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: 1 May 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: **1 May 2012**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF EVIDENCE FROM THE BAR TABLE (HOSTAGES)

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 Related to the Hostages Component with Appendix A" ("Motion"), filed by the Office of the Prosecutor ("Prosecution") on 18 April 2012, and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Prosecution seeks the admission of 14 documents and one video from the bar table pursuant to Rule 89(C) of the Tribunal's Rules of Procedure and Evidence ("Rules").[1] The Prosecution submits that the documents and video relate to the hostages component of the case covered in Count 11 of the Third Amended Indictment ("Indictment").[2] The 14 documents fall into two general categories, namely documents emanating from the United Nations ("UN") and documents originating from the authorities of Republika Srpska ("RS"). The video, which bears 65 *ter* number 40204, contains an excerpt from a BBC television show featuring an interview with the Accused ("Video"). The Prosecution submits that it has explained the relevance, probative value, and authenticity of each document and of the Video, in addition to explaining how each fits into its case.[3] The Prosecution also sets out its arguments with respect to the Accused's objections to the admission of documents with Rule 65 *ter* numbers 01381, 09396, 09144, 13600, and 19241, which it considers to be unfounded.[4]

2. On 23 April 2012, the Accused filed the "Response to Bar Table Motion– Hostage Taking" ("Response") submitting that he has nothing to add to the objections already listed in Appendix A to the Motion.[5] However, the Accused argues that the document with Rule 65 *ter* number 01381, a UNPROFOR memorandum reporting on a conversation between the UNPROFOR Force Commander and Ratko Mladić, should have been tendered through General Rupert Smith.[6] The Accused notes that this "is part of a wider issue that is better addressed in the context of the prosecution's intercepts bar table motions".[7]

[1] Motion, paras. 1, 21.
[2] Motion, para. 1.
[3] Motion, para. 2, Appendix A.
[4] Motion, paras. 5–20.
[5] Response, para. 1.
[6] Response, para. 2.
[7] Response, para. 2.

II. Applicable Law

3. Rule 89 of the Rules provides, in relevant parts, 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.

4. While the most appropriate method for the admission of a document is through a witness who can speak to it and answer questions in relation thereto, admission of evidence from the bar table is a practice established in the case-law of the Tribunal.[8] Evidence may be admitted from the bar table if it fulfils the requirements of Rule 89, namely that it is relevant, of probative value, and bears sufficient indicia of authenticity. 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.[9] Admission from the bar table is a mechanism to be used on an exceptional basis since it does not necessarily allow for the proper contextualisation of the evidence in question.[10]

5. 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.[11]

III. Discussion

6. The Chamber has previously stated that in seeking the admission of evidence from the bar table it is incumbent upon the offering party to demonstrate, with sufficient clarity and specificity,

[8] Decision on Prosecution's First Bar Table Motion, 13 April 2010 ("First Bar Table Decision"), para. 5.
[9] First Bar Table Decision, para. 5.
[10] *See* First Bar Table Decision, paras. 9, 15.
[11] Order on Procedure, Appendix A, Part VII, para. R.

where and how each of the documents fits into its case.[12] The Chamber notes that, in the Motion, the Prosecution has explained how each document and the Video fits into its case.[13] The Chamber is satisfied with the Prosecution's explanations therein. Turning next to the Accused's objections, the Chamber notes that the Accused objects to the admission of five documents from the bar table. The Chamber will analyse each of these documents in turn.

7. First, the document assigned Rule 65 *ter* number 09396 is an order from the Accused to the Main Staff of the VRS, dated 2 June 1995. In the order, the Accused orders the release of 120 UNPROFOR personnel from VRS custody and their transport first to Pale and then onward to the Federal Republic of Yugoslavia. The Accused objects to the admission of this document from the bar table on the basis that there is no English translation in ecourt. The Chamber notes that an English translation is now available in ecourt and therefore, the objection is moot. Having conducted its own assessment, the Chamber finds that this document is relevant to Count 11 of the Indictment and has probative value.

8. The Accused also objects to the admission from the bar table of the document with Rule 65 *ter* number 13600, arguing that it is irrelevant. This document is a conveyance list dated 2 June 1995, that lists five individuals, including Hugh Nightingale, who were handed over for release by the military police in Vlasenica on 2 June 1995. The Chamber finds that this document is relevant to Nightingale's amalgamated statement, which was admitted into evidence pursuant to Rule 92 *bis* of the Rules,[14] and that it has probative value.

