



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: 4 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: 4 April 2008

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON DEFENCE MOTION TO RECALL
WITNESS**

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

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 seized of the “Defence Motion to Recall Witness”, filed publicly on 31 March 2008 (“Motion”) and hereby renders its Decision.

I. SUBMISSIONS OF THE PARTIES

A. Submissions of the Defence

1. In the Motion, the Defence recalls the “Decision on Urgent Motion Concerning Rule 68 Compliance by the Prosecution” publicly filed by the Trial Chamber on 28 March 2008 (“Decision of 28 March 2008”), whereby the Trial Chamber found that the Defence has suffered prejudice by being deprived of the opportunity to use with prior witnesses the exculpatory material that has emerged (“Exculpatory Material”).¹ The Defence was therefore invited to identify witnesses for this purpose and call them for examination-in-chief or cross-examination.² In accordance with the Decision of 28 March 2008, the Defence seeks leave to recall witness PW-9 for further cross-examination during the hearings of 17 and 18 April 2008.³

2. The Defence submits that due to the position held by witness PW-9 at the times relevant to the Indictment it is “highly likely that the witness could provide relevant and probative evidence about certain documents contained within the Exculpatory Material.”⁴

3. Finally, the Defence applies for a Trial Chamber ruling that the Prosecution should not contact PW-9 and/or seek to discuss the case with the witness prior to his return to the Tribunal for further cross-examination.⁵

B. Submissions of the Prosecution

4. On 1 April 2008, the Prosecution publicly filed its “Response to Defence Motion to Recall Witness” (“Response”), whereby it does not oppose the Motion but requests that “if the Prosecution deems it necessary, further re-examination of witness PW-9 should be permitted”.⁶

¹ Decision of 28 March 2008, para. 19.

² *Ibid.*

³ The Defence reserves the right to call the witness at a later date “in the event that further material is disclosed to the Defence which PW-9 is likely to be able to discuss”, Motion, para. 7.

⁴ Motion, para. 6.

⁵ Motion paras 8-9, referring to the practice of the Tribunal that “the proofing is appropriate *prior* to testimony”, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006, para. 22.

⁶ Response, para. 2.

5. The Prosecution further argues that if a restriction of Prosecution's communication with witness PW-9 will be imposed, the same standard should be applied to the Defence, in accordance with the practice of the Tribunal which prohibits both parties to contact a witness once his or her testimony has begun.⁷

II. DISCUSSION

6. In keeping with the Decision of 28 March 2008, the Trial Chamber allows the Defence to recall witness PW-9 for further cross-examination. The Trial Chamber also allows the Prosecution to re-examine the witness on matters arising out of the Defence's further cross-examination.

7. The Trial Chamber notes the practice of the Tribunal prohibiting the parties from contacting a witness once his or her testimony has begun.⁸ As witness PW-9's scheduled re-appearance before the Tribunal is tantamount to a continuation of his previous testimony in this case, the Trial Chamber is of the view that both Prosecution and Defence should abide by that prohibition, the rationale of which is to avoid the risk of affecting or calling into question the integrity of the witness's testimony.

⁷ Response, para. 3, citing, *inter alia*, *Prosecutor v. Kupreškić et. al.*, Case No. IT-95-16-T, Decision on Communication between the Parties and their Witnesses, 21 September 1998, p. 4

⁸ *See, e.g. Prosecutor v. Kupreškić et. al.*, Case No. IT-95-16-T, Decision on Communication between the Parties and their Witnesses, 21 September 1998, p. 4; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-PT, Decision on Prosecution Motion on Trial Procedure, 19 March 1999, p. 5.

III. DISPOSITION

FOR THE FOREGOING REASONS and pursuant to Rule 54 and 89 (B) of the Rules of Procedure of Evidence;

THE TRIAL CHAMBER

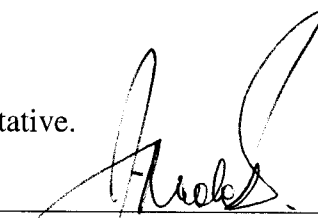
GRANTS the Motion;

ALLOWS the Defence to recall witness PW-9 for the purpose of further cross-examination on 17 and 18 April 2008 and the Prosecution to re-examine the witness on matters arising out of the Defence's further cross-examination;

INSTRUCTS the Registry's Victims and Witness Section to arrange the appearance of witness PW-9 before the Trial Chamber on those dates;

PROHIBITS the Prosecution and the Defence to communicate with witness PW-9 before his testimony.

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



Judge Bakone Justice Moloto
Presiding

Dated this fourth day of April 2008

At The Hague

The Netherlands

[Seal of the Tribunal]