



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: 27 June 2011
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: 27 June 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE PROSECUTION'S BAR TABLE MOTION RELATING TO
WITNESS DOROTHEA HANSON**

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 a motion for the admission of a number of documents from the bar table contained in the “Prosecution Notification in Respect of Expert Report by Dorothea Hanson”, filed on 1 June 2011 (“Notification”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 9 April 2009, the Office of the Prosecutor (“Prosecution”) provided notice of its disclosure of a report written by a proposed expert witness, Dorothea Hanson, and its intention to rely on this report at trial, in accordance with Rule 94 *bis* (A) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ In accordance with Rule 94 *bis* (B), the Accused then notified the Chamber that he would neither challenge Hanson’s expertise nor the relevance of her report, but that he wished to cross examine her and reserved the right “to object at trial to opinions offered outside the expertise of the witness or to the relevance of specific testimony” given by her.²

2. On 1 June 2011, a week before Dorothea Hanson was due to take the stand, the Prosecution filed the Notification, informing the Accused and the Chamber that it was tendering her report and that it intended to use 39 documents during her testimony.³ In the Notification the Prosecution also sought admission “for all purposes” of a “further 34 selected documents” used by Hanson in compiling her report from the bar table (“Motion”).⁴ These documents are listed in Appendix B to the Notification (“Appendix B Documents”), which contains the Prosecution’s submissions on their relevance, probative value, reliability and the manner in which they fit into the Prosecution’s case.⁵

3. Dorothea Hanson started giving evidence on 9 June 2011. On the first day of her testimony, following the Prosecution’s submission of Hanson’s expert report for admission into evidence, the following discussion ensued:⁶

MR. ROBINSON: Mr. President, we don't have any objection to the report, but if I could take this opportunity to ask you what your intentions are with respect to the 34 documents that are in annex B or appendix B to this witness's notification which are also proposed for the bar table?

¹ Prosecution’s Notice of Disclosure of Expert Report by Dorothea Hanson and her Curriculum Vitae, 9 April 2009.

² Response to Rule 94 *bis* Notice: Dorothea Hanson, 11 May 2009, para. 3.

³ Notification, para. 3.

⁴ Notification, para. 3.

⁵ Notification, Appendix B.

⁶ Hearing, T. 14499–14500 (9 June 2011).

Because I think if you don't intend to admit them, then the Prosecutor ought to know about them; and if you are thinking of admitting them, there is at least one that we have an objection to and probably they ought to be alerted to that.

JUDGE KWON: I note those documents are so-called source documents, aren't they, Ms. Sutherland, cited in the -- in an expert's report?

MS. SUTHERLAND: Yes, they are, Your Honour. But we would be seeking to have the documents admitted for the truth of the contents as well as a source document.

JUDGE KWON: So has it not been our practice that with respect to those source documents, unless they are dealt with during the course of the expert's testimony, we do not admit it as evidence?

MS. SUTHERLAND: Your Honour, the Trial Chamber has previously admitted source documents tendered in the same manner as the documents in appendix B and noted that this method of tendering documents was consistent with the guide-lines and previous decisions. And that was in relation to the expert witness Dr. Donia, and that's trial transcript 1st of June, 2010, at pages 3151, line 19, to 3152, line 8. And can I add that the Prosecution has been selective in the appendix B documents and concentrated on what is at issue between the parties as far as we're able to anticipate it. The documents are placed into context in the reports and will be further contextualised by Ms. Hanson during her testimony this morning. In addition, the Prosecutor has satisfied the other requirements for the admission of the documents from the bar table generally and that's pursuant to your order on the procedure for the conduct of the trial of the 8th of October, 2009, appendix A, part 7, paragraph R. And for these reasons, the Prosecution would ask at the end of Ms. Hanson's testimony that appendix B documents be admitted in connection with the report and for all other purposes.

JUDGE KWON: Would you like to respond to this submission, Mr. Robinson?

MR. ROBINSON: Yes, Mr. President. Our preference would be that any comments on these documents be elicited orally from the witness, and we think it burdens the whole record and it especially burdens us given the limitations on us we're given when documents are admitted from the bar table. On the other hand, we realise that if there is going to be bar table motions, then this is probably -- most of them come within what could maybe be filed as a bar table motion near the end of the case or at some point during the case. And on balance we prefer that as much of the information that the Chamber receives be received orally but that we also be given enough time to present our side of it. Thank you.

