



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: 13 February 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: 13 February 2008

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON THE PROSECUTION'S MOTION FOR
RECONSIDERATION OF THE CHAMBER'S DECISION ON
ADMISSION OF DOCUMENTARY EVIDENCE**

The Office of the Prosecutor

Mr. Daryl A. Mundis
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Counsel for the Accused

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Mr. Nicholas David Robson

Case No. IT-04-83-T

13 February 2008

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 Motion to Reconsider ‘Decision on Prosecution Submission on the Admission of Documentary Evidence’ filed publicly with annex on 22 January 2008 (“Motion”) and hereby renders its decision.

I. SUBMISSIONS

A. Prosecution

1. In its Motion, the Prosecution requests that the Trial Chamber reconsider its “Decision on Prosecution Submission on the Admission of Documentary Evidence” (“Decision”) issued on 16 January 2008 and admit into evidence each of the documents listed in the annex to the Motion¹ which had not been admitted into evidence by the Decision. The Prosecution submits that the Decision contains errors of reasoning, and notes that the Trial Chamber has “inherent power to reconsider a previous decision”.²

2. The Prosecution argues that the Trial Chamber could not have “carefully reviewed each and every one of the Proposed Exhibits” as it stated in para. 12 of the Decision, since it was “unable to review [the] content”³ of a number of exhibits that were either not submitted or were not properly translated by the Prosecution.⁴

3. The Prosecution submits that should the Trial Chamber refuse to evaluate the reliability and probative value of the Proposed Exhibits that were missing or lacked proper translations, the result would be an incomplete trial record.⁵ The Prosecution further argues that “the Trial Chamber must not diminish the trial record and its own efforts at doing justice in this case over a simple oversight by the Prosecution”.⁶

4. The Prosecution also points to Proposed Exhibit P02927, a card issued by the Republika Srpska Office for Tracing Missing and Captured Persons which lists Marko Marić as missing. In the Decision, the Trial Chamber stated that this Proposed Exhibit *prima facie* lacked reliability for lack of identifying features, stamps and/or signatures.⁷ However, the Prosecution argues that the Trial

¹ Motion, para. 15. On 25 January 2008, the Prosecution filed its “Prosecution Corrigendum to Motion to Reconsider”, withdrawing its motion to admit Proposed Exhibits P01454 and P03023.

² Motion, para. 8.

³ Decision, paras 14 and 15.

⁴ Motion, paras 9 and 10.

⁵ Motion, para. 13.

⁶ Motion, para. 13.

⁷ Decision, para. 18.

Chamber erred in its reasoning as this Proposed Exhibit is identical in format to Exhibit 647 which was admitted into evidence during the direct examination of Goran Krčmar.⁸ Moreover, witness Goran Krčmar identified Marko Marić on a photograph which was admitted as Exhibit 648.⁹

B. Defence

5. On 30 January 2008, the Defence filed publicly the “Defence Response to Prosecution Motion to Reconsider ‘Decision on Prosecution Motion on the Admission of Documentary Evidence’” (“Response”), whereby it adopts a neutral position regarding Proposed Exhibit P02927 and opposes the remainder of the Motion.¹⁰

6. The Defence argues that the Prosecution had a duty to act with due diligence, and that the failure to provide copies of the Proposed Exhibits or proper English translations was an error on the part of the Prosecution, not the Trial Chamber.¹¹ In the absence of those documents, the Trial Chamber was unable to review or evaluate the Proposed Exhibits.¹²

7. The Defence notes that while para. 12 of the Decision could have been phrased differently, the Trial Chamber was fully aware that certain of the Proposed Exhibits had not been supplied or translated when it ruled against their admission, and as such the Prosecution has failed to demonstrate that there was an error of reasoning on the part of the Trial Chamber.¹³ As to the Prosecution’s argument that it is necessary to reconsider certain Proposed Exhibits to guard against injustice, the Defence claims that the Prosecution has not demonstrated how injustice would result from a refusal to reconsider the Proposed Exhibits in the Motion.¹⁴

8. Should the Trial Chamber decide to evaluate the Proposed Exhibits for admission, the Defence relies upon the arguments it previously raised in its response to the initial Prosecution motion to admit documentary evidence.¹⁵ As regards Proposed Exhibit P02927, the Defence leaves it to the Trial Chamber to decide whether there was any error of reasoning on its part when it decided against the admission of this document.¹⁶

⁸ Motion, para. 11.

⁹ Motion, para. 11.

¹⁰ Response, para. 15.

¹¹ Response, para. 9.

¹² Response, para. 9.

¹³ Response, paras 10 and 11.

¹⁴ Response, para. 12.

¹⁵ Response, para. 13. See *Defence Response to Prosecution Submission on the Admission of Documentary Evidence*, 10 December 2007, in particular paras 16-24.

¹⁶ Response, para. 14.