9. The third document assigned Rule 65 *ter* number 09144 is a letter from the UNPROFOR Canadian contingent Major-General R.R. Crabbe to Mladić on 29 May 1995, protesting against the detention of Canadian UNPROFOR and UNMO personnel. The Accused objects to the admission of this document from the bar table on the basis that it is irrelevant and that since the protests against the detention of UN personnel were well-known, there is no legitimate need for this document.[15] The Chamber finds that this document is relevant to Patrick Rechner's testimony,[16] and that it has probative value.

10. The fourth document, with Rule 65 *ter* number 19241, is a UNPROFOR situation assessment report dated 29 May 1995, which describes the detention of UNPROFOR and UNMO

[12] *See* First Bar Table Decision, para. 6.
[13] Motion, Appendix A.
[14] *See* Decision on Prosecution's Sixth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*: Hostage Witnesses, 2 November 2009, para. 33.
[15] Motion, Appendix A.
[16] T. 11074–11190 (2 February 2011).

personnel by the VRS and proposes several courses of action by the UN to resolve the situation. The Accused objects to its admission from the bar table arguing that the "analyst's speculation is irrelevant" and that it should be subject to cross-examination. The Chamber finds that the UN report is not speculative but that it presents the internal assessment of the situation by the UN. The Chamber finds that it is relevant to Count 11 and has probative value.

11. Finally, the Accused objects to the admission from the bar table of the document with Rule 65 *ter* number 01381. This document is an outgoing cable to Secretary General Kofi Annan from Crabbe on 26 May 1995, requesting information from the UN headquarters in New York and including a copy of Smith's notes on the situation after the NATO air strikes and his subsequent conversation with Mladić. The Accused objects to the admission of this document on the basis that it should have been tendered through Smith during his testimony and subject to cross-examination. While the Chamber notes that this document should preferably have been tendered through Smith during his testimony but was not, this in and of itself does not prevent it from being tendered through the bar table. As the Chamber has previously stated, although admission of a document through a witness is preferable as it provides adequate contextualisation, admitting evidence through the bar table may be used sparingly as a method of introducing evidence to fill in specific gaps in the requesting party's case at a later stage of the proceedings.[17] The information contained in this document supplements Smith's testimony and a document already in evidence[18] in terms of the situation of the UN personnel detained, the NATO air strikes, and Smith's conversation with Mladić. Furthermore, the Chamber notes that the fact that Accused did not have an opportunity to cross-examine Smith on this specific document does not prevent it from being admitted into evidence from the bar table if the requirements of Rule 89(C) are met and if the Chamber is satisfied that pursuant to Rule 89(D), its probative value is not substantially outweighed by the need to ensure a fair trial. The Chamber finds that these requirements have been met and that this document is relevant to Smith's testimony, has probative value, and its admission does not impact the Accused's fair trial rights because the Accused had ample opportunity to cross-examine Smith on these topics.

12. After having analysed the contents of the five documents above, namely documents with Rule 65 *ter* numbers 01381, 09144, 09396, 13600, and 19241, the Chamber is satisfied that they bear sufficient indicia of authenticity. Therefore, the Chamber finds that the requirements for Rule 89(C) of the Rules are met and that documents with Rule 65 *ter* numbers 01381, 09144, 09396, 13600, and 19241 may be admitted into evidence from the bar table.

[17] First Bar Table Decision, para. 9.
[18] T. 11369–11374 (8 February 2011); *see also* P2268.

13. For the remaining documents assigned Rule 65 *ter* numbers 01341, 06204, 08756, 10902, 13548, 13576, 18930, 21956, 22814, and the Video, the Chamber has analysed the contents and finds that all are relevant to Count 11 of the Indictment and have probative value. Therefore, the Chamber is satisfied that the requirements for Rule 89(C) of the Rules are met and these documents and the Video may be admitted into evidence. For the Video, however, the Chamber notes that only the first four minutes contain the relevant interview with the Accused. Therefore, the Chamber will only admit into evidence that portion of the Video, from time code 00:04 to 04:35, which contains the interview with the Accused.

IV. Disposition

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

a) **ADMITS** into evidence the documents with Rule 65 *ter* numbers 01341, 01381, 06204, 08756, 09144, 09396, 10902, 13548, 13576, 13600, 18930, 19241, 21956, and 22814;

b) **ADMITS** into evidence the portion of the Video with Rule 65 *ter* number 40204, from time code 00:04 to 04:35; and

c) **REQUESTS** the Registry to assign exhibit numbers for each of these documents and the Video.

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

Judge O-Gon Kwon
Presiding

Dated this first day of May 2012
At The Hague
The Netherlands

[Seal of the Tribunal]