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: 21 February 2012

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: **21 February 2012**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF EVIDENCE FROM THE BAR TABLE AND FOR LEAVE TO ADD EXHIBITS TO THE RULE 65 *TER* EXHIBIT LIST

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 Bar Table Motion for the Admission of Documents Relating to Deaths of Victims and Request for Leave to Add Exhibits to the Rule 65 *ter* Exhibit List with Appendix A and Confidential Appendix B" ("Motion"), filed by the Office of the Prosecutor ("Prosecution") on 25 January 2012, and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Prosecution seeks the admission of 43 documents from the bar table pursuant to Rule 89(C) of the Tribunal's Rules of Procedure and Evidence ("Rules") on the basis that they are "relevant, probative, and not unduly prejudicial to the Accused, and their admission at the bar will expedite the proceedings in this case."[1] Of the 43 documents, 12 are exhumation reports ("Exhumation Reports") and 31 are death certificates ("Death Certificates"). In addition, the Prosecution requests leave to add 12 of the Death Certificates to its Rule 65 *ter* exhibit list on the basis that they are relevant and of sufficient importance to justify their late addition.[2]

2. On 31 January 2012, the Accused filed a "Response to the Prosecution Bar Table Motion: Exhumation Reports and Death Certificates" ("Response"), submitting that although he does not oppose the admission of the Death Certificates from the bar table, he does oppose the admission of Exhumation Reports.[3] He argues that the Exhumation Reports are investigatory in nature, prepared by the "Muslim side of the conflict" and contain opinions on the manner and cause of death, as well as the identity of victims.[4] The Accused submits that admission of the Exhumation Reports from the bar table deprives him of his right to question and contest the findings found therein.[5] Further, he argues that the investigators who prepared the Exhumation Reports should have been called as witnesses for the Prosecution.[6]

II. Applicable Law

3. Rule 65 *ter* (E)(iii) of the Rules provides, *inter alia*, that the Prosecution shall file the list of exhibits it intends to offer within a time-limit set by the pre-trial Judge and not less than six weeks

[1] Motion, para. 8.
[2] Motion, para. 9.
[3] Response, paras. 2–3.
[4] Response, para. 3.
[5] Response, paras. 3, 5.
[6] Response, para. 4.

before the pre-trial conference.[7] If the Prosecution requests the addition of some items to its exhibit list after such time, the Trial Chamber may authorise this addition if it is satisfied that this is in the interests of justice.[8] In such cases, the Trial Chamber shall examine whether the Prosecution has shown good cause for its request and whether the items sought to be added are relevant and of sufficient importance to justify their late addition.[9] The Trial Chamber may also take into account other factors,[10] including whether the proposed evidence is *prima facie* relevant and of probative value to the charges against an accused.[11] Finally, the Trial Chamber must carefully balance any amendment to the Prosecution's exhibit list with an adequate protection of the rights of the accused.[12] That is, the Trial Chamber must be satisfied that amendments to the exhibit list at that stage of the proceedings provide an accused with sufficient notice, and do not adversely affect his ability to prepare for trial.[13]

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

> (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.
>
> (E) A Chamber may request verification of the authenticity of evidence obtained out of court.

5. The Chamber recalls that evidence does not need to be introduced through a witness in every circumstance and there may be instances where it may be admitted from the bar table if certain conditions are met. The most appropriate method for the admission of a document is

[7] *See also* Decision on Prosecution's Motion for Leave to File a Supplemental Rule 65 *ter* Exhibit List" ("65 *ter* Decision"), 18 March 2010, para. 7.

[8] 65 *ter* Decision, para. 7; Decision on the Second Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Mladić Notebooks), 22 July 2010, para. 7. *See Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007 ("*Popović et al*. Appeal Decision"), para. 27; *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Prosecution Motion for Leave to File a Fifth Supplemental Rule 65 *ter* Exhibit List with Annex A (Confidential), 29 August 2008, para. 10; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution's Third Motion for Leave to Amend Its Rule 65 *ter* Exhibit List, 23 April 2007, p. 3 ("*Dragomir Milošević* Decision").

[9] *Popović et al*. Appeal Decision, para. 37; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Confidential Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List, 8 May 2008 ("*Stanišić & Simatović* Decision"), para. 6.

[10] *Stanišić & Simatović* Decision, para. 6.

[11] *Dragomir Milošević* Decision, p. 3; *Prosecutor v. Popović et al*., Decision on Prosecution's Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List (Confidential), 6 December 2006, p. 7 ("*Popović et al*. Decision").

[12] *Stanišić & Simatović* Decision, para. 6.

