

**UNITED  
NATIONS**



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-96-21-~~A~~AR73  
Date: 16 December 1997  
Original: English

**BEFORE A BENCH OF THE APPEALS CHAMBER**

**Before:** President Gabrielle Kirk McDonald, Presiding  
Judge Lal Chand Vohrah  
Judge Rafael Nieto-Navia

**Registrar:** Mrs. Dorothee de Sampayo Garrido-Nijgh

**Decision of:** 16 December 1997

**PROSECUTOR**

v.

**ZEJNIL DELALIĆ  
ZDRAVKO MUCIĆ a/k/a "PAVO"  
HAZIM DELIĆ  
ESAD LANDŽO a/k/a "ZENGA"**

**DECISION ON PROSECUTION'S APPLICATION FOR LEAVE TO APPEAL  
PURSUANT TO RULE 73**

**The Office of the Prosecutor:**

Mr. Graham Blewitt                      Ms. Teresa McHenry  
Mr. Grant Niemann                      Mr. Giuliano Turone

**Counsel for the Appellant:**

Ms. Edina Rešidović and Mr. Eugene O'Sullivan for Zejnil Delalić  
Mr. Željko Olujić and Mr. Michael Greaves for Zdravko Mucić  
Mr. Salih Karabdić and Mr. Thomas Moran for Hazim Delić  
Mr. John Ackerman and Ms. Cynthia McMurrey for Esad Landžo

## I. INTRODUCTION

1. The present appeal concerns a motion filed by the Prosecution on 20 November 1997 seeking leave to call an additional expert witness to testify in relation to handwriting. Certain documents were seized by the Austrian Police during a search of the premises of one of the accused, Zejnil Delalić, on 18 March 1996. The documents were tendered for admission into evidence on 31 October 1997 after the Austrian police officers who had performed the search had testified and Trial Chamber II (“the Trial Chamber”) was satisfied as to the chain of custody of the documents.
2. The Prosecution seeks to prove that those documents were written and/or signed by the accused Delalić, contending that they form a crucial part of the truth-seeking process in relation to the charges of superior authority against that accused.
3. On 16 July 1997, the Prosecution filed a motion requesting, *inter alia*, that the Trial Chamber direct another accused in the present case, Zdravko Mucić, to produce a handwriting sample for the purposes of proving that he had authored a different hand-written document which was admitted into evidence on 8 July 1997. The Trial Chamber rejected that motion on 6 November 1997.
4. The Prosecution, on 18 November, provided notice to the Defence of its intention to call an expert witness to testify as to the handwriting of the accused Delalić. The Prosecution, on 20 November 1997, then filed its Motion to Seek Leave to Call Additional Expert Witness concerning Handwriting. A decision was given orally by Trial Chamber II on 3 December 1997 rejecting that motion. In the present application, the Prosecution seeks leave to appeal against that decision of Trial Chamber II.

## II. LEAVE TO APPEAL

5. Rule 73 of the Rules of Procedure and Evidence of the International Tribunal provides, *inter alia*:

Decisions on . . . motions are without interlocutory appeal save with the leave of a bench of three Judges of the Appeals Chamber which may grant such leave:

. . . .

- (b) if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally.

6. The intention contained in this sub-paragraph of Rule 73 is of great importance when bearing in mind the function of the jurisprudence of this International Tribunal which has a pioneering role in the development of international criminal law in the context of general international law. In our view, the present application may be considered of general importance to proceedings before this Tribunal and to international criminal law in general because at its heart are issues of fairness to the accused and the proper conduct of international criminal proceedings. We, therefore, have to consider whether the Prosecution has made out a case to bring this motion within the provision of this sub-paragraph of Rule 73.

