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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

Case No.: IT-04-83-AR73.1

Date: 15 April 2008

Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. Hans Holthuis

Decision of: 15 April 2008

THE PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON RASIM DELIĆ'S INTERLOCUTORY APPEAL AGAINST TRIAL
CHAMBER'S ORAL DECISIONS ON ADMISSION OF EXHIBITS 1316 AND 1317**

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

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1. The Appeals 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 seized of an appeal by Rasim Delić (“Delić”) against two oral decisions (together, “Impugned Decision”) rendered by the Trial Chamber on 17 March 2008,¹ admitting into evidence two documents tendered by the Office of the Prosecutor (“Prosecution”).²

I. PROCEDURAL HISTORY

2. At the hearing of 17 March 2008, in the course of the cross-examination of the Defence witness Hajrudin Hubo, the Prosecution sought to confront the witness with two documents, marked P06263 and P06261, respectively. Delić objected on the basis that these documents were not included in the list of exhibits (“Rule 65 *ter* List”) the Prosecution intended to offer under Rule 65 *ter*(E)(iii) of the Rules of Procedure and Evidence (“Rules”). After having heard the parties in court and having considered, *inter alia*, its own “Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of the Counsel in Court” of 24 July 2007 (“Decision Adopting Guidelines”), the Trial Chamber allowed the Prosecution to present the two documents to the witness in question.³ Following the cross-examination of the witness on the content of the two documents, the Trial Chamber proceeded to admit them into evidence as Exhibit 1316 and Exhibit 1317, respectively (“Exhibits”).⁴

3. During the discussion in court that day, the Prosecution emphasized that the importance of the Exhibits could not have been apparent before it received the list, under Rule 65 *ter*(G)(i), of witnesses the Defence intended to call.⁵ It stated that it was showing the first of the Exhibits to the witness “for various purposes, including for impeachment”.⁶ Despite a request by Delić addressed to the Prosecution to explain the issue,⁷ the Prosecution did not clarify its position⁸ and the Trial Chamber did not explicitly rule on the question of whether the Exhibits were admitted as evidence probative of guilt or only for impeachment purposes.⁹

¹ Defence Interlocutory Appeal Against Trial Chamber Decision to Admit Exhibits, 25 March 2008, with a Confidential Annex (“Appeal”).

² *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, T. 7704-7720 (all transcript references below refer to this case).

³ T. 7717-7718.

⁴ T. 7718 and 7720.

⁵ T. 7704, 7706.

⁶ T. 7706. See also T. 7703, which is, however, in private session.

⁷ T. 7708 and 7709-7710.

⁸ T. 7710-7713.

⁹ See text cited *supra*, in fn. 4, at T. 7718 and 7720.

4. On the same day, the Defence requested that the Impugned Decision be provided in writing, and that the Trial Chamber grant leave to appeal the Impugned Decision.¹⁰ On 18 March 2008, the Trial Chamber issued an oral decision, denying the Defence's request that the Impugned Decision be rendered in writing, and granting leave to the Defence to appeal the Impugned Decision ("Decision on Leave to Appeal").¹¹

5. On 25 March 2008, Delić filed his Appeal against the Impugned Decision. The Prosecution filed a response on 4 April 2008 ("Response").¹² Delić filed a Reply on 10 April 2008.¹³ The Appeals Chamber will not consider this late filing,¹⁴ since Delić did not identify sufficient reasons constituting good cause pursuant to Rule 127(A)(i) and (B) of the Rules to recognize it as validly done.¹⁵

II. STANDARD OF REVIEW

6. Trial Chambers exercise broad discretion in relation to trial management and the admissibility of evidence.¹⁶ It is only where an abuse of such discretion can be established that the Appeals Chamber should reverse such decisions.¹⁷ The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The Appeals Chamber will

¹⁰ T. 7718.

