



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: 19 May 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: 19 May 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON GUIDELINES FOR THE ADMISSION OF EVIDENCE THROUGH
WITNESSES**

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”), *ex proprio motu*, issues this decision in relation to the admission of evidence through witnesses.

I. Background and Submissions

1. On 6 May 2010, the Presiding Judge informed the parties of general principles that would apply in this case to the admissibility of evidence through a witness and, in accordance with those principles, denied the admission into evidence of a number of documents tendered by the Accused during the cross-examination of the witness Fatima Zaimović on 5 May 2010.¹
2. On 7 May 2010, the Accused’s legal advisor, Mr. Peter Robinson, made an oral request to the Chamber to “revisit” the decisions it made on 6 May 2010 denying the admission of several documents tendered during the cross-examination of Fatima Zaimović (“Request”).²
3. On 11 May 2010, the Chamber denied the Request, but stated that, in the interests of clarity, it would issue a written decision addressing Mr. Robinson’s oral submissions in support of the Request and providing additional guidelines for the admission of evidence through witnesses in this case. The Chamber also granted the Office of the Prosecutor (“Prosecution”) and the Accused until 14 May 2010 to file written submissions addressing specific issues regarding the admission of evidence in this case.³
4. On 14 May 2010, the Prosecution and the Accused filed their submissions. In his “Submission on Admission of Documentary Evidence” (“Accused’s Submission”), the Accused requests the Chamber, in general, to admit “otherwise relevant and reliable documents which not only corroborate the testimony of the witness, but which contradict that testimony”, and documents which the parties agree can be admitted.⁴ In the “Prosecution’s Submission on Additional Guidelines Governing the Admission of Evidence” (“Prosecution’s Submission”), the Prosecution submits that any additional guidelines “should be framed in a manner that allows for the case-by-case assessment of the admissibility of exhibits, in accordance with the general practices of the Tribunal.”⁵

¹ Hearing, T. 1953 (6 May 2010).

² Hearing, T. 2049-2052 (7 May 2010)

³ Hearing, T. 2370 (11 May 2010).

⁴ Accused’s Submission, paras. 3, 14-15.

⁵ Prosecution’s Submission, para. 10.

5. Mr. Robinson's oral submissions and the Accused's written submissions largely reflect each other. They suggest that the Chamber has adopted an approach to the admission of documents through a witness whereby it will only admit a document if its content is consistent with the witness's evidence, and will not admit a document if it is inconsistent with the witness's testimony and the witness will not acknowledge the facts contained in the document.⁶ Mr. Robinson argues that this approach would result in unfairness because it "would only allow documents that bolster the credibility of a witness to be admitted, and those that impeach the credibility of a witness will not be admitted."⁷ Both Mr. Robinson and the Accused submit that the Chamber's approach is illustrated by its decisions regarding the admission of certain documents through Fatima Zaimović and another witness, David Harland.⁸ In addition, the Accused cites several Appeals and Trial Chamber decisions, particularly to support his assertion that evidence that goes to the credibility of a witness should be admitted.⁹

6. Both Mr. Robinson and the Accused favour a "liberal" approach to the admission of evidence.¹⁰ In this context, Mr. Robinson asserts that "the Chamber [is] concerned with the number of documents it would have to deal with at the time of deliberations in the case."¹¹ The Accused submits that while he "appreciates the Chamber's concern" regarding the need for evidence to meet the requirements of Rule 89 of the Tribunal's Rules of Procedure and Evidence ("Rules"), he lacks the resources and the co-operation of third parties to be able to present evidence that would lay the foundation for the documents he wishes to use.¹² Moreover, according to Mr. Robinson, the Chamber's "high bar for admissibility" will have a detrimental impact on the length of the trial "and make the process more difficult for everyone concerned".¹³ The Accused then states that if the Chamber permits agreed documents to be admitted into evidence he will "commence negotiations with the prosecution to identify documents which might be admitted by stipulation or agreement."¹⁴

7. Taking a slightly different approach, the Prosecution submits that a general prohibition on the admission of documents where a witness was unable to confirm them or comment on their contents would be inconsistent with the practice of the Tribunal, and documents that a

⁶ Hearing, T. 2049-2050 (7 May 2010); Accused's Submission, paras. 4-5.

