



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: 13 April 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: 13 April 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE PROSECUTION'S FIRST BAR TABLE MOTION

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed 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 seized of the “Prosecution’s First Bar Table Motion With Appendix A,” filed on 15 December 2009 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Office of the Prosecutor (“Prosecution”) seeks the admission into evidence of 321 items (“Proposed Exhibits”), which it states pertain to the Sarajevo component of its case, from the bar table, pursuant to Rule 89(C) of the Rules of Procedure and Evidence (“Rules”).¹ The Proposed Exhibits include: (a) reports, requests and orders from the Yugoslav Peoples’ Army, Main Staff of the Army of Republika Srpska (“VRS”) and the Sarajevo-Romanija Corps (“SRK”), and the Bosnian Serb crisis staffs and territorial defence units; (b) reports, minutes, decisions, laws, and announcements of the Bosnian Serb political entities, including the Serbian Democratic Party, and Republika Srpska entities; (c) United Nations (“UN”) documents, such as cables, reports, letters, agreements, resolutions; (d) intercepts; (e) media reports and interviews; (f) video clips; and (g) maps and photographs.

2. The Prosecution submits that the Proposed Exhibits are sufficiently relevant and reliable to justify their admission without the need for further evidence, and that it has “deliberately” filed the Motion at this stage of the proceedings because “admission at an early stage will expedite the trial by obviating the need to call witnesses to introduce [these] documents.”² The Prosecution further submits that it has selected only documents that “provide significant value related to the likely contested issues in this case.”³

3. The Accused requested an extension of time to respond to the Motion, which was granted on 24 December 2009, and he was given until 15 February 2010 to respond.⁴ Thus, on 8 February 2010, the Accused filed his “Response to the Prosecution’s First Bar Table Motion” (“First Response”). In the First Response, the Accused argued that he was unable to provide a substantive response to the Motion because he did not have sufficient resources to prepare one.⁵

¹ Motion, paras. 1, 13.

² Motion, paras. 2, 3. Regarding the stage of proceedings at which the Motion has been filed, the Prosecution cites the examples of the *Boškoski and Tarculovski* and *Delić* cases, in which evidence was admitted from the bar table before the commencement of the cases.

³ Motion, para. 11.

⁴ Decision on the Accused’s Motion for Extension of Time to Respond to Prosecution Motions, 25 December 2009.

⁵ First Response, paras. 5-7.

4. On 26 February 2010, the Trial Chamber denied the Accused's request for a further postponement of the trial, but granted him additional time, until 12 March 2010, to respond to the Motion.⁶ On 11 March 2010, the Accused filed the "2nd Response to Prosecution's First Bar Table Motion" ("Second Response"), in which he opposes the admission of a number of classes of the Proposed Exhibits tendered by the Prosecution, namely, photographs, maps, intercepts, and videos.⁷ He also objects to specific documents, and to the admission through the bar table of documents whose authors or recipients are included on the Prosecution's Rule 65 *ter* witness list.⁸ The Accused further reiterates his objection "that the wholesale taking of judicial notice, admission of written statements, and the admission of documents from the bar table violates the presumption of innocence and unfairly shifts the burden of proof to the accused."⁹

II. Discussion

5. The admission of evidence from the bar table is a practice established in the case-law of the Tribunal.¹⁰ Evidence may be admitted from the bar table if the requirements of Rule 89(C) are met; that is, a Chamber may admit any relevant evidence which it deems to have probative value. As a general rule, the item proposed for admission must have sufficient reliability and relevance to the issues in the case to have probative value.¹¹ Once the requirements of the Rule are satisfied, the Chamber maintains discretionary power over the admission of the evidence,¹² 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. It is a further requirement for the admission of evidence from the bar table that "the offering party must demonstrate, with clarity, and specificity, where and how each document fits

⁶ Decision on the Accused's Motion for Postponement of Trial, 26 February 2010.

⁷ Second Response, paras. 2-3, 8.

⁸ Second Response, paras. 4, 5-6.

⁹ Second response, para. 9.

¹⁰ See, for example, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution's Motion to Re-Open the Case and Exceed the Word Limit and Second Motion to Admit Exhibits from the Bar Table, 7 December 2009 ("*Đorđević* Decision"); *Prosecutor v. Perišić*, Case No. IT-04-81, Confidential Decision on Prosecution's First Bar Table Motion, 5 October 2009 ("*Perišić* Decision"); *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table, Motion to Amend the Bar Table Motion, and Oral Motion for Admission of Additional Exhibit, 14 March 2008 ("*Popović* Decision"); *Prosecutor v. Delić*, Case No. IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008; *Prosecutor v. Milutinović et al.* Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006 ("*Milutinović* Decision"); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Admission of Evidence, 13 July 2006 ("*Prlić* Decision"); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Decision on the Admission of Documents, 28 July 2004.

¹¹ *Đorđević* Decision, para. 4; *Prosecutor v. Milutinović* Decision, para. 10, citing *Prosecutor v. Galić*, Case No. IT-98-29-AR.73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, para. 35.

¹² See *Milutinović* Decision, para. 11; *Prlić* Decision, p. 5; *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 14.

into its case.”¹³ This was also specified in the Chamber’s “Order on Procedure for Conduct of Trial” filed on 8 October 2009 (“Order”), which states in relation to bar table motions 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.¹⁴

The Order also clearly states: “The use by the parties of bar table motions shall be kept to a minimum.”¹⁵

7. In the Motion, the Prosecution stresses the time-saving benefit of the admission of evidence from the bar table, and cites a statement made by Judge May in October 2002, that the Tribunal must “get away from some very outmoded practices which require all evidence to be given orally when there’s very little point to it.”¹⁶ The Chamber acknowledges that the procedures for the admission of evidence at the Tribunal have changed quite significantly since the end of 2002 and the Rules now provide a number of different possibilities for the admission of written evidence in order to expedite proceedings. Indeed, the proceedings in this case thus far clearly demonstrate the extent to which this is so; through the application of Rules 92 *bis* and *quater*, the Chamber has admitted a considerable quantity of written evidence.

