UNITED NATIONS

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: 28 October 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: **28 October 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF AN EXHIBIT FROM THE BAR TABLE FOLLOWING MAJOR THOMAS'S TESTIMONY

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 Motion for Admission of an Exhibit from the Bar Table following Major Thomas's Testimony", filed on 7 October 2010 ("Motion"), and hereby renders its decision thereon.

I. Background and Submissions

1. Witness Major Francis Roy Thomas testified in these proceedings on 15 and 19 September 2010. In the course of his testimony, 16 United Nations Military Observers' ("UNMO") daily situation reports were admitted into evidence, indicating general areas where the UNMOs observed shelling in and around Sarajevo by place name and/or grid reference. Major Thomas was also shown by the Office of the Prosecutor ("Prosecution") a marked map of Sarajevo, which he confirmed is an accurate depiction of the grid references in the corresponding UNMO situation report and was admitted into evidence as exhibit P1560, without objection by the Accused.[1]

2. In the Motion, the Prosecution tenders for admission "a series of [15] base maps of Sarajevo with demonstrative markings depicting the information contained in UNMO Sarajevo daily situation reports", all contained in a single document in ecourt and assigned the Rule 65 *ter* number 22975.[2] The Prosecution submits that the places and/or grid references included in the UNMO situation reports that were admitted into evidence have been marked on these 15 maps following the method used to depict the information in the map shown to Major Thomas in court and admitted as P1560.[3] The Prosecution requests the admission of Rule 65 *ter* number 22975, contending that these maps "will aid the Chamber in understanding the implications of the information in the situation reports" and are "directly relevant to the Prosecution's case concerning the shelling of civilians and civilian objects in Sarajevo."[4]

3. On 11 October 2010, the Accused filed the "Response to Bar Table Motion: Thomas Testimony" ("Response"), in which he objects to the admission into evidence of the document with Rule 65 *ter* number 22975 on two grounds: i) failure of notice by the Prosecution, in light of the absence of the maps now sought to be admitted either on the Prosecution's Rule 65 *ter* exhibit list or on the list of documents notified for use with Major Thomas by the Prosecution;[5] and ii) limited

[1] Francis Roy Thomas, Hearing, T.6804-6805 (15 September 2010).
[2] Motion, paras. 1-2.
[3] Motion, para. 3
[4] Motion, para. 4.
[5] Response, para. 1. *See also* Prosecution's Final Notification of Documents to be Used with Witness Thomas (KDZ108) with Appendix A, 7 September 2010 ("Prosecution's Final Rule 92 *ter* Notification (Thomas)"). *See also*

relevance of the proposed evidence because the maps, "by using a grid method, depict a wider area of shelling than actually took place."[6]

4. On 13 October 2010, following the granting of its request for leave to reply, the Prosecution filed the "Prosecution's Reply to Karadžić's Response to Bar Table Motion: Thomas Testimony" ("Reply"),[7] in which it submits that the Accused "ha[d] sufficient notice of the demonstrative maps," on the basis that "they merely depict information reflected in Prosecution exhibits, using a method explored with [Major Thomas] during his *viva voce* direct examination."[8] The Prosecution notes that the map that was admitted during Major Thomas's testimony was included in the Prosecution's original Rule 65 *ter* list, and the Accused was given notice on 7 September 2010 that it was an exhibit to be used during Major Thomas's testimony.[9] It further submits that the fact that "the maps may 'depict a wider area of shelling than actually took place' is irrelevant to the question of admission."[10]

II. Applicable Law

5. In accordance with Rule 65 *ter* (E)(iii) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Prosecution must file the list of exhibits it intends to offer at trial within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference. As noted previously by the Chamber, "[i]f the Prosecution requests the addition of some items to its exhibit list later than six weeks before the Pre-Trial Conference, the Trial Chamber may authorise this addition in the exercise of its inherent discretion to manage the trial proceedings, and if satisfied that this is in the interests of justice."[11] These requirements were further clarified by the Chamber in its "Decision on the Second Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibits List (Mladić Notebooks)," issued on 22 July 2010. The Chamber refers to the relevant paragraphs therein.[12]

6. The Chamber recalls that, on 8 October 2009, following submissions by the Prosecution and the Accused, it issued the "Order on the Procedure for the Conduct of Trial" ("Order on

---

Prosecution's Notification of Submission of Written Evidence pursuant to Rule 92 *ter* with Appendix A: Witness Francis Roy Thomas (KDZ108), 18 June 2010.

[6] Response, para. 2.

[7] Prosecution's Request for Leave to Reply to Karadžić's Response to Bar Table Motion: Thomas Testimony, 12 October 2010. The Chamber granted the Prosecution's request orally, *see* Hearing, T. 7775 (12 October 2010).

[8] Reply, para. 1. *See also* Reply, paras. 2-3.

[9] Reply, para. 2. *See also* Prosecution's Final Rule 92 *ter* Notification (Thomas), Appendix A, p. 11.

[10] Reply, para. 4.

[11] Decision on the Second Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibits List (Mladić Notebooks), 22 July 2010 ("Decision on Second Rule 65 *ter* Motion"), para. 7; Decision on the Prosecution's Motion for Leave to File a Supplemental Rule 65 *ter* Exhibit List, 18 March 2010, para.7.

