



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-04-81-T

Date: 28 February 2011

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 28 February 2011

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

DECISION ON DEFENCE MOTION FOR
RECONSIDERATION OF DOCUMENT ADMITTED
PROPRIO MOTU

The Office of the Prosecutor
Mr. Mark Harmon

Counsel for Momčilo Perišić
Mr. Novak Lukić
Mr. Gregor Guy-Smith

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”), hereby renders its decision on the Defence’s “Objection to the Admission of Document *Proprio Motu* and Motion for Reconsideration”, filed publicly on 21 February 2011 (“Motion”).

I. BACKGROUND AND SUBMISSIONS

1. In the course of its cross-examination of Ivan Đokić, the Prosecution mentioned a statement by Momčilo Perišić concerning Mr. Đokić’s work on modified air-bombs, namely: “[Ivan Đokić] is also an innovator, because something that could not have been used in this auditorium, he made it in such a way that it is being used from the ground. And everything went topsy-turvy whenever it was used, but that’s just among us”.¹ This statement stems from document 65ter 7680, page 0622-0454.

2. Mr. Đokić said he did not know about this statement by the Accused.² The Prosecution did not seek to admit document 65ter 7680 into the evidentiary record.

3. At the hearing of 8 February 2011, the Trial Chamber asked the Prosecution for its position on the admission of document 65ter 7680.³ The Prosecution averred that it was unable to lay the appropriate foundation for admitting the document during its cross-examination of Mr. Đokić, and said that it would not tender the document.⁴ The Presiding Judge stated “I believe that brings the matter to a rest”, and asked Defence counsel if he had anything to raise, to which he replied “I would agree with Your Honour”.⁵

4. On 18 February 2011, the Trial Chamber decided to admit pages 0622-0429⁶ and 0622-0454 of document 65ter 7680 *proprio motu* under Rule 89(C) of the Rules of Procedure and Evidence (“Rules”).⁷ The document was subsequently labelled Exhibit C4 and made part of the evidentiary record.

5. The Defence’s Motion requests the Trial Chamber to reconsider its decision to admit document 65ter 07680 *proprio motu* and to strike it from the record.⁸

¹ T. 14493.

² *Ibid.*

³ T. 14610.

⁴ *Ibid.*

⁵ T. 14611.

⁶ This is the document’s cover page.

⁷ Decision to Admit Exhibit *Proprio Motu*, 18 February 2011 (“Decision”).

⁸ Motion, paras 1, 29.

6. The Defence argues that the *proprio motu* admission of the document at this stage is prejudicial to the fundamental rights of the Accused because the Defence case has closed.⁹ The Defence submits that the Accused has the right to have adequate time to challenge the evidence against him under Article 21(4) of the Statute.¹⁰

7. The Defence notes that, during the hearing on 8 February 2011, the Trial Chamber stated that the matter of document 65ter 07680 was brought to a “rest”, and that the preparation of its final brief proceeded based on that understanding.¹¹ It submits that the Decision was the first indication that this evidence would be considered by the Trial Chamber for any purpose and that it is unaware of what that purpose may be.¹²

8. According to the Defence, the document is thus inadmissible because, under Rule 89(D), its probative value is substantially outweighed by the need to ensure a fair trial.¹³

9. Finally, the Defence posits that the Tribunal “is based on an adversarial, party-driven system. The presentation of evidence lies within the purview of the parties, not the Trial Chamber”.¹⁴ It adds that, under Rule 98, “the Trial Chamber has the inherent ability to supplement the record with relevant information”, notably by summoning witnesses *proprio motu*, but that this rule does not authorise the admission of an exhibit *proprio motu*.¹⁵ “Permitting the Trial Chamber unlimited discretion to tender and admit its own documents after the completion of the evidentiary phase of the case,” the Defence argues, “creates the potential of the Trial Chamber stepping beyond its mandate as an impartial and unbiased adjudicator and into the realm of advocating a particular position or theory in the context of a trial”.¹⁶

10. In response, the Prosecution opposes the Defence’s position and advances that a trial chamber may admit evidence *proprio motu* under Rule 89(C) without compromising its impartiality.¹⁷ It adds that, under Rule 89(D), the Defence has not demonstrated how the probative value of this evidence is substantially outweighed by the need to ensure a fair trial.¹⁸ The Prosecution further submits that it would have no objection if the Trial Chamber allowed the

⁹ Motion, paras 9-10, 20.

¹⁰ Motion, paras 9, 13, 17.

¹¹ Motion, para. 11.

¹² Motion, para. 12.

¹³ Motion, paras 19-20.

