



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: 5 March 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: 5 March 2008

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR THE
ADMISSION OF DOCUMENTARY EVIDENCE**

The Office of the Prosecutor

Mr. Daryl A. Mundis
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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 “Defence Motion for the Admission of Documentary Evidence”, filed publicly with a confidential annex on 5 February 2008 (“Motion”) and hereby renders its Decision.

I. SUBMISSIONS

1. In its Motion, the Defence requests that the Trial Chamber admit into evidence 142 items (“Proposed Exhibits”) listed in Annex A to the Motion (“Annex”), including 134 documents, 1 video-clip and 7 documents previously marked for identification (“MFI” documents).
2. The Defence submits that the jurisprudence of the Tribunal generally allows documents to be tendered from the bar table without being introduced through a witness.¹ The Defence contends that it has explained the relevance and probative value in respect of each Proposed Exhibit in the Annex, and described the source of the Proposed Exhibits to the extent possible.² The Defence further submits that “[n]othing prevents the Defence from moving to admit the proposed evidence at this relatively early stage, *i.e.* prior to the start of the defence case.” According to the Defence, the early admission of the Proposed Exhibits will reduce the length of the proceedings.³ The Defence also claims that the number of Proposed Exhibits is not excessive in light of the overall number of exhibits currently on the trial record.⁴
3. On 19 February 2008, the Prosecution filed the “Prosecution Response to Defence Motion for the Admission of Documentary Evidence” (“Response”), whereby it opposes the Motion in its entirety. The Prosecution submits that the Motion was filed prematurely and that the Defence has failed to demonstrate with the required clarity and specificity how each Proposed Exhibit fits into its own case, especially because the Defence has not provided references to its Pre-Trial Brief.⁵ In addition, the Prosecution indicates specific objections to a number of Proposed Exhibits, describing how the Defence failed to demonstrate the relevance and/or reliability with respect to each of them.⁶ The Prosecution further argues that the authors of five Proposed Exhibits—D63, D64, D887, D896 and MFI59—“are not fact witnesses and [that] they clearly express opinions”. As a result, it is

¹ Motion, para. 3.

² Motion, paras 7-8.

³ Motion, para. 9.

⁴ Motion, para. 10.

⁵ Response, paras 8-9.

⁶ Response, paras 10-15 and Annex to the Response.

submitted that these documents should only be admitted pursuant to Rule 94 *bis* of the Rules of Procedure and Evidence (“Rules”) or through a non-expert witness who can verify their contents.⁷

4. On 25 February 2008, the Defence filed the “Defence Reply to Prosecution Response to Motion for the Admission of Documentary Evidence” (“Reply”), whereby it requests leave to reply and responds to certain specific challenges by the Prosecution concerning the relevance and reliability of the Proposed Exhibits.⁸ The Defence also provides information on the sources of 79 Proposed Exhibits, which had not been included in the Motion.⁹ The Defence further contends that it is not a requirement for the tendering party to make references to its own pre-trial brief.¹⁰ Regarding Proposed Exhibits D63, D64, D887, D896 and MFI59, the Defence responds that “[r]ather than being expert evidence [...], all five of these documents contain factual information that corroborates evidence given by other witnesses or contained in admitted exhibits.”¹¹

II. DISCUSSION

A. Applicable Law

5. The legal standard for the admission of evidence from the bar table has been set out in a previous ruling.¹² The Trial Chamber in particular recalls that pursuant to Rule 89 (C) of the Rules, a Chamber may admit any evidence, including evidence from the bar table, provided it is relevant and has probative value.¹³ As regards the required probative value, the Trial Chamber reiterates that evidence must be reliable in order to have probative value, although a *prima facie* showing of reliability is sufficient.¹⁴ Concerning the required showing of relevance, the Trial Chamber in its previous ruling stated that “the offering party must be able to demonstrate, with clarity and specificity, where and how each document fits into its case”.¹⁵

B. Preliminary Observations

6. The Trial Chamber disagrees with the Prosecution’s contention that the Defence in general failed to demonstrate with the required clarity how each Proposed Exhibit fits into its own case. In

⁷ Response, para. 16.

⁸ Reply, paras 1, 12-17.

