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23 February 2007

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-95-13/1-T
	Date:	23 February 2007
	Original:	English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: **Mr Hans Holthuis**

Decision: **23 February 2007**

PROSECUTOR

v.

MILE MRKŠIĆ
MIROSLAV RADIĆ
VESELIN ŠLJIVANČANIN

DECISION ON MOTION TO REOPEN PROSECUTION CASE

The Office of the Prosecutor:

Mr Marks Moore
Mr Vincent Lunny
Ms Meritxell Regue
Mr Alexis Demirdjian

Counsel for the Accused:

Mr Miroslav Vasić and Mr Vladimir Domazet for Mile Mrkšić
Mr Borivoje Borović and Ms Mira Tapušković for Miroslav Radić
Mr Novak Lukić and Mr Momčilo Bulatović for Veselin Šljivančanin

1. This decision of Trial Chamber II ("Chamber") is in respect of the "Motion to Reopen Prosecution Case" filed confidentially by the Office of the Prosecutor ("Prosecution") on 13 February 2007 ("Motion"). In this Motion the Prosecution requests that the Chamber reopen the Prosecution case for the limited purpose of receiving as exhibits an audio recording and a transcript referred to in the Chamber's "Decision on Prosecution's Motion to Admit Evidence in Rebuttal" of 28 December 2006. On 14 February 2007 Counsel for Veselin Šljivančanin ("Defence") filed "Defence Response to the Prosecution Motion to Reopen the Prosecution Case" opposing the Motion. Counsel for Mile Mrkšić and Counsel for Miroslav Radić did not file a response to the Motion within the deadline indicated by the Chamber.

A. Background

2. On 15 December 2006 the Prosecution filed its "Motion to Admit Evidence in Rebuttal" seeking leave to present, in rebuttal to the testimony of the Accused Veselin Šljivančanin, the following evidence: (i) the *viva voce* evidence of one witness ("Rebuttal Witness"); (ii) an audio recording of an interview of the Rebuttal Witness with the Accused; and (iii) the transcript of this audio recording. On 28 December 2006 the Chamber granted this motion and ordered that the Rebuttal Witness be called to testify *viva voce*.[1] The Rebuttal Witness was not able to be served and did not appear to testify on the dates set by the Chamber. On 1 February 2007 the Prosecution filed the "Prosecution's Motion to Substitute Rebuttal Witness" seeking leave to substitute another witness for the Rebuttal Witness if the latter remained unavailable by 6 February 2007. On 6 February 2007 the Chamber denied this motion on the grounds that the expected evidence of the proposed substitute witness would not be capable of rebutting the evidence of the Accused.[2] On 9 February 2007, considering that the Rebuttal Witness remained unserved and unavailable, the Chamber declared the presentation of evidence closed.[3]

B. Law

3. Although not specifically provided for by the Rules of Procedure and Evidence ("Rules") the jurisprudence of the Tribunal has established that there are two separate circumstances in which the Prosecution may seek to introduce further evidence after the close of its case-in-chief: it may seek to introduce evidence to rebut the defence case, and it may seek to introduce new evidence by

[1] *Prosecutor v. Mrkšić et al*, Case No: IT-95-13/1-T, "Decision on Prosecution's Motion to Admit Evidence in Rebuttal" issued confidentially on 28 December 2006.
[2] *Prosecutor v. Mrkšić et al*, Case No: IT-95-13/1-T, "Decision on Prosecution's Motion to Substitute Rebuttal Witness" issued confidentially on 6 February 2007.
[3] *Prosecutor v. Mrkšić et al*, Case No: IT-95-13/1-T, "Order Closing Presentation of Evidence," 9 February 2007.

re-opening its case-in-chief.[4] Two different legal standards apply. The law on admission of evidence in rebuttal has been set out in the Chamber's "Decision on Prosecution's Motion to Admit Evidence in Rebuttal" of 28 December 2006 ("Decision of 28 December 2006") and need not be repeated here.

