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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-04-83-T

Date: 24 April 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: **24 April 2008**

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

REASONS FOR ORAL DECISION ON ADMISSION OF EXHIBITS 1316 AND 1317

The Office of the Prosecutor

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1. Trial Chamber I 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") has been ordered by the Appeals Chamber of the Tribunal to further consider a previous oral decision on the admission of two documents.[1] On 21 April 2008, the Trial Chamber by majority –Judge Harhoff dissenting– rendered its new oral decision based on further consideration as directed by the Appeals Chamber ("Oral Decision").[2] The majority's reasons for this Oral Decision are set out below. Judge Harhoff appends reasons for his dissenting opinion.

A. Background

2. At the hearing of 17 March 2008, in the course of the cross-examination of the Defence witness Hajrudin Hubo, the Prosecution confronted the witness with two documents that had not been included on its list of exhibits ("Rule 65 *ter* List"). The Defence objected on the ground that allowing the Prosecution to use such exhibits and admitting them as evidence probative of guilt after the close of its case would infringe the right of the Accused to have adequate time for the preparation of his defence.[3] The Trial Chamber overruled this objection by the Defence and proceeded to admit these documents as exhibits 1316 and 1317. On 18 March 2008, the Trial Chamber granted the Defence request for leave to appeal against its decision admitting the two exhibits.[4]

3. On 15 April 2008, the Appeals Chamber issued the "Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317" ("Appeals Chamber Decision"), wherein the Trial Chamber was ordered to clarify the purpose of the admission of exhibits 1316 and 1317 and to consider what measures, if any, need to be taken to ensure that the fair trial rights of Rasim Delić ("Accused") are protected. The Trial Chamber was also directed to take "any action it deems appropriate as regards the quotation of private session transcript pages in the [Defence] Appeal".[5]

4. On 16 April 2008, the Defence addressed a letter to the Trial Chamber in which it apologises for the inadvertent quotation of private session material in their submissions on appeal.

[1] Transcript pages (T.) 7718 and 7720.
[2] T. 8755. *See also* "Corrigendum to Oral Order on 21 April 2008," issued on 24 April 2008.
[3] T. 7703 – 7704, 7707 – 7709, 7713 – 7716, 7718.
[4] T. 7728 – 7729.
[5] Appeals Chamber Decision, para. 24.

B. Discussion

5. As a preliminary point, the Trial Chamber accepts that the quotation of confidential material in the Defence submissions on appeal was the result of an oversight. Given that the Appeals Chamber has already ordered the Registry to withdraw the public version of that filing from circulation, the Trial Chamber considers it sufficient to order that it be re-filed confidentially.

6. In accordance with the directions given by the Appeals Chamber, the Trial Chamber has reconsidered the admission of exhibits 1316 and 1317 and determined in its Oral Decision rendered on 21 April 2008, that they be expunged from the record of the trial.[6]

7. A review of the transcript of the proceedings of 17 March 2008 revealed that the Prosecution sought admission of exhibit 1316 for various purposes including the truthfulness of their contents, and that it was not limited to impeachment of the witness' credibility.[7] The Trial Chamber found that the same, although not clearly expressed, went for exhibit 1317.[8] The question of impeachment was dealt with during cross-examination and clearly recorded in the transcripts.[9] Therefore, the only purpose for which the exhibits could be admitted into evidence would be for the truthfulness of their contents.

8. The Trial Chamber was thus called upon to determine whether admission of these two exhibits for matters going to the truthfulness of their contents is consistent with the rights of the Accused. Rule 89 (C) of the Rules of Procedure and Evidence ("Rules") entitles a Chamber to "admit any relevant evidence which it deems to have probative value" and that in doing so, a Chamber enjoys considerable discretion provided that the rights of an accused to a fair trial are ensured.[10]

9. In accordance with the sequence envisaged by the Rules for the presentation of evidence in trials taking place before the Tribunal, the Trial Chamber holds that, "[u]nless otherwise directed by the Trial Chamber in the interests of justice,"[11] the Prosecution may not seek to introduce new incriminating evidence during cross-examination.