⁹ Reply, para. 17 and Annex A to Reply.

¹⁰ Reply, paras 4-8.

¹¹ Reply, paras 18-21.

¹² Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008 (“Decision of 16 January 2008”).

¹³ Decision of 16 January 2008, para. 7.

¹⁴ Decision of 16 January 2008, para. 8; *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.

¹⁵ Decision of 16 January 2008, para. 9; *Milutinović* Decision, para. 18.

support of this argument, the Prosecution points out that the Defence filed the Motion prior to the commencement of the Defence case,¹⁶ and even before the Prosecution rested its case.¹⁷ It is, however, the jurisprudence of the Tribunal that “an exhibit may be admitted during a trial at any convenient time, once it is established that there is a sufficient basis on which the Chamber can be satisfied that the exhibit is apparently relevant and of probative value”.¹⁸ The Trial Chamber also notes that, during the Prosecution case, the Defence put to witnesses the nature of its case as occasion demanded, in accordance with Rule 90 (H)(ii). The Defence Pre-Trial Brief filed on 19 January 2007 also sets out the nature of the Defence case in general terms. As a consequence, the Defence case has been known to the Trial Chamber, though not comprehensively. The Trial Chamber is therefore in a position to assess whether and how each of the Proposed Exhibits fits into the Defence case.

7. Moreover, in the Annex, the Defence describes in considerable detail the purported relevance of each Proposed Exhibit. While it is true that the Defence makes no reference to its Pre-Trial Brief, it points to relevant paragraphs of the Indictment with respect to most Proposed Exhibits, and occasionally refers to relevant testimony of Prosecution witnesses and exhibits admitted in the Prosecution case. The Trial Chamber is of the view that while the offering party must clearly and specifically show how each proposed item fits into its case, it is up to the offering party to determine how to achieve this, unless specific requirements have been imposed. There are a number of ways to make such a showing, including through references to the indictment, to the offering party’s pre-trial brief, to relevant exhibits and witnesses’ testimony already in evidence, and to future witnesses to whom the offering party plans to show proposed items.¹⁹ The more detailed information the offering party provides to the Trial Chamber, the more persuasive the offering party’s arguments for admission will be. However, the absence of such references will not in and of itself render proposed items irrelevant or inadmissible.

¹⁶ In particular, the Prosecution emphasises that the Motion was filed prior to the opening statement of the Defence, and prior to the filing of the Defence witness list. The witness list was filed on 19 February 2008, and the opening statement was made on 4 March 2008.

¹⁷ The Prosecution rested its case on 10 February 2008.

¹⁸ *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Decision on Prosecution’s Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E, 14 May 2007, para. 10.

¹⁹ In this regard, the specific requirements imposed in the following jurisprudence could be of guidance, although they are not prerequisites in the present case: *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Order on Prosecution’s Motion to Admit Documentary Evidence with Annexes, 6 June 2006, p. 2; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision Amending the Decision on the Admission of Evidence Dated 13 July 2006, 29 November 2006, p. 8; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Admission of Documentary Evidence Relating to Prozor Municipality, 20 February 2007, p. 3.

C. Decision on Admissibility

8. Having carefully reviewed each and every one of the Proposed Exhibits, and fully taking into account the parties' arguments on each of them, the Trial Chamber makes the following findings.

9. The Trial Chamber is satisfied that the following Proposed Exhibits fulfil the requirements of Rule 89 and that the Defence has demonstrated where and how they fit into their case. They are therefore admitted into evidence: D12, D54, D55, D83, D210, D224, D229, D230, D231, D243, D367, D368, D369, D395, D443, D553, D589, D611, D651, D652, D710²⁰, D722, D724, D727, D804, D805, D807, D809, D810, D812, D813, D814, D816, D818, D821, D823, D826, D827, D828, D829, D830, D832, D833, D834, D835, D836, D837, D839, D840, D841, D842, D843, D844, D845, D846, D847, D849, D850, D852, D853, D854, D855, D856, D857, D858, D859, D860, D863, D864, D865, D866, D867, D868, D869, D870, D871, D872, D873, D874, D875, D876, D877, D878, D879, D880, D882, D885, D888, D889, D890, D891, D892, D893, D894, D897, MFI144, MFI686, MFI972²¹.

