



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-04-83-T

Date: 16 January 2008

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr. Hans Holthuis

Decision of: 16 January 2008

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON PROSECUTION SUBMISSION ON THE
ADMISSION OF DOCUMENTARY EVIDENCE**

The Office of the Prosecutor

Mr. Daryl A. Mundis
Ms. Laurie Sartorio
Mr. Matthias Neuner
Mr. Kyle Wood
Mr. Aditya Menon

Counsel for the Accused

Ms. Vasvija Vidović
Mr. Nicholas David Robson

TRIAL CHAMBER I (“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 Submission on the Admission of Documentary Evidence”, filed publicly with an annex on 28 November 2007 (“Motion”)¹ and hereby renders its Decision.

I. SUBMISSIONS

1. In its Motion, the Prosecution requests that the Trial Chamber admit into evidence a number of documents (“Proposed Exhibits”) set forth in the Annex to the Motion (“Annex”).² The Prosecution submits that the documents are “core exhibits” and that “[t]he overwhelming bulk of these documents are among those that were relied upon by the Prosecution in drafting its Pre-Trial Brief”.³

2. The Prosecution contends that the jurisprudence and practice of the Tribunal allow documents to be tendered from the bar table without being introduced through a witness.⁴ It further submits that each of the Proposed Exhibits can be linked to the Indictment (and/or its Pre-Trial Brief), as shown in the table forming part of the Annex.⁵ The Prosecution submits that it has demonstrated how each of the Proposed Exhibit relates to evidence previously adduced on the same paragraph of the Indictment and Pre-Trial Brief, and that, therefore, “the Trial Chamber may be confident that each of the Proposed Exhibits [is] reliable”.⁶ Finally, the Prosecution claims that it has met the threshold for admissibility of documents by describing the relevance and probative value of each of the Proposed Exhibits in the Annex.⁷

3. The Defence filed publicly its “Defence Response to Prosecution Submission on the Admission of Documentary Evidence” on 10 December 2007 (“Response”), whereby it requests leave to exceed the 3000 word limit and opposed the Motion in its entirety.⁸

4. The Defence submits that admission of the Proposed Exhibits would create unfairness and would be contrary to the principle of judicial economy.⁹ It stresses that admission of such a high

¹ On 10 December 2007, the Prosecution filed its “Corrigendum to Prosecution Submission on the Admission of Documentary Evidence”, submitting the correct translations of several documents contained in Annex A of the Motion.

² Motion, para. 1.

³ Motion, para. 3.

⁴ Motion, paras 4-23.

⁵ Motion, paras 2, 24.

⁶ Motion, para. 24.

⁷ Motion, para. 24.

⁸ Response, paras 3, 27. *See* Practice Direction on Length of Briefs and Motions, IT/184/Rev. 2, 16 September 2005, paras 5, 7.

⁹ Response, paras 20, 27.

number of documents would significantly prolong the trial and risk over-burdening the trial record.¹⁰ The Defence argues that, in line with the principle of orality, the accused has the right to confront witnesses testifying against him.¹¹ Moreover, the Defence submits that in the present trial the parties have generally been expected to seek the admission of documents through witnesses – a practice regulated by paragraph 22 of the Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel introduced on 24 July 2007 (“Guidelines”).¹² The Defence further submits that the admission of the Proposed Exhibits would amount to a reversal of the burden of proof as the Defence will have to call additional witnesses to rebut many of the Proposed Exhibits.¹³ As a consequence, the length of the trial might be extended significantly.¹⁴

5. Furthermore, the Defence submits that the requirements of admissibility of evidence pursuant to Rule 89(C) have not been met in respect of each and every one of the Proposed Exhibits.¹⁵ However, due to the length of the Motion and the resulting time constraints, it specifically makes reference “by way of example” to only 24 of the Proposed Exhibits.¹⁶ Finally, the Defence claims that the Proposed Exhibits “should not be admitted at this stage of the proceedings simply because the Prosecution misjudged where to focus its time and energies during its case”,¹⁷ and notes that many of the Proposed Exhibits are already in evidence.¹⁸

6. On 17 December 2007, the Prosecution filed publicly its “Motion for Leave to Reply and Reply to Defence Response to Prosecution Submission on the Admission of Documentary Evidence” (“Reply”), whereby it asks for leave to file the Reply, responds to certain challenges in the Response and agrees to withdraw 23 documents contained in the Annex to the Motion.¹⁹

¹⁰ The Defence points out that some of the Proposed Exhibits are in excess of 100 pages and the Prosecution has not specified which portions it wishes to have admitted, Response, para. 17.