8. However, the Chamber must also ensure the proper balance between an expeditious and a fair trial and it considers that the admission into evidence at this stage of proceedings, prior to any oral evidence being presented, of a large number of items, many of which go directly to the charges against the Accused, as discussed further below, is not consistent with a fair trial. The presentation of evidence by the Prosecution will commence today. Should the Chamber decide to admit any or all of the Proposed Exhibits during the course of hearing from witnesses led by the Prosecution, it would remain open to the Accused to cross-examine those witnesses in relation to particular items. However, a significant consequence of the admission of evidence from the bar table is that it is then incumbent upon the opposing party to identify the most appropriate witness with whom to challenge a particular document instead of being able to cross-examine the witness who the offering party has determined is best able to speak to that document in the context of its case. In the present circumstances, given the number of items that are the subject of the Motion, this carries the real possibility of over-burdening the Accused.

¹³ *Dorđević* Decision, para. 4; *Perišić* Decision, para. 20; *Milutinović* Decision, para. 18.

¹⁴ Order, Appendix A, Part VII, para. R.

¹⁵ Order, Appendix A, Part VII, para. R.

¹⁶ Motion, para. 5, citing *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Hearing, T. 12305 (23 October 2002).

9. Thus, 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 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. In this regard, the Chamber notes that some of the authors or recipients of the Proposed Exhibits will, according to the Prosecution's Rule 65 *ter* witness list, be appearing before it in the course of the Prosecution case. For all these reasons, the Chamber will decline to admit any of the Proposed Exhibits into evidence from the bar table at this stage.

10. However, as the Prosecution may resubmit some of the Proposed Exhibits in a future bar table motion and/or it may choose to file further bar table motions pertaining to other parts of its case, the Chamber considers it helpful to provide an indication to the parties of the types of items that may and may not appropriately be tendered for admission from the bar table, using the Proposed Exhibits for purposes of illustration.

11. There are certain Proposed Exhibits from various different sources which contain information about the situation in and around Sarajevo during the Indictment period; for example, the actions or anticipated actions of the Main Staff of the VRS and the SRK, and the Bosnian Serb political entities, the situation facing the civilian population in Sarajevo, and the observations of UN personnel, but that do not mention the Accused or other high-level members of the Bosnian Serb military and political bodies in these actions or events. These Proposed Exhibits include: (i) SRK combat and operations reports; (ii) orders and reports of subordinate units of the VRS or SRK; (iii) minutes of meetings of, for example, crisis staffs; and (iv) UN resolutions, and records of meetings between UN personnel and lower-level members of the VRS. Without making any finding as to whether they meet the Rule 89(C) requirements, the Chamber considers that these types of Proposed Exhibits may be appropriate for admission from the bar table at a later stage should the Prosecution not be able to otherwise introduce them through a witness in the course of the trial.

12. There are certain Proposed Exhibits which the Chamber would be unlikely to consider admissible from the bar table. First, the written media reports would not meet the reliability and probative value requirements without a witness to testify to the accuracy of the information contained therein. Secondly, the Chamber notes that the Prosecution tendered a number of maps and a photograph that purport to illustrate the locations of the confrontation lines around

Sarajevo. In the absence of a witness to verify that the confrontation lines were correctly depicted on these maps and the photograph, the Chamber would not consider them to be sufficiently reliable or to have probative value.¹⁷

13. Thirdly, the Chamber will not admit intercepts from the bar table. 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.¹⁸ 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.

14. Fourthly, there are a large number of Proposed Exhibits which pertain directly to the Accused’s individual criminal responsibility for crimes charged in the Indictment. These include: (i) orders and reports signed by the Accused or which were sent to the Accused; (ii) orders and reports signed by high-level members of the VRS Main Staff, particularly Ratko Mladić; and (iii) UN cables and reports that record meetings between the Accused and others, such as Momčilo Krajišnik, and UN personnel. The Prosecution submits that many of these documents are relevant because they demonstrate the Accused’s lead role in events in Sarajevo, including the crimes charged, his intent, his effective control over the Bosnian Serb political leadership and the VRS, or his knowledge of those events. The Chamber notes that there are no explicit restrictions placed on the admission from the bar table of documents that meet the requirements of Rule 89(C). However, as noted above, pursuant to Rule 89(D), the Chamber has a duty to assess whether it should exercise its discretion and deny their admission because the probative value of the documents is outweighed by the need to ensure a fair trial. This may be the case where 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.

15. The bar table is now an established means by which evidence may be admitted at the Tribunal. Notwithstanding that it may result in the saving of time inside the courtroom, in the circumstances of the present case, the Chamber considers that it is essential to view the bar table as mechanism to be used on an exceptional basis and not simply as another means by which

¹⁷ The Chamber further notes with regard to many of the maps tendered that they are not possible to view adequately in court given their apparently original size, that the Chamber has not been provided with the “Sarajevo Specific Court Binder” referred to in Appendix A to the Motion, and that English translations of the maps’ keys and other symbols have generally not been uploaded in court.

evidence may be introduced wholesale into the court record. In particular, the scope of this case requires that evidence is clearly contextualised by items being put to a witness or witnesses who can speak to them. Thus, the Chamber encourages the parties to introduce evidence through a witness wherever possible, and to resort to the tendering of evidence from the bar table only if necessary.

III. Disposition

16. 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 thirteenth day of April 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁸ Prosecution's First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component, para. 9.