¹¹ T. 7728-7729. Judge Harhoff, delivering the decision of the Trial Chamber, stated: "[F]or the purpose of seeking leave to appeal the decision, we also agreed that we could not rule out the possibility that this issue might have an impact on the fairness of the trial, so for that reason we will grant you leave to appeal the oral decision entered yesterday."

¹² Respondent's Brief, Defence Interlocutory Appeal against Trial Chamber Decision to Admit Exhibits, submitted by the Prosecution on 4 April 2008. While this document was formally entered into the case file only on 7 April, it was distributed to Counsel on 4 April, so there is no question of unfairness in relation to the deadline.

¹³ Defence Reply to Respondent's Brief, Defence Interlocutory Appeal against Trial Chamber Decision to Admit Exhibits, 10 April 2008.

¹⁴ See Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal (IT/155/Rev. 3), art. 11.

¹⁵ See, e.g., *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 7.

¹⁶ *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Milan Babić, 14 September 2006, para. 6; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.7, Decision on Appeal Against the Trial Chamber's Oral Decision of 9 January 2008, 11 March 2008, para. 8 and references thereof. See also *Čelebići* Appeal Judgement, para. 533, where the Appeals Chamber stated that "a Trial Chamber exercises considerable discretion in deciding on issues of admissibility of evidence" and that, as a result, "a Trial Chamber should be afforded [...] deference in making decisions based on the circumstances of the case before it".

¹⁷ See, for example, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, paras 20 and 27; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, 18 September 2000, in particular paras 35-37.

also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹⁸

7. The question before the Appeals Chamber is thus not whether it agrees with a decision but whether the Trial Chamber has correctly exercised its discretion in reaching this decision.¹⁹ For the Appeals Chamber to intervene in a discretionary decision of a Trial Chamber, it must be demonstrated that the Trial Chamber has committed a “discernible error” resulting in prejudice.²⁰

III. DISCUSSION

8. In his Appeal, Delić argues two grounds related to the Impugned Decision. The Appeals Chamber will consider his submissions in turn. However, the Appeals Chamber preliminarily notes that at least one passage of the transcripts of the proceedings quoted in the Appeal refers to private session transcripts; it should therefore be confidential until and unless the Trial Chamber decides that those pages be made public.

A. The Trial Chamber erred in law by admitting exhibits tendered by the Prosecution during the Defence case

9. As first ground of appeal, Delić generally submits that the Trial Chamber erred in law by admitting into evidence two documents tendered by the Prosecution after the close of its case-in-chief, “with the possibility of them being used as evidence probative of guilt”.²¹ Delić argues that Rule 85 of the Rules, in providing the order in which the parties shall present their evidence at trial, does not provide a right for a party to produce any further evidence after the close of its case.²²

10. Delić further contends that, according to the jurisprudence of the Tribunal, there are only two exceptions to the general principle that matters probative of a defendant’s guilt should be adduced as part of the Prosecution’s case.²³ The first exception is where evidence sought to be admitted by the Prosecution qualifies as rebuttal evidence or fresh evidence. In any event, this evidence is not to be presented during cross-examination, but rather at the rebuttal stage or if and when proceedings are reopened.²⁴ The second exception is where evidence is introduced by the

¹⁸ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007 (“Prlić Decision on Admission of Transcript”), para. 8.

¹⁹ *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4.

²⁰ Prlić Decision on Admission of Transcript, para. 9.

²¹ Appeal, para. 18.

²² Appeal, para. 19.

²³ Appeal, paras 21-25.

²⁴ Appeal, para. 22.