10. As a consequence, the Trial Chamber reconsidered its decision to admit exhibits 1316 and 1317 and held that in the circumstances of this case: (i) where the exhibits had been tendered for the

[6] T. 8755. In this Oral Decision, the Trial Chamber by majority also ordered that Exhibits 1375 and 1376, which had been admitted contingent on the outcome of the appeal, be expunged from the trial record. The reasoning set out in the present written decision applies *mutatis mutandis* to those two exhibits.
[7] T. 7706, 7717 – 7718.
[8] T. 7719 – 7720.
[9] T. 7717 – 7720.
[10] Appeals Chamber Decision, para. 20.

truthfulness of their contents; and (ii) where the exhibits had been disclosed to the Defence shortly before the commencement of cross-examination, such admission resulted in prejudice to the fair trial rights of the Accused. The only way to remedy the prejudice at the present stage would be to afford the Defence additional time to prepare and recall some witnesses for further examination or cross-examination. Given that the trial had progressed to virtually the end of the Defence case, the Trial Chamber considered that this remedy would not be in the interests of a fair and expeditious trial. Thus, the Trial Chamber found that it was not in the interests of justice to admit the two exhibits in question.

C. Disposition

11. For the foregoing reasons, and pursuant to Article 21 of the Statute, as well as Rules 54, 85, 89 and 95 of the Rules, the Trial Chamber:

1) **DIRECTS** the Registry to re-file confidentially the "Defence Interlocutory Appeal Against Trial Chamber Decision to Admit Exhibits", filed partly confidentially on 25 March 2008; and

2) By majority, Judge Harhoff dissenting, **DECIDED** in its Oral Decision on 21 April 2008 that exhibits 1316 and 1317 shall be expunged from the trial record.

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

Judge Bakone Justice Moloto
Presiding

Dated this twenty-fourth day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

[11] Rule 85 (A) of the Rules.

DISSENTING OPINION OF JUDGE HARHOFF

1. I respectfully take issue with the majority's finding in the present Decision that the Prosecution cannot introduce "new incriminating evidence during cross-examination" of a Defence witness.[12]

2. The majority argues that because the new evidence was tendered for probative purposes relating to the responsibility of the Accused, *i.e.* for purposes other than just refreshing the witness's memory or challenging his credibility, and because it had only been disclosed to the Defence shortly before the examination-in-chief of the witness, it would impair the rights of the Accused to admit these documents at this late stage. The majority adds that assigning more time for the Defence in order to make up for the prejudice caused by this late introduction of new evidence would run contrary to the interests of justice and the right of the Accused to an expeditious trial.

3. The principle upon which the majority relies seems to be that the Prosecution is required to show all of its evidence during the presentation of its case and that once the Prosecution's case is closed, no new incriminating evidence can be introduced by that Party, except in two instances where new material has been discovered, or where Prosecution evidence is introduced at the final rebuttal stage.[13] I do not think, however, that this is an accurate reflection of the procedural rules that apply at present in this Tribunal, nor is it a reasonable principle to govern the presentation of evidence by the Office of the Prosecutor.

4. In my respectful submission, new incriminating evidence can be introduced during cross-examination where that evidence is *relevant* to the Prosecution's case, has *probative value* and is *related or linked to the witness* in the sense that the witness has signed or authored a document, is mentioned therein or otherwise has firsthand knowledge of the document's contents and is able to comment directly thereupon. Two questions arise.

5. The *first* question relates to the circumstances under which new incriminating evidence can be tendered by the Prosecution during cross-examination. Rule 85 of the Rules establish the normal order in which evidence is to be presented during trial: *first* the Prosecution's evidence and *then* the Defence's – unless the interests of justice suggest otherwise.[14] However, this sequence merely sets out the main stages of the trial (a case for the Prosecution followed by a case for the Defence), but it

[12] See paragraph 9 of the present Decision. This principle is derived from the Common Law system which distinguishes between Prosecution and Defence cases during trial.
[13] In using the term "new incriminating evidence", I am excluding "new" material which only goes to refresh the witness' memory or test his credibility and which cannot be admitted into evidence. In these instances, the problem of prejudice does normally not arise.
[14] Evidence in rebuttal and rejoinder may then follow before evidence introduced by the Chamber itself, along with evidence regarding sentencing.

does not regulate the presentation of evidence during examination-in-chief and cross-examination of witnesses during these stages.