⁷ Hearing, T. 2050-2051 (7 May 2010). *See also* Accused's Submission, paras. 6-10.

⁸ Hearing, T. 2050-2051 (7 May 2010).

⁹ Accused's Submission, paras. 12-13.

¹⁰ Hearing, T. 2051 (7 May 2007); Accused's Submission, paras. 20-21. In paragraph 22, the Accused notes the *Milutinović et al.* Order on Procedure and Evidence, 11 July 2006, para. 5, in which the Trial Chamber ordered that "if no challenge is made to the proposed exhibit, it should be admitted into evidence."

¹¹ Hearing, T. 2051 (7 May 2007).

¹² Accused's Submission, paras. 16-19.

¹³ Hearing, T. 2051 (7 May 2010).

¹⁴ Accused's Submissions, para. 23.

witness claims to have no knowledge of may be relevant for assessing the credibility of that witness.¹⁵ Therefore, any additional guidelines should allow for the admission of a document used to confront a witness, irrespective of whether the witness adopts it, provided that the document meets the requirements of Rule 89(C) of the Rules.¹⁶

8. The Prosecution further argues that any additional guidelines should provide for the possibility of the admission of documents that are not presented to a witness in court.¹⁷ It also submits that there are circumstances where the Chamber's previously-expressed concerns regarding the admission of documents from the bar table do not arise, "including where the Accused agrees to the introduction of a document, or where the parties are able to place the document in its context and establish its relevance and probative value to the satisfaction of the Trial Chamber".¹⁸

II. Discussion

(a) Admission of evidence through a witness

9. The Chamber notes firstly that the purpose of the "general principles" outlined by the Presiding Judge on 6 May 2010 was to provide some guidance to the parties as to what the Chamber considers is the appropriate approach to the admission of evidence in this case. However, by their nature, general principles do not purport to govern every situation that may arise in the tendering of evidence, and any decision regarding the admission of an item into evidence is made on a case-by-case basis.

10. In this regard, the Presiding Judge stated on 6 May 2010 that documents put to a witness but which the witness "has no knowledge of or cannot speak to" should not be admitted.¹⁹ This is because, as he went on to say: "In addition to relevance and authenticity, the Chamber must be satisfied as to the probative value of a piece of proposed evidence, and this requires that the witness to whom it is shown is able to confirm its content or make some other positive comment about it. Mr. Tieger's point is that to do otherwise is essentially the same as admitting the document from the Bar Table."²⁰

¹⁵ Prosecution's Submissions, para. 3.

¹⁶ Prosecution's Submissions, para. 4.

¹⁷ Prosecution's Submission, paras. 5-7.

¹⁸ Prosecution's Submission, paras. 8-9.

¹⁹ Hearing, T. 1952 (6 May 2010).

²⁰ Hearing, T. 1952 (6 May 2010).

11. These broad principles reflect the common practice at this Tribunal; they are not exceptional or unusual.²¹ This is because it is desirable that a witness speak to the origins and/or content of a document to be tendered into evidence, to allow the Chamber to properly assess the relevance, authenticity, and reliability of that document, and thus its probative value, and, ultimately, be able to make use of that document in a meaningful way in its overall consideration of the evidence in the case. This general principle does not rule out the possibility of admitting documents that challenge a witness's credibility, including in situations where the witness states that he or she has no knowledge of the document or rejects its contents. In such a context, the fact that the document goes to the witness's credibility *may* constitute sufficient nexus between the witness and the document for it to be admissible. However, the party tendering the document must also be able to satisfy the Chamber as to the document's authenticity and reliability before it could be admitted.

12. In support of their arguments, Mr. Robinson and the Accused sought to show that the Chamber admitted into evidence a military document through David Harland, which was consistent with his testimony, but then denied the admission into evidence of certain documents on the basis that they challenged Fatima Zaimović's credibility. The Chamber notes, however, that this was not the reason it denied the admission of the documents through Fatima Zaimović, as it believes the record clearly shows.