Prosecution to test the credibility of a witness in cross-examination or to refresh a witness' memory.²⁵ According to Delić, the jurisprudence of the Tribunal shows that evidence tendered by the Prosecution with the limited purpose of testing the credibility of a witness or refreshing a witness' memory is not to be used as proof of a defendant's guilt.²⁶

11. Delić also submits that, were the Prosecution allowed to disclose and seek the admission of new documents probative of guilt for the first time during the Defence case, the fairness of the proceedings would be jeopardised for two reasons. First, an accused, in such circumstances, would be deprived of an opportunity to counter the Prosecution's evidence, since the Defence, already at the time of the opening of its case, is to set the number of witnesses it intends to call and specify the documents it proposes to introduce.²⁷ Second, the Prosecution could then "hold back inculpatory documents until the Defence case safe in the knowledge that the Defence could not call evidence to counter [that] evidence".²⁸ Delić submits that the right of the Accused to be informed promptly of the nature and cause of the charge against him and the right to have adequate time for the preparation of his defence would thus be breached.²⁹

12. Delić concludes that the Trial Chamber erred in law by admitting the Exhibits with the possibility that they will be used as evidence probative of guilt. Delić seeks the Appeals Chamber to confirm the principle that evidence forming a fundamental part of the Prosecution's case should be brought as part of the Prosecution case in chief. Delić further requests that the Appeals Chamber either remand the Impugned Decision to the Trial Chamber for a *de novo* adjudication of the admissibility of the Exhibits or, in alternative, rule that the Exhibits are inadmissible and exclude them.³⁰

13. The Prosecution suggests that the Trial Chamber never certified the general issue of whether material not listed in the Rule 65 *ter* List, yet tendered by the Prosecution during the Defence case, can be admitted into evidence. It stresses that the Impugned Decision related to the admission of the Exhibits for purposes other than attacking the credibility of the witness;³¹ therefore, the Decision on Leave to Appeal could have only certified this issue. The Prosecution further contends that the general issue of whether it can adduce new evidence relevant to the guilt of the accused during the Defence case was litigated by the parties in July 2007, at the beginning of the Prosecution case. At

²⁵ Appeal, para. 23.

²⁶ Appeal, paras 24-25, referring to *Prosecutor v. Hadzihasanović and Kubura*, Case No. IT-01-47-T, 29 November 2004, T. 12527 ("*Hadzihasanović* Oral Decision").

²⁷ Appeal, paras 26-27.

²⁸ Appeal, para. 28.

²⁹ Appeal, para. 27.

³⁰ Appeal, para. 42.

³¹ Response, para. 8, referring to T. 7703 and 7709 (where Counsel for Rasim Delić explains the reasons for opposing the tendering of the Impugned Exhibits), and para. 9.

the time, the Trial Chamber issued a ruling,³² which Delić decided not to appeal, to the effect that new evidence can be admitted during cross-examination pursuant to Rule 90(H) of the Rules. Delić, during the Prosecution case, benefited from this ruling and tendered into evidence 432 exhibits during its cross-examination of Prosecution witnesses.³³

14. The Appeals Chamber finds that the Decision on Leave to Appeal – though admittedly somewhat ambiguous in its scope – did not certify the general question of admissibility of evidence tendered during cross-examination for purposes other than impeaching a witness.³⁴ The Impugned Decision only related to the admission of the Exhibits and, therefore, the general question of law is not directly at issue here. Nonetheless, the legal issue raised by Delić is relevant to the Impugned Decision – this aspect will be dealt with below.

B. The Trial Chamber erred in admitting exhibits tendered without sufficient notice to the Defence

15. Delić also argues a second ground of appeal, pleaded in the alternative.³⁵ He submits that, even if the principle of admission of exhibits during cross-examination is correct, the Trial Chamber erred in admitting the Exhibits where, as in this case, they had not been disclosed to the Defence with adequate time to enable the Defence to prepare properly.³⁶ More specifically, Delić received P06263 and P06161, among seven previously undisclosed documents that the Prosecution intended to use in relation to witness Hajrudin Hubo, on 14 March 2008 in their B/C/S³⁷ version. That was about one and a half hours before the examination in chief of Hajrudin Hubo started.³⁸ It was only on the day of that witness's testimony (17 March 2008), fifteen minutes before the Defence resumed the examination, that the Prosecution disclosed English translations of the new documents.³⁹ Delić contends that, in these circumstances, the accused's right to have adequate time to prepare his defence was compromised, since Counsel could not take instructions from him about the new documents, could not discuss the documents with the witness during proofing, nor was adequate time allowed to challenge the documents' authenticity or reliability.⁴⁰

16. Delić further submits that the Prosecution and the Defence are in different situations when it comes to the presentation of evidence for three reasons. First, the burden of proving the charges in

³² Decision Adopting Guidelines.