Procedure"), outlining a set of guidelines "to govern the presentation of evidence and the conduct of the proceedings" and to "ensure that the trial is conducted in a fair and expeditious manner […] with full respect for the rights of the Accused and due regard to the protection of victims and witnesses."[13]

7. The admission of evidence from the bar table is a practice well established in the case-law of the Tribunal.[14] As specified by the Chamber in the Order on Procedure, "[i]n any request for the admission of evidence from the bar table, 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."[15] Furthermore, the Chamber has made it clear that "the use of bar table motions shall be kept to a minimum."[16]

8. In its "Decision on the Prosecution's First Bar Table Motion", issued on 13 April 2010 ("Decision on First Bar Table Motion"), the Chamber emphasised again that "[i]t 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 into its case."[17] Thus, while "[e]vidence may be admitted from the bar table if the requirements of Rule 89(C) are met",[18] even when "the requirements of the Rule 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."[19]

III. Discussion

9. This Chamber has only permitted the admission of Prosecution exhibits that were notified to the Accused and the Chamber by way of the Prosecution's Rule 65 *ter* exhibit list, or for which leave was sought, and granted, for addition to that list. It is for the Prosecution to show good cause for any such request to add an item to its Rule 65 *ter* exhibit list, and to establish the relevance and importance of the item sought to be added.[20] The Chamber must "carefully balance any

[12] *See* Decision on Second Rule 65 *ter* Motion, paras. 7-9 (footnotes omitted).
[13] Order on Procedure, paras. 6, and 1, respectively.
[14] Decision on the Prosecution's First Bar Table Motion, 13 April 2010, para. 5 (footnotes omitted).
[15] Order on Procedure, Appendix A, para. R.
[16] Order on Procedure, Appendix A, para. R.
[17] Decision on First Bar Table Motion, para. 6 (footnotes omitted).
[18] Decision on First Bar Table Motion, para. 5 (footnotes omitted).
[19] Decision on First Bar Table Motion, para. 5.
[20] Decision on Second Rule 65 *ter* Motion, para. 7.

amendment to the Prosecution's exhibit list with an adequate protection of the rights of the accused. That is, the Trial Chamber must be satisfied that amendments to the exhibit list at that stage of the proceedings provide an accused sufficient notice, and do not adversely affect his ability to prepare for trial."[21]

10. The Chamber notes that the proposed exhibit (Rule 65 *ter* number 22975) is neither on the Prosecution's revised Rule 65 *ter* exhibit list of 19 October 2009, nor does the Prosecution seek leave in its Motion to add this document to that list. The Prosecution contends that the maps comprising the proposed exhibit "do not contain any information additional to the situation reports which were admitted through Major Thomas,"[22] and thus seems to be suggesting that they do not constitute independent items of evidence which would need to be on the Rule 65 *ter* exhibit list. However, this is not argued clearly, nor indeed is it persuasive. The relevant UNMO situation reports were listed in the Prosecution's Rule 65 *ter* exhibit list, and were discussed by Major Thomas in his amalgamated statement dated 13 May 2009. One map was also listed in the Rule 65 *ter* exhibit list, and ultimately admitted as P1560. The other 15 maps should also have been so listed, in order to provide adequate notice to the Accused of the Prosecution's intention to tender them. If the maps were generated, or came into the possession of the Prosecution after the filing of its Rule 65 *ter* exhibit list, leave should have been sought to add them. The Chamber notes, however, that the date marked on these 15 maps is October 2010, suggesting that they were only created (presumably by the Prosecution itself) after the testimony of the witness. The Chamber does not consider this to be an acceptable practice, as the Prosecution should have in its possession, and have notified to the Accused, all of the evidence which it will seek to tender through a witness before that witness's testimony, or at least during it, to give the Accused the opportunity to respond and to cross-examine the witness about such evidence, should he so choose.

11. While the Chamber appreciates that the Prosecution may have been seeking to save time in the courtroom by not going through all 15 maps with the witness, such time saving was extremely limited and has been nullified by the time that has now had to be spent out of court by the parties and the Chamber addressing this Motion.[23] Although the Prosecution expressed its intention during the testimony of Major Thomas "to submit an exhibit, by way of Bar table, of maps for each of the situation reports," and no objection was raised at that time, neither the Accused nor the Chamber

[21] Decision on Second Rule 65 *ter* Motion, para. 7 (footnotes omitted).

[22] Reply, para. 3.

[23] The Chamber notes that the most time-efficient manner to tender the maps would have been to prepare them in advance of the witness's testimony, allow the witness the opportunity to review them, and to have simply asked him in the courtroom to confirm that they accurately depicted the information in the UNMO situation reports. This would then have provided the Accused with the opportunity to cross-examine the witness on this matter if he had so wished, and would not have taken up significant in-court time.

could have then understood that the proposed maps were not on the Prosecution's Rule 65 *ter* exhibit list.[24]

12. Moreover, it is for the party requesting the admission of evidence from the bar table to "clearly specify the relevance and probative value of each document [and] provide the indicators of the document's authenticity."[25] On the basis of the information provided by the Prosecution, the Chamber is not convinced that the maps contained in Rule 65 *ter* number 22975 are of significant probative value. In light of the absence of notice to the Accused, the Chamber finds that the probative value of the maps is substantially outweighed by the need to ensure a fair trial, and they will thus not be admitted.

IV. Disposition

13. For these reasons, the Trial Chamber, pursuant to Rule 89 of the Rules, hereby **DENIES** the Motion.

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

Judge O-Gon Kwon,
Presiding

Dated this twenty eighth day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

[24] Hearing, T. 6805 (15 September 2010).
[25] Order on Procedure, Appendix A, para. R.