



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: 9 May 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: 9 May 2008

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADMIT
DOCUMENTS IN 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

1. 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 Admit Documents in Evidence”, filed publicly with two public annexes on 11 April 2008 (“Motion”) and hereby renders its Decision.

I. SUBMISSIONS

2. In its Motion, the Prosecution moves that the Trial Chamber admit into evidence eight items of correspondence between the Office of the Prosecutor (“OTP”) and the relevant authorities of Bosnia and Herzegovina as well as Republika Srpska (“Proposed Documents”) concerning the exhumation of the bodies of the men listed in Annex C of the Indictment.¹

3. In support of its Motion, the Prosecution submits that:

- a) The Proposed Documents were the subject of the “Prosecution Fifth Motion for Leave to Amend its Exhibit List” that was granted by the Trial Chamber on 27 November 2007. As a consequence, “the Defence has been on notice of the Prosecution’s intention to tender these documents into evidence”.²
- b) The Proposed Documents negate the validity and accuracy of the information concerning exhumations that is set forth in Exhibit 651,³ which was admitted into evidence on 3 April 2008.⁴ As a consequence “[the Proposed Documents] simply would not have been relevant if admitted at any other time”.⁵
- c) Any anticipated argument of the Defence claiming to discredit Mr Jovičić, the Republika Srpska Liaison Officer to the Tribunal, is irrelevant as he was “simply the conduit through which the letter [forming part of the Proposed Documents] was sent to the OTP”.⁶

¹ Motion, paras 1, 9, 14.

² Motion, paras 6, 9, 11.

³ Ex. 651 is a signed and stamped letter from the Ministry of Defence of Bosnia and Herzegovina to the OTP, enclosing information on 49 individuals who reportedly went missing or were killed in September 1995 in the Ozren/Vozuća region. The document states that 24 bodies were exhumed. The Documents now proposed by the Prosecution purport to show that only 7 bodies were exhumed, and that the figure given in Ex. 651 is an effect of a mistake made by the employees of the former Ministry of Defence of Republika Srpska. See Proposed Documents, the letter from Mr Jovan Spaić of the RS Secretariat for Cooperation dated 19 April 2007.

⁴ The Trial Chamber notes that the Prosecution tried to introduce the Proposed Documents during its cross-examination of witness Izet Karahasanović on 4 April 2008 but was invited by the Trial Chamber to file its Motion in written form, T. 8143-8146.

⁵ Motion, paras 2, 8, 10, 12.

⁶ Motion, para. 13.

4. On 22 April 2008, the Defence filed the “Defence Response to Prosecution Motion to Admit Documents into Evidence”, with public Annex A and confidential Annex B (“Response”), whereby it opposes the Motion, or alternatively requests the admission of the two memoranda – D1072 and D1096 contained in Annexes A and B (“Memoranda”).⁷

5. In support of its objection, the Defence submits that:

- a) The Prosecution was put on notice that the Defence would rely on the information contained in Exhibit 651, particularly after Mr Krčmar’s testimony on 25 and 26 October 2007, when the Defence unsuccessfully sought its admission.⁸ The Prosecution is therefore incorrect in saying that the Proposed Documents “simply would not have been relevant if admitted at any other time”.⁹
- b) As the information contained in Exhibit 651 relates to matters probative of guilt, under Rule 85 of the Rules of Procedure and Evidence (“Rules”), the Prosecution had a duty to seek admission of the Proposed Documents during its case. The admission of the Proposed Documents at this stage, after the Defence closed its case, would be materially prejudicial to the Defence as the Defence will have no opportunity to call witnesses to counter this evidence.¹⁰
- c) The Proposed Documents have no probative value as the “key document among [them] [being] the letter from Mr Jovan Spaić of the RS Secretariat for Cooperation dated 19 April 2007” is confusing, unclear, speculative and carries less authority than Exhibit 651.¹¹
- d) The Memoranda should be taken into account in determining whether the Proposed Documents “could hold any probative value”.¹²

⁷ Response, paras 2, 26.

⁸ The Trial Chamber recalls that the Defence tried to have this document admitted into evidence in October 2007 through the witness Goran Krčmar. However, the witness insisted that he had never seen it, repudiated its accuracy and validity, and refused to further comment on it. The Chamber therefore refused to admit the document at that point, T. 4592-4600, 4604-4609.

⁹ Response, paras 8-9.