³³ Response, paras 10-14.

³⁴ T. 7728-7729.

³⁵ Appeal, para. 31.

³⁶ Appeal, para. 31.

³⁷ On the use of the term B/C/S, see *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88-2-AR73.1, Decision on Interlocutory Appeal Against Oral Decision of Pre-Trial Judge of 11 December 2007, 28 March 2008, fn. 32.

³⁸ Appeal, para. 5.

³⁹ Appeal, paras 5-7 and 35 fn. 27.

the indictment is on the Prosecution and not on the Defence.⁴¹ Second, the Prosecution has greater resources at its disposal in preparing its case, while the Defence opportunities to gather evidence are more limited.⁴² Third, the Statute guarantees to the accused certain fundamental rights, enshrined in Articles 20(1) and 21 of the Statute, including the right to have “adequate time and facilities for the preparation of his defence”.⁴³

17. Delić finally contends that the Trial Chamber, in admitting the Exhibits, erred in the exercise of its discretion by failing to pay sufficient consideration to the applicable law, thus breaching the Accused’s fundamental rights under the Statute and depriving him of the possibility to have adequate time to prepare his defence.⁴⁴ The Defence submits, in particular, that the Trial Chamber decided that there was no obligation for the Prosecution to disclose material which it intended to present to Defence witnesses, only on the basis that the Decision Adopting Guidelines was silent on this issue, without considering whether it was necessary to issue further guidance to fill this lacuna.⁴⁵ Delić contends that, even if the Rules do not include a specific provision on the presentation of documents by the Prosecution to a Defence witness during the cross-examination, and the timing for the disclosure of these documents, the Trial Chamber should have applied Rule 89(B) of the Rules, which provides that “[i]n cases not otherwise provided for [...] a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law”.⁴⁶ Delić recalls in this respect that other Trial Chambers have ruled that the Defence should receive documents, which the Prosecution intends to present to a Defence witness, at least 24 hours before the Defence witness appears.⁴⁷ Delić further submits that, if the Trial Chamber decided that the documents were useful to determine the credibility of the witness, it could have admitted it “on that narrow basis, making clear that the contents of the document could be used for that reason alone and not as being probative of the guilt of the Accused”.⁴⁸

18. The Prosecution submits, as a preliminary matter, that Delić has failed to show that the Trial Chamber abused its discretion on the basis of the Appeals Chamber’s constant jurisprudence related to discretionary matters.⁴⁹ More specifically, the Prosecution argues that the Trial Chamber reached the Impugned Decision on the basis of standards set in advance which had been accepted by both

⁴⁰ Appeal, para. 36.

⁴¹ Appeal, para. 32.

⁴² Appeal, para. 33.

⁴³ Appeal, para. 34.

⁴⁴ Appeal, para. 40.

⁴⁵ Appeal, para. 40.

⁴⁶ Appeal, para. 38.

⁴⁷ Appeal, para. 39.

⁴⁸ Appeal, para. 37.

⁴⁹ Response, paras 16-18.

parties (the Decision Adopting Guidelines), after having heard their arguments.⁵⁰ The Prosecution further submits that accepting Delić's arguments on the Exhibits would have resulted (i) in an unbalanced approach to admission of evidence tendered by the Defence and by the Prosecution and (ii) in more burdensome procedures for witnesses – some of whom would have to travel to The Hague twice to testify – and for the Tribunal as a whole.⁵¹ On the contrary, according to the Prosecution, Rule 90(H) of the Rules allows wide discretion to trial chambers in allowing each party to put its case to a witness, a discretion entrenched in the “fact-finding function” of the Trial Chamber.⁵²