13. The Prosecution put to David Harland an order signed by General Galić (P825) in the context of his evidence *inter alia* about Bosnian Serb military and political strategy, and the "modulation" of the "pressure" placed on the civilian population in Sarajevo in response to international action.²² David Harland stated who General Galić was, and testified that the document was "an order clearly reducing the level of pressure on Sarajevo" in response to the fact that the United States of America and others were looking to bomb Bosnian Serb positions.²³ As such, David Harland was able to lay a foundation for this document, as well as provide substantive comment on it.

²¹ The Chamber notes that other Trial Chambers have followed the same broad principles, as can be seen from their orders regarding the presentation and admission of evidence. *See, for example, Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Admission of Evidence, 13 July 2006; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Amending the Decision on the Admission of Evidence dated 13 July 2006, 29 November 2006; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Adopting Guidelines for the Presentation of Defence Evidence, 24 April 2008; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Order on Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 29 October 2008 ("*Perišić* Order on Guidelines"); *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Order on Revised Guidelines on the Admission and Presentation of Evidence, 2 October 2009; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties During Trial, 24 February 2010.

²² Hearing, T. 2022, 2026, 2030, 2032 (6 May 2010).

²³ Hearing, T. 2033-2034 (6 May 2010).

14. By contrast, Fatima Zaimović, who reiterated numerous times throughout her cross-examination that she was unable to comment on military or police matters,²⁴ was not in a position to lay the necessary foundation for the admission of a number of military documents put to her by the Accused, that is, the documents with Rule 65 *ter* numbers 1D902, 1D905, 1D909, 1D938, and 1D941. It was the lack of foundation for these documents, and thus the failure to meet the requirement of *prima facie* probative value, that resulted in them not being admitted into evidence.

15. Additionally, however, it is worth noting that, with two exceptions, there was also no apparent nexus between the documents tendered by the Accused and Fatima Zaimović's evidence, including as challenges to her credibility.²⁵ In relation to 1D905, an Army of Bosnia and Herzegovina ("ABiH") document, the witness confirmed that "it says 'Rasim Delić'" on the last page, but could not speak to the document.²⁶ Regarding 1D909, a photograph of Ramiz Delalić ("Čelo"), the Accused asked Fatima Zaimović whether she knew Delalić (she knew of him but had never seen him in person), whether she had seen him on television (not that she remembered), whether she remembered that he killed a Serb man in a wedding party (she heard about it through the media), and whether she remembered that he boasted about it (she did not remember).²⁷ As such, the witness did not say anything related to the photograph, including by, for example, confirming that the man depicted was Delalić. Similarly, Fatima Zaimović did not comment on 1D938, a Bosnian Muslim Ministry of the Interior ("MUP") report, which notes a discussion about Delalić, and that he was treated in the Urology Clinic of Koševo Hospital.²⁸

16. On this issue of the admissibility of documents potentially challenging the credibility of a witness, the cases cited by the Accused do not particularly assist him. For example, in the *Simba* case at the International Criminal Tribunal for Rwanda ("ICTR"), the Appeals Chamber held that witness statements of "non-testifying individuals" may be admitted into evidence if

²⁴ See, for example, Hearing, T. 1898, 1990, 1905, 1908, 1909 (5 May 2010); T. 1964, 1966, 1980 (6 May 2010).

²⁵ The exceptions are 1D902 and 1D941. 1D902 is a Sarajevo Romanija Corps report. Notwithstanding, Fatima Zaimović could neither recall the locations of most of the places, nor the people, named in the report, and could otherwise not speak to the report, she stated that she did not know that an ABiH brigade was stationed in Breka, see Hearing, T. 1905-1906 (5 May 2010). 1D941 is ostensibly a Bosnian Muslim MUP report about the activities of an ABiH brigade, although the Chamber cannot verify the content of this document as the correct translation is not uploaded into court. Fatima Zaimović testified that she did not see the military installations and personnel in several locations in and around Koševo Hospital, as stated in the report, see Hearing, T. 1961-1962, 1964-1967 (6 May 2010). These aspects of her testimony may go to her credibility. The Chamber reiterates, however, that the foundation was not laid for the admission of these documents.

²⁶ Hearing, T. 1905-1906 (5 May 2010).

