



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 January 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: 13 January 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR THE ADMISSION OF ZIBA AVDIĆ'S
STATEMENT**

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 for Admission of Report: Ziba Avdic Statement”, filed on 7 December 2010, (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 5 March 2010, the Trial Chamber issued its “Decision on Prosecution’s Fourth Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* - Sarajevo Siege Witnesses” (“Decision on Fourth Motion”) wherein it provisionally admitted, *inter alia*, Ziba Avdić’s (“Witness”) written statement, subject to the Office of the Prosecutor (“Prosecution”) obtaining the required attestations pursuant to Rule 92 *bis*(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ On 9 July 2010, the Trial Chamber issued its “Decision on Prosecution Motion to Formally Admit the Certified Rule 92 *bis* Statements of Sarajevo Witnesses”, stating that it was satisfied that the written statement of the Witness had been certified by a Presiding Officer appointed by the Registry of the Tribunal pursuant to Rule 92 *bis*(B) of the Rules, and requesting the Registry to record that that statement was admitted into evidence.²

2. In the Motion, the Accused requests that the Chamber admit into evidence an “Official Note” ostensibly recorded in 2000 by the Sarajevo police, an English translation of which is attached to the Motion as Annex A, bearing no indication of its author.³ The Accused argues that this document was disclosed to him by the Prosecution on 30 November 2010, after the Prosecution had represented that it had completed its Rule 66(A)(ii) disclosure obligations, and that because of the lateness of its disclosure, its content could not be addressed at the time the Chamber was considering the admission of the Witness’s evidence pursuant to Rule 92 *bis*.⁴ He asserts that the information contained in the Official Note indicates that Abdulah Fetahović, who was killed by a shell outside the Witness’s house along with her husband, was coming from the defense positions of fire-fighting unit 5459 of the Army of Bosnia and Herzegovina (“ABiH”),

¹ Decision on Fourth Motion, 5 March 2010, para. 77(C)(v).

² Decision on Prosecution Motion to Formally Admit the Certified Rule 92 *bis* Statements of Sarajevo Witnesses, 9 July 2010, para. 10(1).

³ Motion, paras. 1, 7.

⁴ Motion, para. 6.

and submits that "[t]his new information is relevant because it is lawful to kill a combatant at any time".⁵ According to the Accused, the "authenticity of the document is unquestioned".⁶

3. Should the Chamber not admit the Official Note, the Accused requests that it reconsider its decision to admit the statement of the Witness pursuant to Rule 92 *bis*.⁷ He states that granting either of the forms of relief requested is necessary to ameliorate the prejudice caused by the Prosecution's violation of its Rule 66(A)(ii) disclosure obligations.⁸

4. On 15 December 2010, the Prosecution filed the "Prosecution Response to 'Motion for Admission of Report: Ziba Avdic Statement'" ("Response") in which it opposes the Accused's requests.⁹ The Prosecution asserts that the Official Note "lacks sufficient indicia of reliability to be probative of the issue identified by the Accused for admission under Rule 89(C) from the bar table".¹⁰ It observes that the Note makes reference to a death certificate for "Abdulah" issued by the command of a fire-fighting unit of the ABiH, but that no such death certificate is appended, and indeed that the death certificates for Abdulah Fetahović and Muhamed Avdić provided along with the Note to the Prosecution by the Bosnian authorities make no reference to the ABiH.¹¹ Moreover, the Note is an investigator's summary that is "devoid of any information as to the circumstances under which the subject interview was taken and recorded, and how the statement was prepared", and contains "second-hand hearsay, attributed to both Mesdames Fehatović [sic] and Avdić".¹² The Prosecution therefore concludes that the report is "imprecise as to the source of information".¹³ Finally, the Prosecution argues that the Official Note cannot be considered reliable, as it does not bear the signatures of the interviewees, nor is there any indication that it was subject to review by the interviewees.¹⁴

5. With regard to the Accused's alternative request for reconsideration of the Decision on Fourth Motion, insofar as it pertains to the Witness, the Prosecution submits that the Accused "fails to demonstrate a clear error of reasoning in the Decision or that reconsideration is necessary to prevent an injustice".¹⁵ According to the Prosecution, the material provided by the Accused in the Motion is "tenuously connected" to the Witness, and at present "it is speculation

⁵ Motion, paras. 4-5.

⁶ Motion, para. 7.

⁷ Motion, para. 8.

⁸ Motion, para. 9.

⁹ Response, para. 1.

¹⁰ Response, para. 3.

¹¹ Response, para. 2, footnote 6.

¹² Response, para. 4.

¹³ Response, para. 4.

¹⁴ Response, para. 4.

¹⁵ Response, para. 6.

that [the Witness] possesses the material information contained in the [Note]".¹⁶ On this ground the Prosecution concludes that "the Accused presents no reason why [the Witness] should be required to appear for cross-examination on her admitted evidence".¹⁷

II. Applicable Law

6. Evidence may be admitted from the bar table if the requirements of Rule 89(C) are met; that is, the Chamber may admit any relevant evidence which it deems to have probative value.¹⁸ 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.¹⁹ 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).²⁰

7. The Trial Chamber recalls that in its "Order on Procedure for Conduct of Trial", filed on 8 October 2009, it specified that "[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".²¹ It furthermore emphasised that "[t]he use by the parties of bar table motions shall be kept to a minimum".²²

8. With regard to the Accused's alternative request to the Trial Chamber to reconsider its decision to admit the statement of the Witness pursuant to Rule 92 *bis*, the Appeals Chamber has stated that "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice'".²³ The party requesting a reconsideration of a decision

¹⁶ Response, para. 7.