¹⁰ Response, paras 10-12, 14. The Defence also quotes the Appeals Chamber in *Prosecutor v. Rasim Delić*, Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decisions on Admission of Exhibits 1316 and 1317, Case No. IT-04-83-AR73.1, 15 April 2008, para. 22, in saying that “when evidence is tendered by the Prosecution there must be a fair opportunity for the Defence to accused to challenge it; this is all the more true if evidence is tendered after the close of the Prosecution case”, Response, para. 13.

¹¹ Response, paras 15-24.

¹² Response, para. 25.

II. APPLICABLE LAW

6. As a preliminary point, the Trial Chamber notes Rule 85 of the Rules of Procedure and Evidence (“Rules”) providing that:

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interest of justice, evidence at the trial shall be presented in the following sequence:

- (i) evidence for the prosecution
- (ii) evidence for the defence
- (iii) prosecution evidence in rebuttal

[...]

7. As a consequence, any exception to the sequence of presenting evidence as set forth by the aforementioned Rule will only be allowed if the Trial Chamber finds this to be in the interests of justice and not causing prejudice to the rights of the accused.

8. The legal standard for the admission of evidence from the bar table has been set out in a previous ruling of this Trial Chamber.¹³ In particular, it should be recalled 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.¹⁴ 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.¹⁵ 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”.¹⁶

III. DISCUSSION

9. The Trial Chamber finds that, if admitted, the Proposed Documents might constitute evidence probative of guilt. The Trial Chamber however notes that the Proposed Documents were tendered for the purpose of challenging the validity and the accuracy of the document that became Exhibit 651 when tendered by the Defence during its case. As such, the Proposed Exhibits fall

¹³ Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008 (“Decision of 16 January 2008”).

¹⁴ Decision of 16 January 2008, para. 7.

¹⁵ 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.

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

within the category of evidence that is usually led at the rebuttal stage.¹⁷ Moreover, the Trial Chamber agrees with the Prosecution's submission that the Proposed Documents would not have been relevant if admitted before Exhibit 651 formed part of the record. As a consequence, the Trial Chamber finds that it is in the interests of justice, if all the requirements of the Rule 89 are fulfilled, to admit the Proposed Documents at this stage.

10. However, the Trial Chamber also notes that the admission of the Proposed Documents at this stage of the proceedings, after the close of the Defence case, would deprive the Defence of the opportunity to counter this evidence and as such would not accord with the fair trial rights of the Accused.¹⁸ Nevertheless, the Trial Chamber finds that the admission into evidence of the Memoranda proposed by the Defence would be a sufficient remedy for this situation.

11. The Trial Chamber notes that the challenges submitted by the Defence claiming that the Proposed Exhibits are confusing, unclear, speculative and that some of them carry less authority than Exhibit 651 relate not to the question of their probative value, as the Defence contends, but rather to the question of weight that is to be given to them by the Trial Chamber.

12. The Trial Chamber finds that the Proposed Documents tendered by the Prosecution and Memoranda tendered by the Defence fulfil the requirements set out by the Rule 89 of the Rules in being relevant and having probative value. Moreover, the Trial Chamber is satisfied as to the Parties' showing regarding how the Proposed Documents and Memoranda fit into their cases.

¹⁷ See *Prosecutor v. Delalić et. al.*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 273.

¹⁸ See *Prosecutor v. Rasim Delić*, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, Case No. IT-04-83-AR73.1, 15 April 2008, para. 22.

IV. DISPOSITION

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

GRANTS the Motion;

DECIDES that the Proposed Documents are admitted into evidence for the purpose of challenging the validity and accuracy of the information set forth in Exhibit 651;

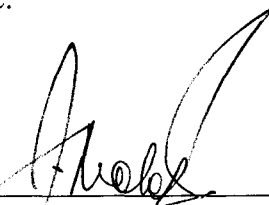
DECIDES that Memoranda are admitted into evidence;

DECIDES that the Memorandum attached to the Response as Annex B is admitted under seal;

REQUESTS the Registry to assign one common exhibit number to all the Proposed Documents and Memorandum attached to the Response as Annex A; and

REQUESTS the Registry to assign a separate exhibit number to the Memorandum attached to the Response as Annex B.

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



Judge Bakone Justice Moloto
Presiding

Dated this ninth day of May 2008

At The Hague

The Netherlands

[Seal of the Tribunal]