¹¹ Response, para. 18.

¹² Response, para. 18. *See Prosecutor v. Rasim Delić*, Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel, 24 July 2007.

¹³ Response, para. 20.

¹⁴ Response, para. 20.

¹⁵ Response, paras 24, 27.

¹⁶ Response, para. 24.

¹⁷ Response, para. 21.

¹⁸ Response, paras 25-26.

¹⁹ Reply, paras 5-6.

II. APPLICABLE LAW

7. According to Rule 89 of the Rules, a Chamber may admit any evidence provided it is relevant and has probative value. The probative value however must not be substantially outweighed by the need to ensure a fair trial.²⁰

8. Moreover, the jurisprudence of the Tribunal establishes that evidence must be reliable in order to have probative value as defined in Rule 89 of the Rules. As such, reliability is a prerequisite to admissibility of evidence. However, “a *prima facie* showing of a document’s reliability is sufficient”.²¹

9. The Trial Chamber notes that the admission of evidence from the bar table is generally permitted by the jurisprudence of the Tribunal.²² The Trial Chamber concurs with the Trial Chamber in *Milutinović* in requiring that “the offering party must be able to demonstrate, with clarity and specificity, where and how each document fits into its case”.²³

10. The Trial Chamber recalls its Guidelines whereby it set out the procedure governing admission of evidence in this case. The relevant parts state as follows:

26. Parties should always bear in mind the basic distinction that exists between the admissibility of documentary evidence and the weight that documentary evidence is given under the principle of free evaluation of evidence. The practice will be, therefore, in favour of admissibility.

27. The admission of a document into evidence does not, in itself, signify that the information contained therein will necessarily be deemed to be an accurate portrayal of the facts. Factors such as authenticity and proof of authorship will naturally assume the greatest importance in the Trial Chamber’s assessment of the weight to be attached to individual pieces of evidence. As has previously been stated, “[t]he threshold standard for the admission of evidence [...] should not be set excessively high, as often documents are sought to be admitted into evidence, not as ultimate proof of guilt [...], but to provide a context and complete the picture presented by the evidence in general”.

28. The fact that this Trial Chamber may rule on the admissibility of a particular document or other piece of evidence will not prevent that ruling from being reversed [...]

29. There is no general prohibition on the admission of documents simply on the grounds that their purported author has not been called to testify. Similarly, the fact that a document is unsigned or unstamped does not, *a priori*, render it void of authenticity.

30. When objections are raised on grounds of authenticity or reliability, this Trial Chamber will follow the practice of this Tribunal, namely, to admit documents and/or video recordings and then

²⁰ Rule 89 (C) and (D) of the Rules; *see also* *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, paras 31, 35.

²¹ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006 (“*Milutinović* Decision”), para. 10; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Admission of Evidence, 13 July 2006, p. 5.

²² *See e.g. Prosecutor v. Kordić and Cerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 27; *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, paras 24-36.

²³ *Milutinović* Decision, para. 18.

decide on the weight to be given to them within the context of the trial record as a whole. As provided for in Rule 89(E) of the Rules, the tendering party may be requested to provide the Trial Chamber with verification of the authenticity of evidence obtained out of court. Additionally, when an objection is made on the ground of reliability, the tendering party may be required to produce sufficient indicia of reliability to make a *prima facie* case for the admission of the document, audio tape or video in question[...]²⁴

11. In addition to this, the Trial Chamber also retains discretion whether to admit each of the Proposed Documents. To that end, it must have due regard to the right of the Accused to a fair trial and the dictates of judicial economy, in particular the risk of over-burdening the trial record as well as delaying the trial proceedings.²⁵

III. DISCUSSION

12. Having carefully reviewed each and every one of the Proposed Exhibits the Trial Chamber makes the following findings.

13. The following Proposed Exhibits were dropped by the Prosecution and therefore do not form part of the Motion any longer:²⁶ P01129, P01133, P01199, P01253, P01270, P01416, P01455, P01871, P02028, P02052, P02071, P02265, P02307, P02340, P02562, P02674, P02676, P02680, P02682, P02725, P02815, P02825, P02869.