19. Moreover, the Prosecution asserts that, even if there was abuse of discretion on the part of the Trial Chamber, this error did not yet result in prejudice to Delić – prejudice in evidentiary matters is only discernible at the end of the trial proceedings, when the Trial Chamber will assess the probative value of the exhibits in question.⁵³ In addition, the Prosecution points out that the Trial Chamber made its ruling after having heard Delić's contentions on the timing of the disclosure of the Exhibits in a language that the witness understands and, presumably, taking into account that Delić had not requested any postponement to discuss the import of the Exhibits.⁵⁴

20. According to Rule 89(C) of the Rules, a “Chamber may admit any relevant evidence which it deems to have probative value”. More specifically, Rule 90(F)(i) of the Rules states that a “Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time”. Within the discretion afforded to it, a Trial Chamber may admit any evidence which it deems relevant and of probative value, provided that the right of the accused to a fair trial is ensured in the process.⁵⁵

21. In the present case, the Prosecution contends that it could not have ascertained the importance of the Exhibits until Delić had disclosed its own list of witnesses pursuant to Rule 65 *ter* (G)(i). However, the Prosecution did not proceed to disclose the Exhibits immediately after this list was filed, but just prior to the beginning of the testimony of witness Hajrudin Hubo. Having decided to appeal the Impugned Decision immediately, Delić understandably did not request another remedy – such as an adjournment of the proceedings or the possibility of recalling the witness due to the lack of time to prepare – at the time of the tendering of the Exhibits.

⁵⁰ Response, para. 19.

⁵¹ Response, para. 21.

⁵² Response, paras 22-23.

⁵³ Response, paras 24-25.

⁵⁴ Response, paras 26-27.

⁵⁵ Rule 89(D) of the Rules.

22. In these circumstances, the Appeals Chamber notes that the Impugned Decision does not clarify whether the Exhibits were admitted as evidence probative of guilt or only for impeachment purposes of the witness in question. This may cause confusion, prejudicing Delić in the organization of his case. According to the principles enshrined in the Statute– in particular in Article 21(4)(b) and (e) – on the rights of the accused, when evidence is tendered by the Prosecution there must be a fair opportunity for the accused to challenge it; this is all the more true if evidence is tendered after the close of the Prosecution case. In situations where the accused opposes the admission of evidence during cross-examination due to alleged breach of his right to a fair trial, a Trial Chamber must consider how it intends to strike the appropriate balance between the need to ensure the rights of the accused and its decision to admit such evidence.

23. The Trial Chamber therefore erred in not specifying the purpose for which the Exhibits were admitted despite the request by Delić and, consequently, in not addressing how the prejudice caused by the admission of the Exhibits, if any, could be redressed. Only after having considered the mode of disclosure of the documents in question, the purpose of their admission, the time elapsed between disclosure and examination of the witness, the languages known to Counsel and the accused, as well as any other relevant factual considerations, the Trial Chamber will be able to provide a reasoned opinion on the prejudice, if any, caused by the admission of the Exhibits and on the measures to address such prejudice – for example providing more time for cross-examination, adjourning the session, or granting the possibility of re-calling the witness if Delić shows it is necessary. Having failed to give sufficient weight to relevant considerations in reaching its decision, the Trial Chamber committed a discernible error.

IV. DISPOSITION

24. On the basis of the foregoing, and noting the extensive submissions of the parties on the matter both at trial and during this appeal, the Appeals Chamber

ORDERS the Registrar to withdraw the public version of the Appeal from public circulation;

REQUESTS the Trial Chamber to take any action it deems appropriate as regards the quotation of private session transcript pages in the Appeal;

ORDERS the Trial Chamber to clarify the purpose of the admission of the Exhibits;

ORDERS the Trial Chamber to consider on that basis what measures, if any, need to be taken to ensure that Delić's right to a fair trial is protected; and

DISMISSES the Appeal in all other respects.

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

Done this 15th day of April 2008,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the Tribunal]