



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 April 2013

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 April 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION TO EXCLUDE DNA EVIDENCE

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 “Motion to Exclude DNA Evidence”, filed on 11 March 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. The background to this Motion is outlined in the Chamber’s “Decision on the Accused’s Motion for Binding Order to International Commission for Missing Persons” issued on 4 March 2013 (“Decision”) and shall not be repeated here. It is sufficient to recall once again that the Chamber agreed that the Accused should be able to engage his own DNA expert to run DNA identification tests relating to alleged victims of the conflict in Bosnia and Herzegovina, similar to those conducted by the International Commission for Missing Persons (“ICMP”) and the expert witness Thomas Parsons, for the purpose of checking the accuracy of the ICMP’s identifications and challenging Parsons’ evidence.¹ The parties eventually agreed that the Accused would conduct these tests on 300 test cases, 295 of which would be selected randomly while the remaining five would be selected by the Accused.² It was the ICMP’s position that it had to obtain consents of the family members who provided genetic data in relation to the 300 test cases, before disclosing this material to the Accused for the purpose of re-testing.³ In the Decision, the Chamber refused to issue a binding order and/or a subpoena to the ICMP compelling it to produce to the Accused the material relating to 14 test cases for which it was unable to obtain consents for disclosure of the genetic data to the Accused.⁴

2. In the Motion, the Accused requests that the Chamber exclude “evidence of the results of DNA analysis entered into evidence in this case” on behalf of the Office of the Prosecutor (“Prosecution”) arguing that he has been unable to test it in a “scientifically valid way” so that its admission violates his right to a fair trial, including the right set out in Article 21(4)(e) of the Tribunal’s Statute (“Statute”).⁵ He concedes that the rationale of the Decision is “dispositive” of the Motion, but states that he “nevertheless needs to ensure that he has sought the remedy of exclusion of the evidence” so that, if convicted, he can argue before the Appeals Chamber that the Trial Chamber erred in admitting DNA evidence without giving the Defence an effective

¹ Decision, para. 1. *See also* Order on Selection of Cases for DNA Analysis, 19 March 2010, p. 2; Decision in Relation to Selection of Cases for DNA Analysis, 23 September 2011, p. 2.

² Decision, para. 1.

³ Decision, para. 1.

⁴ Decision, paras. 24–36.

⁵ Motion, paras. 1, 4.

opportunity to test it.⁶ The Accused further claims that the Decision was flawed because it failed to take into account the “principle of randomness” in scientific testing.⁷ Finally, he submits that the ICMP’s refusal to provide the genetic data relating to 14 test cases means that there is “no way to obtain a random sample from [the ICMP’s] database of DNA cases.”⁸

3. On 25 March 2013, the Prosecution filed the “Prosecution’s Response to Motion to Exclude DNA Evidence” (“Response”) in which it argues that the Accused has failed to show that the probative value of the DNA evidence in question is substantially outweighed by the need to ensure a fair trial, as he is required to do by Rule 89(D) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), thus urging the Chamber to deny the Motion.⁹ The Prosecution also submits, relying on one of the Chamber’s earlier decisions, that exclusion of evidence is an extreme remedy which should be granted only in rare circumstances to avoid demonstrated prejudice.¹⁰ It further notes that, as found in the Decision, the materials already provided to the Defence in relation to the 286 test cases are sufficient to enable the Accused to test the ICMP’s results and challenge Parsons’ evidence¹¹ and that the outstanding 14 cases are therefore not necessary and will not materially assist the Accused or his case.¹² The Prosecution adds that, to the extent that testing 286 samples makes any substantive difference to the testing of 300 samples, this would be an issue of weight rather than admissibility.¹³ Finally, it posits that the ICMP’s proposal to substitute the 14 outstanding test cases with another 14 cases by looking to “the immediately following case file” would preserve the random nature of the newly selected cases.¹⁴

II. Applicable Law

4. Article 21(4)(e) of the Statute provides that the Accused shall be entitled “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

5. Rule 89(D) of the Rules states that a “Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”

⁶ Motion, para. 2.

⁷ Motion, para. 3.

⁸ Motion, para. 4.

⁹ Response, paras. 2, 7.

¹⁰ Response, para. 8, citing to the Decision on Accused’s Twenty-Ninth Disclosure Violation Motion, 11 January 2011, paras. 15–16.

¹¹ Response, paras. 1, 4.

¹² Response, para. 12.

¹³ Response, para. 12.

¹⁴ Response, paras. 11, 13–14.

III. Discussion

6. The Chamber recalls that one of the reasons for not compelling the ICMP to disclose to the Accused the materials relating to the 14 outstanding test cases was that the sample of 286 test cases was large enough for proper testing.¹⁵ As a result, it remains of the view that the Accused is still able to test the ICMP's results and challenge Parsons' evidence. Accordingly, the Chamber does not consider that the Accused's right under Article 21(4)(e) of the Statute to examine the witnesses against him and to obtain examination of witnesses on his behalf under the same conditions as the witnesses against him has been violated.

7. The Chamber has also considered the Accused's argument regarding the "principle of randomness in scientific testing" which he claims the Chamber has failed to take into account thus violating his right under Article 21(4)(e). However, the Accused makes no attempt to elaborate how the Chamber's refusal to compel the ICMP to disclose the outstanding material has had an impact on the "principle of randomness". He also does not explain how or why the alternatives still open to him, namely to test 286 cases and/or to accept the ICMP's offer to disclose materials relating to another randomly selected sample of 14 cases would affect this principle to such an extent as to make the exercise of re-testing the ICMP's results ineffective. If the argument is that the material relating to the 14 outstanding test cases is bound to be the very material which would show that the ICMP's results are flawed, the Chamber recalls that the Accused has made this submission earlier and that it has been firmly rejected in the Decision.¹⁶

8. For those reasons, the Chamber does not consider that the probative value of the DNA evidence is outweighed, let alone substantially outweighed, by the need to ensure a fair trial and comply with Article 21(4)(e) of the Statute. In fact, in giving the Accused the opportunity to re-test a large number of ICMP DNA identifications and engaging in a protracted and laboured litigation with the ICMP over a number of years, the Chamber has done its absolute utmost to ensure that the Accused is able to exercise his right under Article 21(4)(e) of the Statute.

¹⁵ Decision, paras. 26–27. The Chamber notes that this is 95 percent of the sample the Accused himself requested.

¹⁶ Decision, paras. 29–30.

IV. Disposition

9. Accordingly, the Trial Chamber, pursuant to Article 21(4)(e) of the Statute and Rules 54 and 89(D) of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this sixteenth day of April 2013
At The Hague
The Netherlands

[Seal of the Tribunal]