¹⁴ Motion, para. 26.

¹⁵ Motion, paras 26-27.

¹⁶ Motion, para. 27.

¹⁷ Response to Defence Motion to the Admission of Document *Proprio Motu* and Motion for Reconsideration, 24 February 2011 (“Response”), paras 5-6.

¹⁸ Response, para. 9.

Defence to reopen its case for the limited purpose of challenging the content of document 65ter 07680.¹⁹

II. APPLICABLE LAW

11. Rules 89(C) and 89(D) provide that “[a] Chamber may admit any relevant evidence which it deems to have probative value” and “may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”.

12. According to the jurisprudence of the Tribunal, a 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.²⁰ Such circumstances may include new facts or arguments that have arisen since the issuance of a decision.²¹

III. DISCUSSION

13. It is well established that the criminal procedure of the Tribunal blends elements of both civil law and common law systems.²² “The Rules of the Tribunal are neither a mere reflection of the ‘common-law’ accusatorial system or the ‘civil-law’ inquisitorial system, nor are their origins predominantly in only one system; rather, the Rules are a hybrid of the two systems”.²³ The practice of the Tribunal is “primarily” based on an adversarial system but not exclusively.²⁴

¹⁹ Response, para. 10.

²⁰ See *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Decision on Motion for Reconsideration of Oral Decision Issued on 29 February 2008, 10 March 2008, para. 5; *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; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Reconsideration of Oral Decision Dated 24 April 2007 Regarding Evidence of Zoran Lilić, 27 April 2007, para. 4.

²¹ See *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on the Prosecution’s Motion for Reconsideration of the Chamber’s Decision on Admission of Documentary Evidence, 13 February 2008, para. 9; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Second Decision on the Admission of Documentary Evidence Submitted by the Prosecution (Dretelj and Gabela), 18 January 2008 (signed 12 December 2007), p. 4, fn. 4 with further references.

²² See, e.g., *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Decision on the Prosecution’s Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, para. 8 (“*Limaj Decision*”).

²³ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-PT, Decision on Joint Defence Motions for Reconsideration of Trial Chamber’s Decision to Review All Discretionary Materials Provided to the Accused by the Prosecution, 21 January 2003, para. 12.

²⁴ *Prosecutor v. Dragoljub Kuranac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 43; *Prosecutor Dario Kordić and Mario Cerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 22; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukašin Andrić, and Dobre Aleksovski and Decision *Proprio Motu* Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy, 17 May 2005, para. 17; *Limaj Decision*, para. 8; *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 23. See also *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, Dated 28 May 1998, 12 June 1996, para. 31 (“The

14. A trial chamber may exercise its discretion to occasionally admit certain documents *proprio motu*. Rule 89(C) specifies that “[a] Chamber may admit any relevant evidence which it deems to have probative value”. Moreover, Rule 98 allows a trial chamber to call witnesses and examine them. By implication, a trial chamber may additionally seek to admit a document through a witness whom it has called. It follows that there is no categorical rule against admitting documents *proprio motu*.²⁵

15. The Trial Chamber nonetheless agrees with the Defence that it should have been afforded a reasonable opportunity to challenge the admission of document 65ter 7680 *proprio motu*. The Trial Chamber therefore finds that circumstances exist to reconsider its decision in order to prevent an injustice.

16. The Trial Chamber finds that, under Rule 89(D), the probative value of the document in supplementing the evidentiary record is outweighed by the need to ensure a fair and expeditious trial. In light of the Defence’s objection, the Trial Chamber decides to quash its decision and strike the document from the record.

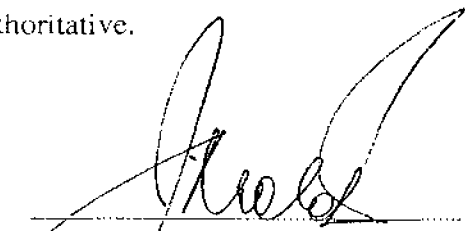
IV. DISPOSITION

17. For the foregoing reasons, the Trial Chamber hereby

GRANTS the Motion, and

STRIKES document 65ter 7680 (Exhibit C4) from the record.

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



Judge Bakone Justice Moloto
Presiding Judge

procedural regime designed for the Tribunal and applied by the Trial Chamber consists of a synthesis which is an amalgam of the accusatorial features of the common law and the inquisitorial features of the civil law systems. It is conceded that the former predominates”).

²⁵ Similarly, Rule 94(B) allows a Trial Chamber to act *proprio motu* and “decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal”.

Dated this twenty-eighth day of February 2011

At The Hague

The Netherlands

[Seal of the Tribunal]