14. The following Proposed Exhibits, although described in the Annex, were not placed on the CD attached to the Motion: P01639, P01750, P01842, P01846, P01847, P01848, P01850, P01851, P01852, P01853, P01854, P01858, P01880, P01882, P01896, P01901, P01915, P02219, P02276, P02283, P02309, P02401, P02402, P02404, P02407, P02520, P02697, P03023, P05001, P05012 (file is corrupted), P06156, P06179. As the Trial Chamber was unable to review their contents, it cannot admit them into evidence.

15. The following Proposed Exhibits were attached to the Motion without proper English translation: P01187, P01687, P01954, P02070, P02091, P02108, P02118 (although saved on the CD as P02188), P02132, P02275, P02483, P02678, P02918. As the Trial Chamber was unable to review their contents, it cannot admit them into evidence.

16. The Trial Chamber is satisfied that the following Proposed Exhibits fulfil the requirements of Rule 89 and that the Prosecution has demonstrated where and how they fit into their case. They are therefore admitted into evidence: P01021, P01055, P01056, P01086, P01104, P01145, P01188, P01193, P01308, P01381, P01391, P01397, P01412, P01445, P01525, P01526, P01533, P01569,

²⁴ Guidelines, paras 26-30 (footnotes omitted).

²⁵ See *Prosecutor v. Rasim Delić*, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 94(B), 9 July 2007, p. 5.

P01614, P01685, P01702, P01802, P01803, P01805, P01806, P01820, P01825, P01849, P01861, P01868, P01869, P01917, P01924, P01929, P01976, P01994, P01999, P02027, P02041, P02047, P02069, P02093, P02102, P02120, P02130, P02140, P02148, P02182, P02257, P02266, P02267, P02297, P02311, P02318, P02326, P02329, P02330, P02331, P02332, P02333, P02344, P02365, P02392, P02393, P02412, P02437, P02448, P02455, P02461, P02467, P02468, P02474, P02475, P02476, P02478, P02488, P02493, P02509, P02513, P02517, P02525, P02585, P02586, P02589, P02602, P02636, P02655, P02657, P02712, P02713, P02730, P02752, P02778, P02782, P02844, P02867, P02922, P02938, P02944, P03039, P03063, P04038, P04076, P04088, P05002, P05003, P05004, P05005, P05007, P05009, P05010, P05013, P05015, P05016, P05017, P05018, P05019, P05020, P05022, P05023, P05024, P05025, P05026. Proposed Exhibit P03041 is admitted into evidence under seal. Proposed Exhibit P01594 is admitted into evidence subject to the Prosecution submitting the relevant B/C/S translation.

17. The following Proposed Exhibits fulfil the requirements for admission only in part: P01522 (ERN 0403-4560), P02966 (ERN 0616-1386-0616-1389, 0616-1491-0616-1494), P02967 (ERN 0616-0134, 0616-0417-0616-0420), P02968 (ERN 0616-0548-0616-0550, 0616-0796-0616-0798), P02969 (ERN 0616-1692-0616-1693, 0616-1839-0616-1840), P02970 (ERN 0616-1312-0616-1313, 0616-1258-0616-1259, 0616-1264, 0616-1266), P02971 (ERN 0616-0970-0616-0975, 0616-1052-0616-1053, 0616-1064, 0616-1114-0616-1116).

18. The following Proposed Exhibits *prima facie* lack reliability (e.g. lack of identifying features, stamps and/or signatures, which can lead to the reasonable conclusion that the said documents were nothing but drafts or/and were not sent to their purported recipients) and are therefore not admitted into evidence: P01011, P01030, P01174, P01196, P01452, P01457, P01532, P01567, P01804, P01919, P02040, P02049, P02080, P02299, P02304, P02352, P02433, P02439, P02473, P02489, P02504, P02582, P02597, P02694, P02760, P02882, P02906, P02927, P05028, P05029.