¹⁷ Response, para. 7.

¹⁸ Decision on the Prosecution's First Bar Table Motion, 13 April 2010 ("First Bar Table Decision"), para. 5.

¹⁹ *Prosecutor v. Dorđević*, Case No. IT-05-87/I-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, para. 4, citing *Prosecutor v. Galić*, Case No. IT-98-29-AR.73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 35.

²⁰ First Bar Table Decision, para. 5, citing *Prosecutor v. Milutinović et al.* Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 11; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Admission of Evidence, 13 July 2006, p. 5; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Decision on the Admission of Documents, 28 July 2004.

²¹ Order on the Procedure for the Conduct of Trial, 8 October 2009 ("Order on Procedure"), Appendix A, Part VII, para. R.

²² Order on Procedure, Appendix A, Part VII, para. R.

²³ Decision on Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010 ("Judicial Notice Decision"), para. 12, citing *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis*.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006, para. 25, fn. 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-

is under an obligation to demonstrate such a clear error in reasoning, or the existence of particular circumstances which warrant reconsideration in order to prevent an injustice.²⁴

III. Discussion

9. The “Official Note” was disclosed to the Accused pursuant to Rule 66(A)(ii) well after the deadline for disclosure of such material had passed. The Chamber has in several previous decisions expressed its concern about the Prosecution’s failure to abide by its disclosure obligations, including with regard to prior statements made by Rule 92 *bis* witnesses.²⁵ However, while the Note proposed for admission into evidence appears relevant to the charges in the Indictment pertaining to Sarajevo, and, in particular, the allegations contained in Schedule G.2, the Chamber is not satisfied as to its probative value given its form and content. The information contained therein which is of interest to the Accused is the note made by the author that, at the end of an interview with the Witness and Mejra Fetahović, they provided him with the death certificates of their husbands, which are supposed to be attached to the “Official Note”. With regard to Abdulah Fetahović, it is noted that the death certificate was issued by a unit of the ABiH as he was returning from the defence positions of that unit at the time of his death. However, neither death certificate is in fact attached to the English translation provided by the Accused, and the author of the “Note” is unidentified by name or function. Indeed, there is no indication on the document itself that it is a record of an interview conducted by the police. The Prosecution has provided copies of the death certificates in BCS for both men, which they received at the same time as the “Official Note”, and indicated that neither of these was issued by or makes reference to the ABiH. Given the poor quality of the copies and the lack of an English translation, the Chamber cannot assess whether this is correct. There is also no indication given in the statement that it was subject to review by the Witness or Ms. Fetahović, nor is it signed by them. Furthermore, as far as Mejra Fetahović’s alleged statement is concerned, it is this Chamber’s settled practice not to admit a third person’s statement unless the veracity of its content is confirmed.

98-44A-A, Judgement, 23 May 2005, paras. 203–204); *see also* *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d’une Erreur Matérielle”, 14 June 2006, para. 2.

²⁴ Judicial Notice Decision, para. 12, citing *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2; also citing *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić’s Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009, pp. 2–3.

²⁵ Decision on Accused’s Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010, paras. 35–38; Decision on Accused’s Twenty-second, Twenty-fourth and Twenty-sixth Disclosure Violation Motions, 11 November 2010, paras. 42–43.

10. In addition, the Chamber is not satisfied that there is a proper basis for it to reconsider its earlier decision to admit the Witness's evidence pursuant to Rule 92 *bis*. The Chamber reiterates that the party requesting reconsideration of a decision is under an obligation to demonstrate that there has been a clear error in reasoning, or the existence of particular circumstances which warrant reconsideration in order to prevent an injustice. In the Motion, the Accused fails to put forward any argument which would satisfy either of these prongs, beyond stating that reconsideration is necessary to ameliorate the prejudice caused by the Prosecution's violation of its Rule 66(A)(ii) disclosure obligations. The Chamber is not, however, convinced that reconsideration of its decision to admit the Witness's evidence pursuant to Rule 92 *bis* is necessary in order to prevent injustice, despite the Prosecution's breach of its disclosure obligations. The Accused will have the opportunity to submit evidence to the effect that Abdulah Fetahović was a combatant when he was killed during the course of his defence case through bringing witnesses, such as Ms. Fetahović, or tendering documentary evidence that is sufficiently reliable and probative. Moreover, it is not clear from the "Official Note" that the Witness herself would be in a position of knowledge concerning the death certificate of Abdulah Fetahović and his status as a civilian or combatant at the time of his death, thereby warranting the cross-examination of the Witness by the Accused.

IV. Disposition

11. For these reasons, pursuant to Rule 54 and 89 of the Rules, the Chamber hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this thirteenth day of January 2011
At The Hague
The Netherlands

[Seal of the Tribunal]