4. The standard for reopening of a case has been established by the Appeals Chamber, which has held that the primary consideration in determining an application for reopening a case is whether, with reasonable diligence, the evidence could have been identified and presented in the case-in-chief of the party making the application. If it is shown that the evidence could not have been identified and presented in the Prosecution's case-in-chief with the exercise of reasonable diligence, the Trial Chamber should determine as a matter of discretion whether to admit the evidence, having regard, in particular, to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings.[5]

5. Evidence proposed after the close of the Prosecution case should still meet the general requirements for admissibility of evidence of the Tribunal. The Trial Chamber must be satisfied that the proposed evidence is relevant and has probative value. While the jurisprudence of the Tribunal allows for the admission into evidence of documents from the bar table, this would normally be allowed only where the Trial Chamber is satisfied that the proposed documents are authentic and the evidence included in them is reliable. Indeed, Trial Chambers have found this method suitable for admission of official public documents, but inappropriate for admission of video recordings containing interviews with accused, especially those which contained sequences that were put together and edited by the Prosecution.[6]

C. Arguments

6. The Prosecution submits that the Chamber's Decision of 28 December 2006 allowed for the admission of three independent pieces of evidence, two of which are the audio recording and its

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[4] *See* for example *Prosecutor v. Slobodan Milošević*, Case No: IT-02-54-T, "Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex," 13 December 2005 ("*Milošević* Decision"), para 9.

[5] *Prosecutor v. Delalić et al*, Case No: IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para 283. *See* also *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No: IT-02-60-T, "Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence under Rule 92bis in its Case on Rebuttal and to Re-open its Case for a Limited Purpose," 13 September 2004 ("*Blagojević* Decision), para 8; *Milošević* Decision, para 11. Further, three factors have been identified as being "highly relevant to the fairness to the accused of admission of fresh evidence," namely: (i) the stage of the trial at which the evidence is sought to be adduced; (ii) the potential delay in the trial that admission of the evidence could cause; and (iii) the effect of bringing new evidence against one accused in a multi-defendant case (*Čelebići* Appeal Judgement, para 290; *Prosecutor v Delalić et al*, Case No: IT-96-21-T, "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case," 19 August 1998, para 27; *Blagojević* Decision, paras 10-11; *Milošević* Decision, para 10).

[6] *Prosecutor v. Stanislav Galić*, Case No: IT-98-29-T, "Decision on the Admission into Evidence of Documents Tendered from the Bar Table by the Prosecutor," 11 September 2002, p 4.

transcript proposed for admission by this Motion. It is submitted further that the admission of the audio recording and its transcript are not contingent upon the Rebuttal Witness appearing before the Chamber and have independent probative value with respect to rebutting the evidence of the Accused Šljivančanin.

7. The Defence opposes the Motion and submits that by admission of the audio recording and its transcript into evidence without the Defence being given the opportunity to test the authenticity of the audio recording and to address issues related to the weight to be given to the proposed evidence, it would be deprived of the opportunity to dispute allegations put forward by the Prosecution. It refers to earlier decisions of the Chamber where documents pertaining to certain witnesses were not admitted into evidence without the Defence being given the opportunity to cross-examine these witnesses on the respective documents. It further points out that the transcript and its translation contain numerous terminological, grammatical and translation errors.

D. Discussion

8. As a preliminary consideration it should be pointed out that in its Decision of 28 December 2006 the Chamber had been satisfied that the audio recording and a transcript of it (the documents proposed for admission in the present Motion) could be admitted. However, this was in the context that the Rebuttal Witness could identify the audio tape and the circumstances in which he claimed to have interviewed the Accused Šljivančanin and recorded that interview on the audio tape. The failure of the Rebuttal Witness to appear and give evidence has removed a fundamental basis on which the Chamber could be satisfied about the authenticity of the audio tape and the reliability and completeness of its content.