### III. LEAVE TO CALL ADDITIONAL EXPERT WITNESS CONCERNING HANDWRITING

7. In the Order to Provide Notice of Expert Witnesses, issued by the Trial Chamber on 25 January 1997, the Prosecution and Defence are required to provide other parties with notice of potential expert witnesses by specified dates. Paragraph 2(iv) of that Order provides that a Party must show good cause before the Trial Chamber will allow it to call an expert witness, notice of whose testimony is given after the specified dates. The Order was made bearing in mind the “importance of an orderly and informed presentation of the facts of this case to a fair and just result”.
8. After due consideration of the submissions of the Parties, we find that the Prosecution has failed to show good cause as to why it should be permitted to call an additional expert witness at the eleventh hour in the presentation of its case. We would accordingly reject the Prosecutor’s Motion to Seek Leave to Call Additional Expert Witness concerning Handwriting and affirm the decision of Trial Chamber II of 3 December 1997. Our reasons for so doing are as follows.
9. The need to prove the authorship of the relevant documents should have come to the attention of the Prosecution in June 1997. Prosecution witness Moerbauer was one of the Austrian police officers who had discovered the documents and had identified them in his testimony on 5, 9 and 10 June 1997. Cross-examination, however, of Mr Moerbauer on 10 June 1997 revealed that it was impossible for him to have recognised the handwriting on the documents as belonging to any specific individual<sup>1</sup>. Moreover, Counsel for the Prosecution was specifically questioned on the basis of his assertion that a particular document was authored by the accused Delalić:

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<sup>1</sup> Transcript, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, 10 June 1997, pp. 3744 - 3745.

JUDGE JAN: But what is the basis for saying that this letter is written by Delalic?

MR TURONE: I was saying something about the signatures.

JUDGE JAN: Does he know the signatures? How can he say that? All he can say is that this letter was found among the folders. He doesn't know who wrote that letter and whether that letter really bears the signatures of Delalic.<sup>2</sup>

10. It was at this stage of the proceedings that the Prosecution should have been on guard and given notice of any additional expert witness it may have intended to call in relation to the handwriting of the accused Delalić. The Prosecution advances two arguments as to why it had not decided to call an additional expert witness on handwriting at an earlier stage in the proceedings. Firstly, the Prosecution explains that it "chose not to call an expert witness on the issue of handwriting because of the wealth of evidence contained in the documents themselves that shows that they are reliable, authentic, and the property of Mr. Delalić". Secondly, it submits that it had delayed seeking an additional expert witness on handwriting because it had waited until 6 November 1997 for a decision on its motion of 16 July 1997 that the Trial Chamber require the accused, Mucić, to provide a sample of his handwriting for the purpose of proving the authorship of a different document.
11. However, it is, in our view, quite clear from the quoted passages of the transcript of the hearing on 10 June 1997 that the Trial Chamber would require proof of the authorship of the documents beyond the documents *per se*. In addition, we are not persuaded by the contention by the Prosecution that its delay is justified because it was waiting for a decision by the Trial Chamber which if it had been successful would have required an accused to incriminate himself by surrendering a sample of his handwriting for comparison. This, in our view, is not an

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<sup>2</sup> Transcript, *Prosecutor v. Zejnir Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, 10 June 1997, pp. 3746-3747.

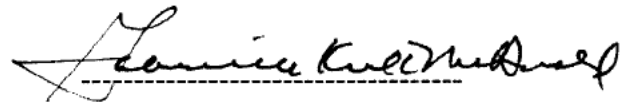
acceptable answer to the failure by the Prosecution to secure alternative and independent proof of the authorship of the documents.

12. There is also no indication that the expert witness was unavailable at an earlier time. It is now too late in the day to permit the Prosecution to reopen the issue of the authenticity of this documentary evidence without prejudicing the right of the accused to a fair trial, guaranteed in Article 21 of the Statute, Article 14 of the International Covenant on Civil and Political Rights and underscored in the order of the Trial Chamber issued on 25 January 1997.
13. We conclude that the Prosecution has failed to show good cause, as required by Paragraph 2(iv) of the order of 25 January 1997, why it should be allowed to call an additional expert witness as to handwriting where it failed to give notice of this witness within the required dates. In coming to this conclusion, we are fully conscious of the need to allow the Prosecutor all legal means necessary to prove facts to meet the most exacting standards of proof. In the present case, however, where the Prosecution is almost ready to close its case and the accused have already spent long periods in detention, we find the individual right of the accused to a prompt and fair trial to be overriding especially having regard to the fact that with greater assiduity the Prosecution could have provided this expert evidence earlier. It is our view that the Prosecution has failed to make out a case to justify the granting of leave to appeal the Decision to the Appeals Chamber.

**IV. DISPOSITION**

14. For the foregoing reasons, the BENCH OF THE APPEALS CHAMBER unanimously REJECTS the Prosecution's Application for Leave to Appeal Pursuant to Rule 73.

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



Gabrielle Kirk McDonald

President

Dated this sixteenth day of December 1997  
At The Hague  
The Netherlands.