4. Having considered these arguments, the Chamber reiterated its previously stated position that bar table motions should be used as a last resort and thus encouraged the Prosecution to put the Appendix B Documents to Dorothea Hanson while she was on the stand. The Chamber noted, however, that if some of these Documents were not put to her by the end of her testimony, the Chamber would issue a reasoned decision on the remaining Appendix B Documents "so that this issue will not arise again."⁷ The Accused's legal adviser then clarified that the document he was objecting to was the Kozarski Vjesnik newspaper article (65 *ter* number 05029), on the basis that the Chamber has previously held that newspaper articles are not admissible through bar table motions.⁸

⁷ Hearing, T. 14501 (9 June 2011).

⁸ Hearing, T. 14501 (9 June 2011).

5. At the end of Dorothea Hanson's testimony, the Prosecution informed the Chamber that 12 of the 34 Appendix B Documents were not put to Hanson during her testimony and that it was therefore tendering them for admission from the bar table, for all purposes. These have the following Rule 65 *ter* numbers: 00170, 01552, 15369, 01540, 17248, 07866, 01092, 07113, 05750, 08539, 00803, and 06689. The Prosecution also noted that it was no longer seeking to tender the document objected to by the Accused (namely, the document with Rule 65 *ter* number 05029).⁹

6. In response, the Accused's legal adviser submitted that the 12 Appendix B Documents in question should not be admitted from the bar table as they were not put to Hanson and thus were not dealt with in accordance with the instructions given by the Chamber at the beginning of her testimony. He did not, however, have any specific objections relating to any of the 12 Appendix B Documents.¹⁰

II. Applicable Law

7. Rule 89 of the Rules provides, in relevant part:

- (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.

8. The Chamber recalls, as it has in earlier decisions on requests for admission of evidence from the bar table, that the admission of evidence from the bar table is a practice established in the case-law of the Tribunal.¹¹ Evidence may be admitted from the bar table if it is considered to fulfil the requirements of Rule 89 that it be relevant, of probative value, and bear sufficient indicia of authenticity.¹² Once 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).¹³

9. The Chamber also recalls its "Order on Procedure for Conduct of Trial" issued on 8 October 2009 ("Order"), which states with regard to any request for the admission of evidence from the bar table that:

⁹ Hearing, T. 14935–14937 (20 June 2011).

¹⁰ Hearing, T. 14969–14970 (20 June 2011).

¹¹ Decision on the Prosecution's First Bar Table Motion, 13 April 2010 ("First Bar Table Decision"), para. 5 (citations omitted); Decision on Prosecution Bar Table Motion for the Admission of Bosnian Serb Assembly Session Records, 22 July 2010, para. 4.

¹² Rule 89(C), (E).

¹³ First Bar Table Decision, para. 5 (citations omitted).

The use by the parties of bar table motions shall be kept to a minimum. In 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.¹⁴

10. In the Chamber's "Decision on the Prosecution's First Bar Table Motion" issued on 13 April 2010 ("First Bar Table Decision"), this Chamber 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 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.¹⁵

This remains the view of the Chamber, and continues to be the general practice in this case.

11. Rule 94 *bis* of the Rules governs the procedure that must be followed when a party wishes to call an expert witness. In addition to Rule 94 *bis*, the Chamber has provided guidelines pertaining to the admission of expert reports, and the sources used by an expert in compiling his or her report. With regard to the latter, the Chamber stated: "[t]he sources used by an expert in compiling his or her report will not be admitted as a matter of course".¹⁶ In the Order on Prosecution Request for Clarification and Proposal Concerning Guidelines for Conduct of Trial, issued on 20 October 2009 ("Order on Clarification"), the Chamber provided further explanation of when it would consider admitting sources to an expert report:

Expert reports generally should be complete and understandable in themselves, such that there is no need to tender for admission into evidence the sources used by the expert. However, should the presenting party wish to tender certain sources used by an expert in compiling his or her report, it can apply to the Chamber for their admission, either orally or in writing. The Chamber notes that the presenting party should be very selective in the sources that it tenders for admission into evidence and provide clear reasons as to why these sources should be admitted in addition to the expert report itself.¹⁷

12. Later on, in a decision relating to another expert witness, namely Richard Philipps, the Chamber further clarified its position on the admission of source documents:

Expert reports provide the Chamber with synthesis and analysis of voluminous and often complex technical material by a suitably qualified expert, thus ensuring that the Chamber is not required to undertake the same task. As such, documents and other items that are source material are not admitted for their substantive content. Rather, the purpose of admitting source material is

¹⁴ Order, Appendix A, para. R.