²⁷ Hearing, T. 1972 (6 May 2010).

²⁸ Hearing, T. 1973-1974 (6 May 2010), where Fatima Zaimović said that: (i) the eye department was in the same building as the children's department, but did not share the same entrance; (ii) she did not know about Delalić; (iii) there was always security at the front desk (and had been before the war as well), but did not know who the chief of security for the hospital was.

they are necessary to the Trial Chamber's assessment of the witness's credibility and are not used to prove the truth of their contents.²⁹ In the *Karemera* decision cited by the Accused, an ICTR Trial Chamber set out in broad terms what is required for admission pursuant to Rule 89(C), including that, for an item to have probative value, "the applicant must show that the evidence tends to prove or disprove an issue" and that evidence "may also be relevant and have probative value if it may affect the credibility of a witness."³⁰ The Chamber sees no inconsistency between these findings and its general approach, including because neither the Appeals Chamber nor the *Karemera* Trial Chamber stated that items tendered for admission that go to or affect a witness's credibility should be admitted even though they do not meet the requirements of Rule 89(C).³¹

17. The Chamber emphasises once again that it is not precluding the admission of documents which might go to the credibility of witnesses brought by either party, but it is rather providing guidance as to the appropriate manner in which this can be done. It remains open to the Accused to resubmit the documents that he put to Fatima Zaimović during his cross-examination of her, and which were denied admission by the Chamber, either by putting them to other witnesses who can verify their authenticity and reliability, or by tendering them from the bar table (where the relevance and probative value of each document, and how they fit into his case, must be substantiated in accordance with the Chamber's Order on the Procedure for the Conduct of Trial ("Order on Procedure")).³² Should the documents be admitted later, either through another witness or by way of a bar table motion, it will be open to the Accused, in his closing brief or arguments, to draw the Chamber's attention to any possible discrepancy between the documents and Fatima Zaimović's testimony and to suggest the conclusions that should be drawn by the Chamber concerning her credibility.

18. The Chamber notes Mr. Robinson's and the Accused's submissions about the difficulties the Accused may face in ensuring that he is able to lay sufficient foundation for the admission of some documents. While there may be exceptional and discrete instances where a degree of latitude is warranted, the Chamber is not convinced that the resource and co-operation obstacles,

²⁹ *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 20.

³⁰ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Oral Motions by Edouard Karemera and the Prosecution to Admit Certain Documents into Evidence, 29 May 2008 ("*Karemera* Decision"), para. 3.

³¹ The Chamber notes that other Trial Chambers have taken another approach to the admission of statements of non-testifying individuals, and this Chamber will follow that other approach in this case. See *infra* paragraph 25(e). As an example of guidelines of other Chambers setting out this other approach, see *Perišić* Order on Guidelines, para. 12.

³² For the guidelines pertaining to bar table motions, see Order on the Procedure for the Conduct of Trial, 8 October 2009, Appendix A, para. R. See also Hearing, T. 1910-1911 (5 May 2010).

as advanced by the Accused, could be said to justify overriding the need for each party to meet the basic requirements of Rule 89(C) before a document is admitted into evidence.

(b) Admission of agreed documents

19. Both parties submit that where they agree that a document should be admitted into evidence, the Chamber should grant its admission. The Accused states that, if the Chamber agrees to such an approach, he will discuss with the Prosecution which documents might be admitted “by stipulation or agreement.”

20. The Chamber encourages all co-operation between the parties, and considers that it is open to them to find areas of agreement that may facilitate the expeditious and smooth running of the proceedings, including with regard to the admission of evidence. Should the parties reach agreement on particular documents which they wish to have admitted into evidence, it is anticipated that they will file a joint bar table motion.³³ In such a situation, the requirements the Chamber has previously elaborated for bar table motions would apply. That is, the parties shall: (i) provide a short description of the documents; (ii) clearly specify the relevance and probative value of each document; (iii) explain how the documents fit into one or both parties’ cases; and (iv) provide the indicators of the documents’ authenticity.³⁴

21. In assessing the admission of the documents tendered by way of such a joint bar table motion, the Chamber will take into account the parties’ agreement. However, notwithstanding any agreement by the parties, it remains the Chamber’s duty to ensure that all material tendered for admission meets the relevant standards for admission.³⁵ The Chamber must be able to assess the probative value of all tendered material, and, ultimately, it must be able to assess the weight to be ascribed to it. Neither will be possible unless the Chamber is satisfied of each agreed document’s relevance, probative value, and place in either or both parties’ cases. Similar considerations apply to any documents offered into evidence by either party in the courtroom and to which the opposing party does not object.