10. D306 bears neither a signature nor a stamp and could therefore be denied admission for lack of identifying features.²² However, this document is part of the 942-page compilation of minutes and transcripts of the RBiH Presidency sessions (MFI308).²³ Witness Zdravko Đuričić testified to the Presidency sessions and how the transcripts and minutes of those sessions were taken.²⁴ Considering the volume of this compilation, it was marked for identification in order for the parties to make selections of relevant portions and tender them into evidence, as the need arises.²⁵ Having this procedural background in mind, the Trial Chamber is satisfied of the *prima facie* reliability and relevance of D306. However, it should be noted that the BCS version of D306 submitted to the Trial Chamber appears to be incomplete when compared with the English translation. D306 is

²⁰ Regarding D710, the Trial Chamber recalls that this document was once shown to witness Muris Hadžiselimović in court by the Defence, but later withdrawn following the objection by the Prosecution mainly on the ground that the witness had no link with the document. In its Response, the Prosecution does not raise any specific objection in relation to this document. The Trial Chamber is satisfied that D710 is relevant and of probative value.

²¹ Regarding MFI144, MFI686 and MFI972, the Trial Chamber recalls that these documents were tendered in court by the Defence and marked for identification following the objections by the Prosecution mainly on the ground that the witnesses who were shown these documents had never seen them before (T. 1129, T. 1131-1134, T. 4923, T. 6753-6755). In its Response, the Prosecution does not raise specific objections to the relevance of the three documents. With the Defence having supplemented information on the sources of MFI144 and MFI686, the Trial Chamber is satisfied that they are relevant and of probative value.

²² On this basis, the Prosecution opposes the admission of this document, Response, para. 12, footnote 18 and Annex to the Response.

²³ This compilation has not been admitted into evidence, although the Defence appears to have understood that it was admitted into evidence as Ex. 308. *See* Reply, para. 15.

²⁴ T. 2069-2078, 2102-2103, 2107-2111.

²⁵ T. 2078-2085.

therefore admitted into evidence only subject to the Defence submitting the unabridged BCS version.

11. 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 and/or were not sent to their purported recipients). They are therefore not admitted into evidence: D58, D59, D61, D62, D142, D170, D251, D616, D817, D819, D820, D824, D825, D831, D848, D851, D861, D884, D886, D898, MFI814²⁶.

12. Of the Proposed Exhibits which have sufficient indicia of *prima facie* reliability, the Defence 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: D186, D797, D798, D799, D800, D801, D802, D803, D811, D815²⁷, D822, D862, D883, VD25, MFI991²⁸.

13. D895 is a purported list of members of the 7th Muslim Brigade from 1992 to 1995, which appears in a book by Taib Terović, entitled “the Seventh”. Although the Trial Chamber finds this document to be relevant to the Defence case, it is unable to rely on the information contained in the list not knowing where and how the author acquired this list, and/or how this list was made.²⁹ The Trial Chamber therefore considers that D895 *prima facie* lacks reliability. D895 is not admitted into evidence.

14. D63, D64, MFI59 are excerpts from a book entitled “Al-Qaida’s Jihad in Europe”, authored by Evan Kohlmann, who was initially listed in the Prosecution’s witness list as an expert witness specialised in the “Mujahedin”³⁰ but later dropped. D887 is a 25-page article by Evan Kohlmann published on the internet;³¹ and D896 constitutes excerpts of a book entitled “Al Qaeda in Europe” by Lorenzo Vidino. All these documents discuss leaders of the “Mujahedin” and/or their connection with entities outside Bosnia and Herzegovina, and are therefore relevant to the Defence case.

²⁶ As regards MFI814, the Trial Chamber notes in addition that witness Fuad Zilkić repudiated the contents of this document in court. For this reason, the Trial Chamber ruled at that time that it was not admitted into evidence, T. 5439, 5441.

²⁷ Regarding D815, the Trial Chamber notes that the date of this document is unclear due to the poor quality of the copy. In the absence of a date, the Trial Chamber is unable to assess its relevance to the Defence case.

