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: 30 September 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: **30 September 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO ADMIT DOCUMENTS PREVIOUSLY MARKED FOR IDENTIFICATION

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 "Motion to Admit Documents Previously Marked For Identification", filed by the Accused on 6 September 2010 ("Motion"), and hereby issues its decision thereon.

1. On 8 October 2009, the Trial Chamber issued the "Order on the Procedure for the Conduct of the Trial" ("Order") in which it *inter alia* stated that any item marked for identification in the course of the proceedings, either because there is no English translation or for any other reason, will not be admitted into evidence until such time as an order to that effect is issued by the Chamber.[1]

2. On 3 September 2010, the Accused's legal advisor, Mr. Peter Robinson, informed the Chamber that an English translation of D459, which was previously marked for identification, was available and made an oral request for its admission.[2]

3. On 6 September 2010, the Chamber made an oral ruling admitting D459.[3] At this time, the Chamber also requested that in the future, for the convenience of the Chamber, the parties file a written submission covering a number of items marked for identification, when necessary.[4]

4. As a result, also on 6 September 2010, the Accused submitted the Motion, requesting that 37 documents previously marked for identification purposes now be admitted into evidence as exhibits.[5] At the time these documents had been used in the course of the proceedings no English translation was available. On 20 September 2010, the Office of the Prosecutor ("Prosecution") filed the "Prosecution Response to Motion to Admit Documents Previously Marked for Identification" ("Response"), expressing its opposition to the admission of the items marked for identification as D40, D41, D42, D163, D164, D169, D170, D171, and D222. The Prosecution has no objection to the admission of the remainder of the documents.[6]

5. On 24 September 2010, the Accused filed his "Request for Leave to Reply: Motion to Admit Documents Previously Marked for Identification" ("Request"), seeking leave to reply to

[1] Order on the Procedure for the Conduct of the Trial, 8 October 2009, Appendix A, paras. O and Q.
[2] Hearing, T. 36 (3 September 2010).
[3] Hearing, T. 6216 (6 September 2010).
[4] Hearing, T. 6216 (6 September 2010).
[5] Motion, para. 1 (MFI numbers D20, D40, D41, D42, D48, D116, D118, D155, D159, D160, D163, D164, D165, D167, D169, D170, D171, D175, D176, D181, D182, D185, D186, D187, D188, D189, D191, D193, D208, D221, D222, D245, D263, D300, D303, D308, D315).
[6] Response, para. 2.

the Response. In this Request, the Accused also withdrew his previous request to admit the documents marked for identification as D163, D164, D169, D170, and D171.[7]

6. Having been granted leave to reply, the Accused filed his reply brief on 27 September 2010, making further submissions about the relevance and/or authenticity of MFI D40, D41, D42, and D222.[8] He also submits that if MFI D42 is admitted, it is not necessary to admit MFI D40 and D41, which are extracts of that document.[9]

7. On 28 September 2010, the Prosecution submitted the "Prosecution's Request for Leave to Sur-Reply to Reply Brief: Motion to Admit Documents Previously Marked for Identification" ("Prosecution's Request").[10] The Chamber, after consideration, deems such a sur-reply unnecessary and thus denies the Prosecution's Request.

8. In making its determination on the admission of documents previously marked for identification purposes, the Trial Chamber shall consider whether the proposed exhibits satisfy the requirements of Rule 89(C) of the Tribunal's Rules of Procedure and Evidence ("Rules"), which is to say that they are relevant and of probative value. This duty applies regardless of any agreement by the parties: it remains the Chamber's province to ensure that all material tendered for admission meets the relevant standards for admission.[11] The Chamber has previously clarified the circumstances in which documents or other proposed items of evidence can be admitted through a witness. On 6 May 2010, the Presiding Judge stated that documents put to a witness but which the witness "has no knowledge of or cannot speak to" should not be admitted.[12] This is because: "[i]n addition to relevance and authenticity, the Chamber must be satisfied as to the probative value of a piece of proposed evidence, and this requires that the witness to whom it is shown is able to confirm its content or make some other positive comment about it."[13] Subsequently, in its Decision on Guidelines for the Admission of Evidence Through a Witness, the Chamber stated that it:

> must be able to assess the probative value of all tendered material, and, ultimately, it must be able to assess the weight to be ascribed to it. Neither will be possible unless the Chamber is satisfied of each agreed document's relevance, probative value, and place in either or both

[7] Request, para. 3.

[8] Reply Brief: Motion to Admit Documents Previously Marked for Identification, 27 September 2010 ("Reply"), paras. 4–6.

[9] Reply, para. 4.

[10] Prosecution's Request for Leave to Sur-reply to Reply Brief: Motion to Admit Documents Previously Marked for Identification, 28 September 2010,

[11] Decision on Guidelines for the Admission of Evidence Through a Witness, 19 May 2010 ("Decision"), para. 10. *See also Prosecutor v. Perišić*, Order on Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 29 October 2008, Annex, para. 40.

[12] Hearing, T. 1952 (6 May 2010).

[13] *See also* Decision, para. 10.

> parties' cases. Similar considerations apply to any documents offered into evidence by either party in the courtroom and to which the opposing party does not object.[14]

9. On the basis of the information provided by the Accused in the Motion, and having reviewed the documents themselves along with the relevant hearing transcripts, the Trial Chamber is satisfied as to the relevance and probative value of the following items, currently marked for identification: D48, D116, D118, D155, D159, D160, D165, D167, D175, D176, D181, D182, D185, D186, D187, D188, D189, D191, D193, D208, D221, D245, D263, D300, D308, and D315.