19. The Prosecution has not shown with the required clarity and specificity the relevance of the following Proposed Exhibits, *i.e.*, how they fit into its case. As a consequence they are not admitted into evidence: P01046, P01097, P01102, P01109, P01137, P01142, P01231, P01454, P01460, P01467, P01510, P01704, P01973, P02011, P02015, P02072, P02281, P02291, P02454, P02470, P02481, P02528, P02549, P02556, P02557, P02759, P02824.

²⁶ All numbers refer to the numbers on the Prosecution *65ter* list.

20. In keeping with a previous ruling,²⁷ the Trial Chamber finds that admission from the bar table of the Proposed Exhibit P02820, the purported diary of Anwar Shaaban, would result in unfairness to the Accused. It is therefore not admitted into evidence.

IV. DISPOSITION

21. For the reasons set out above, and pursuant to Articles 20, 21 and 22 of the Statute and Rules 54, 89 and 126 *bis* of the Rules, the Trial Chamber hereby

GRANTS leave to the Defence to exceed the 3000 word limit of the Response,

GRANTS leave to the Prosecution to file the Reply,

GRANTS the Motion **IN PART**,

DECIDES as follows:

- a) The following Proposed Exhibits are admitted into evidence: P01021, P01055, P01056, P01086, P01104, P01145, P01188, P01193, P01308, P01381, P01391, P01397, P01412, P01445, P01525, P01526, P01533, P01569, P01614, P01685, P01702, P01802, P01803, P01805, P01806, P01820, P01825, P01849, P01861, P01868, P01869, P01917, P01924, P01929, P01976, P01994, P01999, P02027, P02041, P02047, P02069, P02093, P02102, P02120, P02130, P02140, P02148, P02182, P02257, P02266, P02267, P02297, P02311, P02318, P02326, P02329, P02330, P02331, P02332, P02333, P02344, P02365, P02392, P02393, P02412, P02437, P02448, P02455, P02461, P02467, P02468, P02474, P02475, P02476, P02478, P02488, P02493, P02509, P02513, P02517, P02525, P02585, P02586, P02589, P02602, P02636, P02655, P02657, P02712, P02713, P02730, P02752, P02778, P02782, P02844, P02867, P02922, P02938, P02944, P03039, P03063, P04038, P04076, P04088, P05002, P05003, P05004, P05005, P05007, P05009, P05010, P05013, P05015, P05016, P05017, P05018, P05019, P05020, P05022, P05023, P05024, P05025, P05026;

²⁷ See *Prosecutor v. Rasim Delić*, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 13 November 2007, para. 17, holding that:

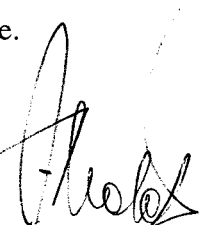
“**Luka Babić**. The Trial Chamber notes that this witness was a HVO military policeman and that his statement concerns a diary found next to the dead bodies of five Mujahedin, one of whom was the alleged EMD leader Anwar Shaaban. It appears that the evidence contained in the statement itself does not go to proof of the acts and conduct of the Accused or any of his immediate subordinates. Since the Prosecution has not sought to tender the diary, there is no need to determine its authenticity. The Trial Chamber will therefore admit into evidence the statement of Luka Babić pursuant to Rule 92 *bis*.”

- b) Proposed Exhibit P03041 is admitted into evidence under seal;
- c) Proposed Exhibit P01594 is admitted into evidence subject to the Prosecution submitting the relevant B/C/S translation;
- d) The following Proposed Exhibits are admitted into evidence in part: P01522 (ERN 0403-4560), P02966 (ERN 0616-1386-0616-1389, 0616-1491-0616-1494), P02967 (ERN 0616-0134, 0616-0417-0616-0420), P02968 (ERN 0616-0548-0616-0550, 0616-0796-0616-0798), P02969 (ERN 0616-1692-0616-1693, 0616-1839-0616-1840), P02970 (ERN 0616-1312-0616-1313, 0616-1258-0616-1259, 0616-1264, 0616-1266), P02971 (ERN 0616-0970-0616-0975, 0616-1052-0616-1053, 0616-1064, 0616-1114-0616-1116);

DENIES the remainder of the Motion; and

REQUESTS the Registry to assign exhibit numbers to the Proposed Exhibits admitted into evidence.

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



Judge Bakone Justice Moloto
Presiding

Dated this sixteenth day of January 2008

At The Hague

The Netherlands

[Seal of the Tribunal]