II. DISCUSSION

9. According to the jurisprudence of the Tribunal, the Trial Chamber has inherent discretionary power to reconsider a previous decision if there has been a clear error of reasoning or if particular circumstances exist that justify reconsideration in order to prevent an injustice.¹⁷ Such circumstances may include new facts or arguments that have arisen since the issuance of a decision.¹⁸

10. After careful consideration, the Trial Chamber has made the following determinations.

11. The Trial Chamber notes that the Proposed Exhibits that were not submitted or translated by the Prosecution were ruled inadmissible in the Decision because they had not been properly submitted for review.¹⁹ As the documents were ruled against solely for this reason and not on substantive grounds, there was no error of reasoning on the part of the Trial Chamber in denying admission of these Proposed Exhibits. It goes without saying that the Trial Chamber cannot and indeed will not admit documents directly into evidence which it has not seen nor had a chance to review. Furthermore, as the Trial Chamber was unable to consider the reliability and probative value of those exhibits that were not supplied or translated, it considers the relevant portion of the Motion regarding the admission of said documents to constitute a new motion for admission of evidence from the bar table rather than a motion for reconsideration. The Trial Chamber recalls in this respect the legal standards for the admission of evidence from the bar table as set out in its Decision of 16 January 2008.²⁰

12. Regarding the portion of the Motion to reconsider the refusal to admit Proposed Exhibit P02927, the Trial Chamber recalls that it found that the document *prima facie* lacked reliability due to the absence of features which would identify its author.²¹ This reasoning is still valid and the Prosecution has not shown that there was an error of reasoning on part of the Trial Chamber. For the very reason that Exhibit 647 was admitted through a witness, the Trial Chamber was fully justified to apply a different standard and reject admission of P02927 from the bar table. However, as it appears that the non-inclusion of P02927 in Exhibit 647 is the result of a mere oversight by the Prosecution, the Trial Chamber, in exercise of its discretion, in this particular instance decides to admit Proposed Exhibit P02927.

¹⁷ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.3, Confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006, para. 25, fn. 40.

¹⁸ See *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Second Decision on the Admission of Documentary Evidence submitted by the Prosecution (Dretelj and Gabela), 12 December 2007, p. 4 fn. 4 with further references.

¹⁹ Decision, paras 14 and 15.

²⁰ Decision, paras 7-11.

²¹ Decision, para. 18.

13. The following Proposed Exhibits were withdrawn by the Prosecution and therefore no longer form part of the Motion:²² P01454, P03023.

14. The Trial Chamber is satisfied that the following Proposed Exhibits fulfil the requirements of Rule 89 of the Tribunal's Rules of Procedure and Evidence ("Rules") and that the Prosecution has demonstrated how they fit into the Prosecution case. These Proposed Exhibits are therefore admitted into evidence: P01687, P01750, P01842, P01846, P01847, P01848, P01850, P01851, P01852, P01853, P01854, P01858, P01880, P01896, P01901, P01915, P01954, P02070, P02108, P02275, P02401, P02402, P02404, P02407, P02483, P02520, P02697, P02918, P05001, P05012, P06179.

15. The following Proposed Exhibits are admitted in part per the request of the Prosecution, as the proposed sections fulfil the requirements for admission: P01639 (ERN 0181-4481-0181-4482, ERN 0181-4508-0181-4509, ERN 0181-4515-0181-4516, ERN 0181-4522-0181-4522, ERN 0181-4548-0181-4548); P02118 (The portion of this document that was translated into English and provided to the Trial Chamber in the annex to the Motion will be admitted into evidence; this translation contains text for section 4 of the document).

16. The following Proposed Exhibit *prima facie* lacks reliability (*e.g.* lack of identifying features, stamps and/or signatures, which can lead to the reasonable conclusion that said document was nothing but a draft and/or was not sent to its purported recipients) and is therefore not admitted into evidence: P02091.

17. The Prosecution has not shown with the required clarity and specificity required the relevance of the following Proposed Exhibit to the Prosecution's case, and as a result, it is not admitted into evidence: P06156.

²² On 25 January 2008, the Prosecution filed its "Prosecution Corrigendum to Motion to Reconsider", withdrawing its motion to admit Proposed Exhibits P01454 and P03023.

III. DISPOSITION

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

GRANTS the Motion **IN PART**,

DECIDES as follows:

a) The following Proposed Exhibits are admitted into evidence:

P01687, P01750, P01842, P01846, P01847, P01848, P01850, P01851, P01852, P01853, P01854, P01858, P01880, P01896, P01901, P01915, P01954, P02070, P02108, P02275, P02401, P02402, P02404, P02407, P02483, P02520, P02697, P02918, P05001, P05012; P06179;

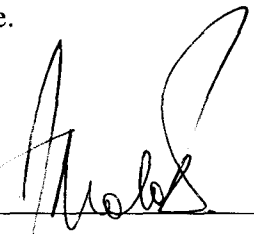
b) The following Proposed Exhibits are admitted into evidence in part:

P01639 (ERN 0181-4481-0181-4482, ERN 0181-4508-0181-4509, ERN 0181-4515-0181-4516, ERN 0181-4522-0181-4522, ERN 0181-4548-0181-4548); P02118 (The portion of this document that was translated into English and provided to the Trial Chamber in the annex to the Motion will be admitted into evidence; this translation contains section 4 of the document);

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 thirteenth day of February 2008

At The Hague

The Netherlands

[Seal of the Tribunal]