¹⁵ First Bar Table Decision, para. 9.

¹⁶ Order, Appendix A, para. P. The Chamber further stated that, "[e]xpert reports should, however, be fully referenced in order to facilitate the Trial Chamber's determination of their probative value and, ultimately, the weight to be ascribed to them."

¹⁷ Order on Clarification, para. 5.

to enable the Chamber to verify, if necessary, the basis upon which the expert reached his or her conclusions, as well as how the relevant analysis was conducted. These documents are only, therefore, of assistance to the Chamber in determining the weight to be ascribed to the expert report. The Chamber notes, however, that if, at a later date, a witness discusses the content of a document previously admitted as a source document in such a way that renders that document admissible for its content, its status can be changed to reflect its admission for all purposes.¹⁸

Again, this remains the position of the Chamber, and continues to be the general practice in this case.

III. Discussion

A Bar table motions and source documents

13. As a preliminary remark, the Chamber notes that the manner in which the Motion was filed by the Prosecution, namely as part of the Notification, is not the proper way to file bar table motions as it is, contrary to the Prosecution's submissions, neither in line with the guidelines relating to bar table motions nor with the guidelines relating to admission of source documents. The Chamber notes that this is not the first time the Prosecution has filed a bar table motion which is in some way connected to one of its witnesses. In fact, this seems to be a developing practice in this case, in particular in relation to expert witnesses, in contradiction with the Chamber's instructions.¹⁹ The documents tendered in such bar table motions are, as a result, not being put to the witnesses who are clearly best placed to comment on them, even though these witnesses are already on the stand. While it is commendable that the Prosecution is trying to save court time, it has been given a substantial number of in-court hours in which to complete its case.²⁰ Thus, the Prosecution should endeavour to strike the appropriate balance between using the time allocated to present its case, including documentary evidence, while at the same time complying with the Chamber's guidelines to the greatest extent possible.

14. In addition, filing bar table motions as part of witness notifications also curtails the Accused's ability to respond to such requests within 14 days provided by Rule 126 *bis* as

¹⁸ Decision on Prosecution's Submission on the Relevancy of Certain Documents Relating to the Testimony of Richard Philipps With Appendix A, 9 July 2010 ("Philipps Decision"), para. 10.

¹⁹ See e.g. Prosecution Notification in Respect of Expert Reports by Patrick Treanor, 25 May 2011, Appendix B; Prosecution's Submission of Expert Reports by Robert Donia pursuant to Rule 94 *bis*, 5 February 2010, Appendix B; Prosecution Notification in Respect of Expert Report by Dr. Christian Nielsen, 24 June 2011, Appendix B. The Prosecution also filed a bar table motion following Major Francis Roy Thomas's evidence, see Prosecution's Motion for Admission of an Exhibit from the Bar Table following Major Thomas's Testimony, 7 October 2010. Finally, while the witness notification in relation to Richard Philipps tendered the documents listed therein as "associated exhibits", these were in fact offered from the bar table as they were not discussed in the amalgamated statement. See Philipps Decision, para. 7.

²⁰ On 6 October 2009, during the Pre-Trial Conference, the Trial Chamber issued an oral ruling pursuant to Rule 73 *bis* (C), in which it allocated to the Prosecution a maximum of 300 hours for the presentation of its case. Pre-Trial Conference, T. 467 (6 October 2009). See also Decision on the Application of Rule 73 *bis*, 8 October 2009, para. 7.

witness notifications are generally filed several days before the witness is due to give evidence and the ruling on admission of documents listed therein is usually made during, or on completion of, that witness's evidence. Accordingly, the Chamber will no longer accept bar table motions filed as part of witness notifications. Instead, bar table motions should be filed as stand alone motions, *separate* from witness notifications, thus giving the Accused the time he is entitled to under the Rules in which to respond.