10. However, the Chamber is not satisfied as to the relevance and probative value of the documents marked for identification as D20, D40, D41, D42, D222, and D303, for the following reasons:

> (a) MFI D20: This document is comprised of a table, with the heading "List of Serbian Villagers Residing in Renovica Who Need To Have Their Housing And Compensation Addressed", which is five pages in the original B/C/S and four pages in the English translation. It does not bear any indication as to its origin or source. When part of the document was put to the witness, Sulejman Crnčalo, on 15 April 2010, the witness stated that he was not familiar with the relevant village (Jelak). The witness, upon questioning, did say that he knew people from another village listed in the table with certain surnames also contained in the table. However, this alone fails to establish a foundation for the admission of the document, as the witness was unable to make any substantive comment or to provide any evidence in relation to it.[15]
>
> (b) MFI D40, D41, and D42: In ecourt, D40 and D41 are one page documents in both English and B/C/S, containing information about two individuals. They do not bear any indication as to their origin or source. During the hearing on 21 April 2010, the Accused stated that these are extracts from a monograph, also in ecourt in its full version.[16] D42, in the original B/C/S version, is four-pages in ecourt, the first page of which is an emblem apparently from a unit of the Army of Bosnia and Herzegovina. The subsequent three pages, in B/C/S, are apparently extracts from the same monograph referred to by the Accused and from which D40 and D41 are extracted. However, the English version of D42 is

[14] Decision, para. 21.
[15] Hearing, T. 1226−1228 (15 April 2010).
[16] Hearing, T. 1378−11 (21 April 2010).

81 pages in ecourt, which appears to be either the full monograph, or a larger part thereof. When these three extracts were put to witness KDZ064, on 21 April 2010, the witness was not able to testify as to their contents, origin, or author.[17] Indeed, the Presiding Judge noted the lack of foundation for the document at the time D40 was marked for identification.[18] While the Accused further questioned the witness about these documents, the subsequent testimony of KDZ064 also failed to lay an adequate foundation for their admission into evidence, and at no point since then has any witness been requested or able to do so.[19] The Accused's submission, in the Reply, concerning the authenticity of D42, does not assist, as it is not evidence. Even if there were no dispute as to the authenticity of the document, it could still not be admitted through KDZ064, whose evidence did not provide a foundation for its admission.

(d) MFI D222: This document bears the title "Directive on the Defence of the Sovereignty and Independence of the Republic of Bosnia and Herzegovina" and purports to have been issued by a commander of the Bosnian Territorial Defence forces. On 26 May 2010, the document was put to the witness, Colm Doyle, who stated that he was not familiar with the events described in it. Upon further questioning, the witness stated that these events were never brought to his attention and that he did not know if these events should have been brought to his attention.[20] On 27 May 2010, the document was again put to the same witness and the witness was questioned as to what the author(s) of the document meant by using certain phrases in the document. The witness stated that he could only make assumptions as to the meaning of the phrases in question.[21] The Chamber is therefore not satisfied that a proper foundation has been laid for the admission of this document through Colm Doyle.

(e) MFI D303: This document is a portion of an article from the publication *Politika*, dated 26 March 1992. When the witness Robert Donia was questioned as to whether a certain person made a statement quoted in the article, he was unable to answer the question. The witness could merely comment on his knowledge of *Politika* in general, and stated that, based on that knowledge, he was unable to confirm the contents of the document. When questioned further as

[17] Hearing, T. 1327−1386 (21 April 2010).
[18] Hearing, T. 1327 (21 April 2010).
[19] Hearing, T. 1327–1386 (21 April 2010).
[20] Hearing, T. 2780−2781 (26 May 2010).

to statements in the document, the witness answered that he had no basis of knowledge for the contents of the publication.[22] The Chamber is therefore not satisfied that a proper foundation has been laid for the admission of this document through Robert Donia.

11. The Accused has not yet provided a full translation, as requested by the Prosecution, of documents marked for identification as D163, D164, D169, D170, and D171, and has indeed withdrawn his request that they be admitted at this time. For that reason, they will remain marked for identification until full translations are available in ecourt. When these translations are provided, the Chamber notified, and a request made for their admission, the Chamber will then consider whether they meet the criteria for admission.

Disposition

12. Accordingly, for the reasons outlined above, pursuant to Rule 89 of the Rules, the Trial Chamber hereby:

(a) **DENIES** the Prosecution's Request for Leave to Sur-Reply;

(b) **GRANTS** the Motion **IN PART** and **ADMITS** into evidence the items currently marked for identification as: D48, D116, D118, D155, D159, D160, D165, D167, D175, D176, D181, D182, D185, D186, D187, D188, D189, D191, D193, D208, D221, D245, D263, D300, D308, and D315; and

(c) **INSTRUCTS** the Registry to mark MFI D20, MFI D40, MFI D41, MFI D42, MFI D222, and MFI D303 as not admitted, removing their MFI status.

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

Judge O-Gon Kwon
Presiding

Dated this thirtieth day of September 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

[21] Hearing, T. 2863 (27 May 2010).
[22] Hearing, T. 3648−3649 (10 June 2010).