6. Rule 85 has to be understood in light of other Rules governing the admission of evidence in the Tribunal. Rule 89(A) reminds that the Tribunal is not bound by any national rules of evidence and Rule 89(C) allows a Chamber to admit any relevant evidence which it deems to have probative value. Rule 90(H)(i) further establishes that cross-examination, as a starting point, shall be limited to the subject matter of the examination-in-chief and matters affecting the credibility of the witness, but the Rule then goes on to say that the cross-examining Party may go beyond that and introduce *other* matters that are relevant to the case of that Party.

7. According to Paragraph A.a.1. of the Chamber's "Procedural Guidelines" of 24 July 2007, both Parties are requested to provide to the other Party (and to the Chamber) a list of the documents it intends to use for the *examination-in-chief* of each witness at least two working days before the start of the testimony. However, a similar requirement was deliberately *not* included for the cross-examinating Party because the Chamber realized that it would be almost impossible for that Party to anticipate in advance which issues would be brought up during examination-in-chief of the witness. The cross-examining Party, thus, would be unable to exhaustively select all of the documents it intends to bring up *before* it had heard the witnesses principal testimony.

8. These Rules suggest that the Prosecution is not necessarily compelled to list all of its evidence prior to the commencement of the Defence case. The Prosecution, in other words, may tender a piece of evidence deemed to be relevant and have probative value regardless of when or how it is tendered.

9. In the Tribunal's judicial practice, the Prosecution has already for a long time been allowed to introduce new incriminating evidence during cross-examination when this material is relevant to the case, has probative value in respect of the Indictment and is related to the witness. In the *Slobodan Milošević* trial, the Trial Chamber had refused to admit material presented by the Prosecution during cross-examination of Defence witnesses who had either rejected the material outright or were unable to say anything meaningful about it. However, the Trial Chamber acknowledged that the:

> "Prosecution may put material to Defence witnesses, so long as it does so in accordance with Rule 90(H) of the Rules, but this does not allow it to have that material admitted into evidence *where no basis for its admission has been made out.*" (italics added)[15]

The Chamber went on to say that:

[15] See paragraph 9 in the Trial Chambers Decision of 17th May 2005 on "Prosecution Motion for Reconsideration Regarding Evidence of Defence Witness Mitar Balević, Vladislav Jovanović Vukašin Andrić and Dobre Aleksovski"; in *The Prosecutor v. Slobodan Milošević* (Case no. IT-02-54-T).

> "The principal reason for the Trial Chamber's ruling [to deny admission], as discussed above, is that the Prosecution case has now closed and that it cannot seek the admission of material *on a freestanding basis* during the course of the Defence case to challenge Defence evidence." (italics added)[16]

The *Milošević* Decision suggests that *if* the new material put to the witness by the Prosecution during cross-examination is relevant to its case, has probative value in respect of the Indictment and is clearly related to the witness, *then* such evidence is admissible.[17]

10. The larger problem, of course, is that the Defence may suffer prejudice by allowing the Prosecution to introduce new incriminating evidence after it has closed its case, and I am very much aware of this risk. However, the best way to alleviate this concern, in my view, is to provide for adequate procedural compensation. If this can be done by allowing the Defence additional time to prepare for and conduct its examination-in-chief of the witness while the witness is still there, or perhaps to recall the witness at the end of its case, that would best favour the interests of justice. This is not a free access for the Prosecution to re-open its case, but a limited possibility to put to a witness a relevant, probative and related document during cross-examination.[18]

11. In the instant case, I am unsure about the additional time for examination-in-chief the Defence would have required to counter this new evidence if the Chamber had so proposed, but I do not believe – given the nature of these documents – that much additional time would have been needed or that it would have been contrary to the interests of justice to allow the Defence such extra time. I was therefore favourable to admitting these four documents.