[13] *Dragomir Milošević* Decision, p. 3.

through a witness who can speak to it and answer questions in relation thereto.[14] Admission from the bar table is a mechanism to be used on an exceptional basis since it does not necessarily allow for proper contextualisation of the evidence in question.[15] Evidence may be admitted from the bar table if it fulfils the requirements of Rule 89. Once these requirements 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.[16]

6. The Chamber also recalls its "Order on Procedure for Conduct of Trial", issued on 8 October 2009 ("Order on Procedure"), which states with regard to any request for the admission of evidence from the bar table 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.[17]

III. Discussion

7. The Chamber notes that the request to add the 12 Death Certificates to the Prosecution's Rule 65 *ter* list comes at a considerable time after the commencement of the trial proceedings. However, the Prosecution submits that the 12 Death Certificates were sent to it by the government of Bosnia and Herzegovina ("BiH") in April, September, and October 2011, in response to two specific requests for assistance pertaining to another case at the Tribunal.[18] The Chamber accepts that these 12 Death Certificates are relevant to issues in this case as specified in the Motion.[19] Therefore, the Chamber is satisfied that the Prosecution has shown good cause for its request and that the 12 Death Certificates in question are of sufficient importance to justify their late addition. In addition, the Chamber recalls that the Accused does not object to the addition of the 12 Death Certificates to the Prosecution's Rule 65 *ter* list and therefore considers that their late addition would not prejudice the Accused. Accordingly, the Chamber considers that it is in the interests of justice to add the 12 Death Certificates to the Prosecution's Rule 65 *ter* list.

8. Turning now to the admission of the Death Certificates and the Exhumation Reports from the bar table, the Chamber first recalls that the Accused has not objected to the admission of the

[14] Decision on the Prosecution's First Bar Table Motion, 13 April 2010 ("First Bar Table Decision"), para. 9.
[15] *See* First Bar Table Decision, paras. 9, 15.
[16] First Bar Table Decision, para. 5.
[17] Order on Procedure, Appendix A, Part VII, para. R.
[18] Motion, para. 9.
[19] *See* Motion, Appendix A and Confidential Appendix B.

former from the bar table. Having reviewed these Death Certificates, the Chamber is of the view that they are relevant to a number of incidents alleged in the Third Amended Indictment, including: the killing of men in the Ljubija iron ore mine in Prijedor (Scheduled Incident A10.7);[20] the people who suffocated while being transported to Manjača camp in Banja Luka (Scheduled Incident B1.2);[21] the killing of men in front of Manjača camp in Banja Luka (Scheduled Incident B1.3);[22] the killing of men at Luka camp in Brčko (Scheduled Incident B5.1);[23] the killing of men in the Dom Kulture in Pale (Scheduled Incident B14.1);[24] the killing of people in "Room 3" at Keraterm camp in Prijedor (Scheduled Incident B15.1);[25] the killing of people at Omarska camp in Prijedor (Scheduled Incident B15.2);[26] the killing of men and women taken from Omarska camp to Hrastova Glavica in Prijedor (Scheduled Incident B15.3);[27] the killing of men on Vlasić Mountain in Prijedor (Scheduled Incident B15.6);[28] the killing of men in the Čelopek Dom Kulture in Zvornik (Scheduled Incident B20.2);[29] and the killing of men in the Karakaj Technical School in Zvornik (Scheduled Incident B20.3).[30] The Chamber therefore finds that these Death Certificates are relevant to the Prosecution's case and have probative value. In addition, having analysed their contents, the Chamber is satisfied that they bear sufficient indicia of authenticity. The Chamber also finds that the Prosecution has adequately explained how they fit into its case.[31] Consequently, the Chamber finds that the requirements for Rule 89(C) of the Rules are met and the Death Certificates may be admitted into evidence. However, with respect to the Death Certificates assigned Rule 65 *ter* numbers 12686, 12870, 12875, 12879, 12880, 12881, 12882, 12883, 12887, 12888, 12891, 12896, 12898, and 12902, the Chamber notes that they contain additional information, including the location and the cause of death. Therefore, Chamber will only admit them into evidence for the limited purpose of showing that the individuals in question are dead and nothing more.

9. Turning now to the Exhumation Reports, the Chamber notes that these are reports containing findings from exhumations of mass graves in BiH. The findings made therein include

[20] Rule 65 *ter* number 23575.
[21] Rule 65 *ter* number 23249.
[22] Rule 65 *ter* number 23378.
[23] Rule 65 *ter* numbers 23571, 23572.
[24] Rule 65 *ter* number 23576.
[25] Rule 65 *ter* number 23500.
[26] Rule 65 *ter* numbers 23501, 23573.
[27] Rule 65 *ter* number 23574.
[28] Rule 65 *ter* numbers 12686, 12870, 12873, 12875, 12879, 12880, 12881, 12882, 12883, 12887, 12888, 12891, 12896, 12898, 12902, 23569 and 23570.
[29] Rule 65 *ter* number 23577.
[30] Rule 65 *ter* numbers 23578, 23579 and 23580.
[31] Motion, Appendix A and Confidential Appendix B.

