Chamber also recalls its “Order on Procedure for Conduct of Trial”, issued on 8 October 2009 (“Order on Procedure”), 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.⁸

6. Rule 94(B) of the Rules allows the Chamber to take judicial notice of the authenticity of documentary evidence. To take such judicial notice, the Chamber shall assess whether the documentary evidence in question was sufficiently authenticated and admitted into evidence in a previous trial.⁹

III. Discussion

7. The Chamber recalls that in its very first bar table decision, which related to a bar table motion filed by the Prosecution before the Prosecution case had even started, it stated as follows:

While evidence does not need to be introduced through a witness in every circumstance, and there may be instances where it is appropriately admitted from the bar table, it is the Chamber’s view that the most appropriate method for the admission of a document or other item of evidence is through a witness who can speak to it and answer questions in relation to it. *The bar table should not generally be the first port of call for the admission*

⁵ Decision on Prosecution’s First Bar Table Motion, 13 April 2010 (“First Bar Table Decision”), para. 5.

⁶ First Bar Table Decision, para. 5.

⁷ First Bar Table Decision, paras. 9, 15.

⁸ Order on Procedure, Appendix A, Part VII, para. R.

⁹ Decision on the Prosecution’s First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component, 31 March 2010 (“Judicial Notice Decision”), para. 16; Decision on the Prosecution’s motion for Judicial Notice of Intercepts Related to the Sarajevo Component and Request for Leave to Add One Document to the Rule 65 *ter* Exhibit List, 4 February 2011, paras. 12–17.

*of evidence. It is, rather, 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.*¹⁰

8. This remains the view of the Chamber, and continues to be the general practice in this case. Accordingly, the Chamber shall not admit the Intercepts from the bar table at this stage of the case and instead encourages the Accused to tender them through witnesses who can discuss and authenticate them during the defence case.

9. In any event, for the sake of completeness, the Chamber notes that the Intercepts are not admissible due to the Accused's failure to establish their authenticity. The Chamber recalls that in the above mentioned decision it also stated as follows:

As the Chamber has noted in the "Decision on the Prosecution's First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component", filed on 31 March 2010, intercepts are a special category of evidence as that they bear no *prima facie* indicia of authenticity or reliability, and these requirements must be fulfilled by hearing from the relevant intercept operators or the participants in the intercepted conversation.¹¹ *As such, 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.*¹²

10. While the Chamber eventually did admit a number of intercepts offered by the Prosecution from the bar table, it did so at the very end of the Prosecution case when the Prosecution had established their authenticity, either through the evidence of intercept operators or through the use of Rule 94(B).¹³ In this particular case, however, the Accused's only comment in relation to the authenticity and reliability of the Intercepts is that they are intercepts "under conditions already found to be reliable".¹⁴ In other words, the Accused makes no attempt to show that each one of the Intercepts offered has either been specifically authenticated by an intercept operator or that judicial notice of its authenticity can be taken due to the operation of Rule 94(B). Accordingly, the Accused has failed to meet the standard set forth in the Chamber's earlier decisions on similar Prosecution motions.

11. For all of the above reasons, the Chamber has decided to deny the admission of the Intercepts from the bar table.

¹⁰ First Bar Table Decision, para. 9 [emphasis added].

¹¹ Prosecution's First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component, para. 9.

¹² First Bar Table Decision, para. 13 [emphasis added].

¹³ See Decision on Prosecution's First Bar Table Motion for the Admission of Intercepts, 14 May 2012; Decision on Prosecution's Third Bar Table Motion for the Admission of Intercepts (Srebrenica), 24 May 2012; Decision on Prosecution's Second Bar Table Motion for the Admission of Intercepts, 25 May 2012.

IV. Disposition

12. Accordingly, the Trial Chamber, pursuant to Rule 89(C) of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this ninth day of October 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁴ See Annex A to the Motion.