²⁸ Regarding MFI991, the Trial Chamber recalls that this document has been marked for identification following an objection by the Prosecution on the ground that witness Ivan Negovetić neither confirmed its content nor was affiliated with the entity from which the document originated, T. 6821-6826. The Trial Chamber is still not satisfied as to the relevance of this document.

²⁹ See also the Prosecution’s objection to the admission of this document, Response, para. 12, footnote 18 and Annex to the Response.

³⁰ Prosecution Submission Pursuant to Rule 65 *ter*, Annex C, Prosecution Witness List, 31 October 2006.

³¹ See also Corrigendum to Defence Motion for the Admission of Documentary Evidence, 18 February 2008.

However, as the Prosecution asserts,³² the contents of these documents appear to be based on research of the authors, not on their direct experience. Since the Trial Chamber has not been provided with sufficient information on the background of the authors or how they became acquainted with details contained in the documents, it is not able to further assess the reliability of their contents. The Trial Chamber thus is not satisfied of the *prima facie* reliability of D63, D64, D887, D896 and MFI59, unless further testimony is provided by a witness.³³ These documents are not admitted into evidence.

15. MFI651 is a signed and stamped letter from the Ministry of Defence of Bosnia and Herzegovina to the Office of the Prosecutor of this Tribunal, enclosing information on 49 individuals who reportedly went missing or were killed in September 1995 in the Ozren/Vozuća region. The Trial Chamber recalls that this document was shown in court to witness Goran Krčmar, who insisted that he had never seen it, repudiated its accuracy and validity, and refused to further comment on it.³⁴ The Trial Chamber ruled that the *prima facie* reliability of this document was not established since “it [had not] been authenticated”, and that another witness would be necessary to authenticate it.³⁵ Since then, this document has never been put to any witness. This ruling therefore stands. Accordingly, MFI651 is not admitted into evidence, without another witness testifying to it and confirming its authenticity.

16. Finally, the Trial Chamber recalls that its rulings on admissibility of the Proposed Exhibits may be reversed during the Defence case,³⁶ when the Defence has an opportunity to tender through witnesses the Proposed Exhibits which were not admitted into evidence in this Decision.

III. DISPOSITION

17. 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 hereby

GRANTS leave to the Defence to file the Reply,

GRANTS the Motion **IN PART**,

DECIDES as follows:

³² Response, paras 16-17.

³³ Regarding MFI59, the Trial Chamber notes that this document was not admitted into evidence in court for the reason that witness Andrew Hogg who was shown this document could not confirm its contents, T. 350-353.

³⁴ T. 4592-4600, 4604-4609. *See also*, Annex to the Response, which makes references to this testimony.

³⁵ T. 4609-4612, 4614.

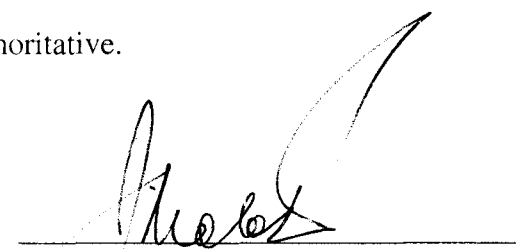
³⁶ Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel, 24 July 2007, Annex, para. 28.

1. The following Proposed Exhibits are admitted into evidence: D12, D54, D55, D83, D210, D224, D229, D230, D231, D243, D367, D368, D369, D395, D443, D553, D589, D611, D651, D652, D710, D722, D724, D727, D804, D805, D807, D809, D810, D812, D813, D814, D816, D818, D821, D823, D826, D827, D828, D829, D830, D832, D833, D834, D835, D836, D837, D839, D840, D841, D842, D843, D844, D845, D846, D847, D849, D850, D852, D853, D854, D855, D856, D857, D858, D859, D860, D863, D864, D865, D866, D867, D868, D869, D870, D871, D872, D873, D874, D875, D876, D877, D878, D879, D880, D882, D885, D888, D889, D890, D891, D892, D893, D894, D897, MFI144, MFI686, MFI972;
2. D306 is admitted into evidence subject to the Defence submitting the unabridged BCS version.

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 fifth day of March 2008

At The Hague

The Netherlands

[Seal of the Tribunal]