the identification of the corpses as well as the time and causes of death. Some of these Reports also contain opinions as to who caused those deaths.[32] The Chamber finds that these reports are relevant to a number of scheduled incidents in the Indictment, including: the killing of people in Pudin Han in Ključ (Scheduled Incident A7.1);[33] the killing of men between the Begići and Vrhpolje bridge (Scheduled Incident A12.1);[34] the killing of people in Hrustovo village in Sanski Most (Scheduled Incident A12.2);[35] the killing of people from Budin in Sanski Most (Scheduled Incident A12.4);[36] the killing of people in Paklenik in Višegrad (Scheduled Incident A14.2);[37] the killing of men in front of Manjača camp (Scheduled Incident B1.3);[38] the killing of men in Manjača camp (Scheduled Incident B1.4);[39] the killing of detainees at the KP Dom in Foča (Scheduled Incident B8.1);[40] the killing of men in Novi Grad (Scheduled Incidents B12.1 and B12.2);[41] the killing of people in Hrastova Glavica in Prijedor (Scheduled Incident B15.3);[42] and the killing of men from Betonirka camp in Sanski Most (Scheduled Incident B17.1).[43] The Chamber finds that these Exhumation Reports are relevant to the Prosecution's case and have probative value. The Chamber is satisfied that they bear sufficient indicia of authenticity. The Chamber also finds that the Prosecution has adequately explained how they fit into its case.[44] Therefore, the Chamber finds that the requirements for Rule 89(C) of the Rules are met with respect to the Exhumation Reports.

10. The Chamber notes, however, that although documents may be admitted through the bar table if they meet the requirements of Rule 89(C), the Chamber must also be satisfied that pursuant to Rule 89(D) their probative value is not substantially outweighed by the need to ensure a fair trial. For the Exhumation Reports, which contain a combination of factual findings and opinions on the location and manner of death, as well as identifying the alleged perpetrators, the Chamber is of the view that they are not appropriate for admission from the bar table as doing so would deprive the Accused of his right to challenge the findings contained therein. The more appropriate method for admission of the Exhumation Reports would be through a witness who can speak to them and

[32] *See* Rule 65 *ter* number 13093, stating "The bodies were those of Bosniak civilians killed by Serbian paramilitary formations on 1 August 1992 in Lukavice settlement of the hamlet of Budim", p. 1; Rule 65 *ter* number 13024, stating "The bodies are those of Bosniak civilians killed in Sanski Most between June and September 1992 by Serbian paramilitary formations", p. 1.
[33] Rule 65 *ter* 13106.
[34] Rule 65 *ter* 04786.
[35] Rule 65 *ter* 13061 and 13064.
[36] Rule 65 *ter* 13093
[37] Rule 65 *ter* 12552.
[38] Rule 65 *ter* 12949.
[39] Rule 65 *ter* 13081.
[40] Rule 65 *ter* 12602
[41] Rule 65 *ter* 13648.
[42] Rule 65 *ter* 13051.
[43] Rule 65 *ter* 13024.
[44] Motion, Appendix A and Confidential Appendix B.

answer questions in relation thereto. This would also give the Accused the opportunity to cross-examine such a witness and test his or her evidence. While admission of documents through the bar table may alleviate the concerns associated with conducting an expeditious trial, those concerns do not outweigh the importance of maintaining a fair trial. The Chamber does not find the Exhumation Reports to be the proper type of evidence that may be admitted through the bar table.

IV. Disposition

11. Accordingly, the Chamber, pursuant to Rules 65 *ter* and 89(C) of the Rules, hereby:

a) **GRANTS** the Prosecution leave to add documents assigned Rule 65 *ter* numbers 23569, 23570, 23571, 23572, 23573, 23574, 23575, 23576, 23577, 23578, 23579, and 23580 to the its Rule 65 *ter* exhibit list;

b) **ADMITS** into evidence the documents assigned Rule 65 *ter* numbers 23249, 23500, 23501, 23571, 23572, 23573, 23574, 23575, 23576, 23577, 23578, 23579, and 23580;

c) **ADMITS** into evidence, under seal, the documents assigned Rule 65 *ter* numbers 12868, 12870, 12873, 12875, 12879, 12880, 12881, 12882, 12883, 12887, 12888, 12891, 12896, 12898, 12902, 23378, 23569, and 23570;

d) **REQUESTS** the Registry to assign exhibit numbers for each of these documents; and

e) **DENIES** the admission into evidence of documents assigned Rule 65 *ter* numbers 04786, 12552, 12602, 12949, 13024, 13051, 13061, 13064, 13081, 13093, 13106, and 13648.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-first day of February 2012
At The Hague
The Netherlands

[Seal of the Tribunal]