22. The Chamber here reiterates its concern that the case record does not become overburdened with an enormous volume of documents that have no apparent relationship to the case or where it is not clear how they fit into the cases of either party. While it is in the nature of a case of this scope that the parties have access to many documents which they may wish to tender into evidence, it should be apparent to them that it is in neither of their interests to have

³³ See also *Perišić* Order on Guidelines, Annex, para. 23.

³⁴ See Order on the Procedure for the Conduct of Trial, 8 October 2009, Appendix A, para. R.

³⁵ See also *Perišić* Order on Guidelines, Annex, para. 40.

hundreds of documents on the record which the Chamber cannot utilise in a meaningful way when assessing all the evidence brought at the end of the trial.

(c) Additional Guidelines

23. In Appendix A to the Order on Procedure the Chamber did not set out guidelines generally addressing the admissibility of evidence through a witness. Following the experiences in court to date, it considers that such guidelines would now be helpful, and has, therefore, decided that Appendix A of the Order on Procedure will be read in conjunction with these additional guidelines. In formulating these guidelines it has drawn upon those of other Trial Chambers.³⁶

24. The Chamber reiterates that these are *general* guidelines for the benefit of the smooth conduct of the trial, and that each of its decisions on the admission of a particular item into evidence will be made on a case-by-case basis, taking into account all the relevant circumstances. It notes, in particular, that the admissibility of a document that goes to a witness's credibility is sufficiently covered by guidelines (a) and (b) below. Furthermore, it is satisfied that it is not necessary to add a guideline dealing with the admission of evidence that has been agreed by the parties, as it considers that this situation is already adequately dealt with by both guideline (a) below and the previous guideline (R) on bar table motions.

25. The additional guidelines shall read as follows:

- (a) The Chamber will only admit evidence which it considers to be relevant and probative. The tendering party must demonstrate its relevance and probative value.
- (b) As a general rule, the party tendering a piece of evidence shall do so through a witness who is either the author of that piece of evidence, or who can speak to its origins and/or content. The tendering party shall demonstrate some nexus between the witness and the document before offering the document into evidence.
- (c) There will be no blanket prohibition on the admission of evidence simply on the grounds that the purported author of that evidence has not been called to testify. Likewise, the fact that a document has neither a signature nor a stamp is not in itself a reason to find that the document is not authentic.
- (d) The opposing party may object to the admission of a particular item of proposed evidence tendered by a party on grounds of relevance or probative value, including authenticity. If a party challenges the authenticity of proposed evidence, it must specify its reasons for doing so. Upon hearing the objections of the party challenging the proposed evidence, the Trial Chamber shall rule on its admissibility.
- (e) The parties may confront a witness ("witness A") in court with the witness statement or the transcript of prior testimony of another witness ("witness B") from another case before this Tribunal. If witness A denies the content of the evidence put to him or her, or

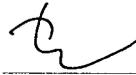
³⁶ See *supra* fn. 21.

disputes it, witness B's witness statement or transcript of prior testimony will not be admitted unless and until witness B is brought to give evidence in this case. If witness A confirms or adopts the contents of witness B's evidence that has been put to him or her, then that part of witness B's evidence can be admitted whether witness B comes to testify or not.

IV. Disposition

26. Accordingly, the Trial Chamber, pursuant to Rules 54 and 89(C) of the Rules, hereby **ORDERS** that the guidelines set out in the Appendix of the Order on Procedure shall be read in conjunction with the additional guidelines provided for in paragraph 25 (a)-(e) above.

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



Judge O-Gon Kwon
Presiding

Dated this nineteenth day of May 2010
At The Hague
The Netherlands

[Seal of the Tribunal]