9. The Prosecution now seeks to reopen its case to be permitted to tender into evidence the same audio recording and its transcript, but without the critical evidence of the Rebuttal Witness validating the tape. If it were an authentic, reliable and complete record of an interview given by the Accused Šljivančanin in 1992 there would be no question of its admissibility. As the Chamber has already found, this evidence relates to a significant issue arising out of defence evidence which could not have been anticipated, namely that the Accused Šljivančanin in his evidence contested that he had given an interview and what is alleged to have been said during this alleged interview. He accepted that he had spoken to the Rebuttal Witness but commented that the whole of the alleged interview was a fabrication. Although not stated in this Motion, the Prosecution has previously indicated that it was first aware of the audio recording following the Accused

Šljivančanin's testimony at the trial and that it had obtained it in December 2006.[7] The Chamber is satisfied, therefore, that the proposed evidence could not have been identified and presented in the Prosecution's case-in-chief with the exercise of reasonable diligence.

10. The main issue before the Chamber, however, remains whether, in exercise of its discretion pursuant to Rules 89(C) and 89(D) of the Rules, it should allow the admission into evidence from the bar table of this audio recording and its transcript.

11. The proposed audio recording is asserted by the Prosecution to contain an audio record of an interview with the Accused Šljivančanin by the Rebuttal Witness which, it is asserted, took place in November 1992 and which, it is asserted, served as a basis for a newspaper article. This newspaper article was put to the Accused during cross-examination but he was given scant opportunity to comment on the asserted fact of giving the interview and he denied that its content, in material respects, represented his views or words. The Prosecution offers no evidence of the assertions identified or that the voice, or one of the voices on the audio recording is indeed the voice of the Accused Šljivančanin and that, if so, no parts of this recording have been deleted, added, modified, or otherwise tampered with over the approximately 15 years since, it is asserted, the interview has been recorded.

12. The Prosecution proposes that the Chamber identify for itself that the voice on the tape is the voice of the Accused Šljivančanin. That involves an expertise, especially in light of the fact that the recording is alleged to have been made some 15 years ago and is not claimed to be of high sound quality. It is in a language that the Chamber does not understand. The Chamber does not have the expertise this would require. There is no evidence to determine when, how, and by whom the recording was made nor is there evidence that the recording is of only one conversation.

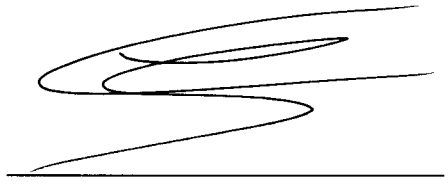
13. The audio recording is asserted to have served as a basis for a newspaper article written by the Rebuttal Witness. This article is already in evidence. It was put to the Accused Šljivančanin by the Prosecution in cross-examination but he denied that material parts of it were his words. He was not cross-examined about an asserted audio recording of the interview. In these circumstances the audio tape and its transcript, if admitted, would not provide a basis on which the Chamber could be satisfied about the truthfulness of the Accused Šljivančanin's position at the trial with respect to this newspaper article, nor could it be accepted by the Chamber as evidence of admissions by the Accused Šljivančanin.

[7] *Prosecutor v. Mrkšić et al*, Case No: IT-95-13/1-T, "Prosecution's Motion to Admit Evidence in Rebuttal with Annexes," 15 December 2006, para 6.

14. It was for these reasons that in its Decision of 28 December 2006 the Chamber allowed that the Defence be given the opportunity to test the authenticity of the audio recording and to raise issues relevant to its weight in cross-examination. In the absence of evidence capable of establishing the authenticity, accuracy and completeness of the audio recording and the proposed transcript and without giving the Defence the opportunity to test these issues in cross-examination the Chamber is not able to be satisfied that without the evidence which the Prosecution had anticipated from the missing Rebuttal Witness the proposed audio recording is of sufficient probative value to be admitted into evidence at this stage or that its admission from the bar table in rebuttal would be fair to the Accused Šljivančanin.

For the foregoing reasons and pursuant to Rules 85, 89(C) and 89(D) of the Rules the Chamber **DENIES** the Motion.

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



Judge Christine Van Den Wyngaert

Dated this twenty-third day of February 2007
At The Hague
The Netherlands

[Seal of the Tribunal]