15. In addition, with respect to expert witnesses, the Chamber notes that the Prosecution has started to use bar table motions as a means of tendering into evidence source material used by experts in preparation of their reports. This is again contrary to the Chamber's instruction that expert reports should be complete and understandable without such material, and that if source documents are to be admitted, the presenting party is to be "very selective" in tendering them. Tendering a substantial number of source documents from the bar table in relation to a number of different experts is, in the Chamber's view, not very selective. It is also contrary to the Chamber's position that source documents, unless put to a witness, should not be admitted for their substantive content but only as a tool for verifying the basis upon which a particular expert reached his or her conclusions.²¹ In this respect, the Chamber also recalls that if, at a later date, a witness discusses the content of a document previously admitted as a source document in such a way that he or she renders that document admissible for its content, its status can be changed to reflect its admission for all purposes. Finally, while the Prosecution accurately asserts that the Chamber has previously admitted documents from the bar table in relation to another expert witness, namely Robert Donia, the Chamber notes that this was prior to it clearly stating its position on admission of source documents which are not used with the witness, as outlined above in paragraph 12. The Chamber reiterates once again that bar table motions should be kept to a minimum and not used as a means of tendering into evidence documents used as source material. Accordingly, if the Prosecution wants to tender into evidence a source document for its substantive content, it should present this document to the expert while that expert is on the stand. In that respect, the Chamber notes that Dr. Christian Nielsen, another expert witness, is due to give evidence soon and that his notification also contains a bar table motion. The Chamber hereby instructs the Prosecution to put the documents it is tendering from the bar table to Dr. Nielsen when he takes the stand, should it seek their admission into evidence.

16. Finally, the Chamber has already said and reminds the parties again that while there may be a perception that the admission of evidence from the bar table saves some in-court time, it

²¹ See para. 12, above.

can in fact lengthen the proceedings due to the sheer volume of evidence thus admitted.²² This is particularly so if the parties continue as a matter of course to tie bar table motions to particular witnesses thus regularly using them as a safety net when time runs out or as additional means of admitting even more documents. Accordingly, for all the reasons given above, the Chamber will at this stage consider only whether the 12 remaining Appendix B Documents should be admitted into evidence as *source documents* rather than admitted for all purposes.

B Appendix B Documents

17. The Chamber recalls that the Accused generally objects to the admission of the 12 Appendix B Documents from the bar table on the basis that they should have been put to Dorothea Hanson when she was giving evidence, but that, at the same time, he makes no specific objections to each of the 12 Documents in question. The Chamber considers that admitting these 12 Documents solely as a reference tool addresses the Accused's concerns about their admission in general. As source material, the substance of these documents will not be considered by the Chamber and, again, may only be used to assist the Chamber in assessing the probative value of Hanson's expert report, if necessary.

18. Having reviewed the 12 Appendix B Documents, the Chamber notes that the Prosecution has, in setting out the relevance of each document to its case, as well as where they are referred to in Dorothea Hanson's report and how they fit in her evidence, clearly linked these Documents to Hanson's report. Accordingly, the Chamber will be able to, if necessary, verify the basis upon which Dorothea Hanson reached her conclusions. For that reason, the Chamber is of the view that the 12 Appendix B Documents are admissible as source documents to Hanson's expert report.

19. While the Prosecution has also addressed additional reasons as to why these 12 Appendix B Documents should be admitted into evidence in addition to Hanson's expert evidence, namely the fact that they are also relevant to other issues in this case, the Chamber refers to its discussion above.²³ Therefore, unless another witness speaks to them, the Chamber will consider the 12 Appendix B Documents only when determining the weight to ascribe to Hanson's expert evidence.

²² Decision on Motion for Admission of Evidence from Bar Table: General Michael Rose, 29 October 2010, para. 9.

²³ See paras. 13–16.

IV. Disposition

20. Accordingly, the Trial Chamber, pursuant to Rules 89 and 94 *bis* of the Rules, hereby **GRANTS** the Motion, in part, and:

- (a) **ORDERS** that the 12 Appendix B Documents with the following Rule 65 *ter* numbers be admitted into evidence as source documents to Dorothea Hanson's expert report: 00170, 01552, 15369, 01540, 17248, 07866, 01092, 07113, 05750, 08539, 00803, and 06689; and
- (b) **REQUESTS** the Registry to assign exhibit numbers to the above listed 12 Appendix B Documents, and to include a note in court on each of them stating that they have been admitted as source documents for reference purposes only.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-seventh day of June 2011
At The Hague
The Netherlands

[Seal of the Tribunal]