12. The *second* question is whether new material must appear on the Prosecution's 65*ter*-list before it can be tendered. This list has to be submitted no less than 6 weeks before the pre-trial conference, long before the Prosecution has any idea about which witnesses the Defence will eventually call at trial. At that early stage of the proceedings it is virtually impossible for the Prosecution to identify just which documents it will need to tender at trial many months or even sometimes years ahead. The Prosecution is frequently, if not always, asked by the Judges during the pre-trial phase in each case to *reduce* its 65*ter*-list, and it would be an unwarranted limitation on the Prosecution's ability to make its case if the Judges were now to say that it could only tender

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[16] *Ibidem*, paragraph 17.

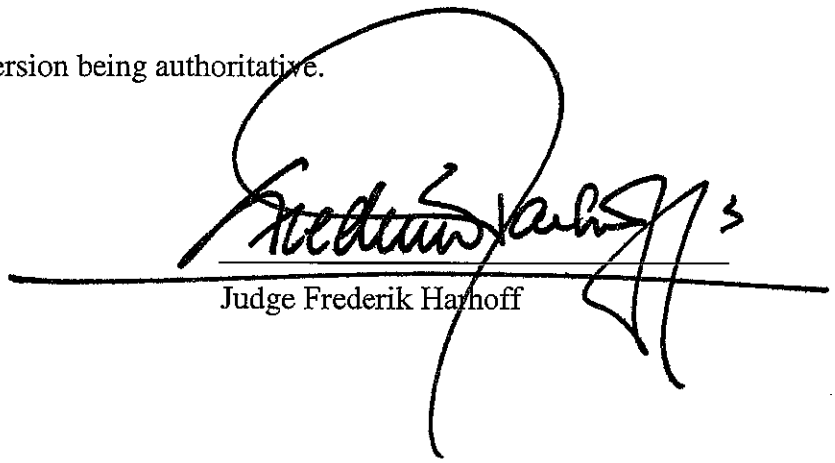
[17] If, for instance, the secretary of an accused general is examined in-chief by the Defence about three meetings in which the general took part in the presence of the secretary, should the Prosecutor then not be allowed to cross-examine the witness also about a fourth meeting – and to put to the witness, say, the minutes of this other meeting taken by the witness?

[18] In the instant case, Exhibits 1316 and 1317 were two short certificates *signed* by the witness to verify that 2 named Arabs, respectively, had been members of the Army of Bosnia and Herzegovina's Unit VJ 5689 (the *El Mujahid Detachment*, the EMD). Exhibit 1375 was the ABiH Book of Rules on Acknowledgements and Incentives, while Exhibit 1376 was a document *authored* by the witness awarding "Commendations" to a number of units and individual soldiers, including the EMD and some of its members. These four exhibits did not appear to be of crucial importance for either Party in addition to the evidence that had already been admitted, but they were relevant to the Prosecution's

material listed prior to the trial, or subsequently admitted by the Trial Chamber's leave. The effect of such requirement would be that the Prosecution would feel obliged to include *all* of its material right away in its 65*ter*-list, which in turn would be counter-productive.

13. The implication of allowing the Prosecution to tender non-listed evidence, obviously, is that the very purpose for which the list is produced becomes diluted. If the list is supposed to be binding on the Prosecution at trial, this has to mean that *only listed material can be tendered for admission*. However, in light of the nature of the trials before this Tribunal, including the length of our proceedings, the number of witnesses, the enormous amount of evidence and the hybrid mixture of our procedures, the 65*ter*-lists cannot, in my submission, be ultimately binding on the Prosecution to the effect that non-listed evidence can never be tendered under any circumstance. Hence I find that the four documents, in the instant case, could have been tendered and admitted into evidence.

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



Judge Frederik Harhoff

Dated this twenty-fourth day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

case, connected to the witness and did have probative value. They were, furthermore, announced to the Defence a couple of hours before the witness were to appear for cross-examination.