

UNITED
NATIONS



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-05-87/1-T
Date: 7 December 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking

Decision: 7 December 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION TO RE-OPEN THE
CASE AND EXCEED THE WORD LIMIT AND SECOND
MOTION TO ADMIT EXHIBITS FROM THE BAR TABLE**

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

A. Introduction

1. On 28 October 2009, the Prosecution, before closing its case, indicated that it intended to file a motion to have further documents admitted into evidence.¹ Rather than wait for the Prosecution to file the motion and have determined its motion regarding these documents before closing its case, this Trial Chamber (“Chamber”) allowed the Prosecution to close its case subject to that motion.² The Prosecution therefore proceeded to close its case that same day,³ and on 5 November 2009, it filed a Motion seeking leave to reopen the Prosecution case for the limited purpose of receiving into evidence 93 documents proposed for admission.⁴ On 19 November 2009, Counsel for Vlastimir Đorđević (“Defence”) filed a Response objecting to the admission of only two of the documents.⁵ On the following day, 20 November 2009, the Defence filed a Corrigendum to its Response (“Corrigendum”), with minor corrections of no material substance.⁶

2. In the Motion, the Prosecution submits that all documents proposed for admission into evidence are relevant and bear sufficient indicia of reliability and authenticity.⁷ It also submits that the contents of the documents proposed are supported by other exhibits and by witness testimony already received by the Chamber.⁸ Due to the large number of documents that it seeks to tender, the Prosecution also requests leave to file a motion exceeding the 3,000 word limitation set out in the Practice Direction on the Length of Briefs and Motions.⁹ The Chamber is satisfied that in view of the large number of documents which the Prosecution seeks to have admitted into evidence, the oversized Motion is justified. Leave will be granted to exceed the prescribed word limit.

3. In the Response and Corrigendum, the Defence submits that two of the documents proposed – Documents 00808 and 01725 – cannot be admitted into evidence without calling a witness to provide context and/or clarification.¹⁰ The Defence submissions in respect to those two documents will be addressed in the relevant sections where those documents are discussed.

¹ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Court Session of 28 October 2009, T. 9328-9329.

² *Ibid.*

³ *Ibid.*

⁴ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Prosecution’s Motion to Re-Open the Case and Exceed the Word Limit and Second Motion to Admit Exhibits from the Bar Table”, 5 November 2009 (“Motion”).

⁵ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Vlastimir Đorđević’s Response to Prosecution’s Motion to Re-Open the Case and Exceed the Word Limit and Second Motion to Admit Exhibits from the Bar Table”, 19 November 2009 (“Response”).

⁶ “Corrigendum to Vlastimir Đorđević’s Response to Prosecution’s Motion to Re-Open the Case and Exceed the Word Limit and Second Motion to Admit Exhibits from the Bar Table with Annex A”, 20 November 2009.

⁷ Motion, paras 4-5.

⁸ Motion, para 5.

⁹ Motion, paras 2-3. *See* Practice Direction on the Length of Briefs and Motions, 16 September 2005.

¹⁰ Response, paras 1, 3 and 4.

B. Law

4. Pursuant to Rule 89(C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. As a general rule, the document proposed for admission has to be of sufficient reliability¹¹ and relevance¹² to the issues in the case to have probative value. It is for the party that moves to have a document admitted into evidence to demonstrate its relevance and reliability to justify its admission.¹³ The Chamber may exclude evidence under Rule 89(D) of the Rules, if its probative value is substantially outweighed by the need to ensure a fair trial.

5. It is desirable that documents are tendered for admission through witnesses who are able to comment on them. A party is not necessarily precluded from seeking the admission of a document even though it was not put to a witness with knowledge of the document (or its content) when that witness gave testimony in court. However, the failure to put the document to such a witness is relevant to the exercise of the Chamber's discretion to admit the document. Further, if the document is admitted, the failure is likely to limit the value of the document in evidence.¹⁴

C. Discussion

6. The Chamber will discuss below only the two documents subject to the Defence objection.

1. Documents not subject to objection

7. The Defence does not object to the admission of the following documents on the basis that they are generally reliable:¹⁵ Rule 65ter numbers 01146, 01162, 01425, 01429, 01434, 00927, 00922, 00926, 04154, 05268, 05269, 05272, 05279, 05283, 05284, 05298, 05275, 05286, 05293, 05294, 05295, 04260, 01041, 01929, 01946, 01930, 02574, 02575, 02801, 03081, 04050, 04052, 02591, 04311, 04306, 02930, 01148, 01138, 04053, 04307, 04138, 04101, 04168, 01063, 04046,

¹¹ The Appeals Chamber has clarified that "a piece of evidence may be so lacking in terms of indicia of reliability that it is not 'probative' and is therefore not admissible", *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No: IT-95-14/2-AR73.5, "Decision on Appeal Regarding Statements of a Deceased Witness", 21 July 2000, para 24. See also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, "Decision on Prosecution's Motion to Admit Documentary Evidence", 10 October 2006, para 10 (quoting *Prosecutor v. Duško Tadić*, Case No: IT-94-1-T, "Decision on Defence Motion in Hearsay", 5 August 1996, para 15); *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-T, "Decision on Mile Mrkšić's Motion for Admission of Documents", 21 November 2006; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, "Decision on Bošković Defence Motion to Amend Its Rule 65ter List and Admit Exhibits from the Bar Table", 20 March 2008 ("*Bošković* 20 March 2008 Decision"), para 4.

¹² *Bošković* 20 March 2008 Decision, para 4; see *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92bis (C)", 7 June 2002, para 35.

¹³ *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-T, "Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E", 14 May 2007 ("*Bošković* 14 May 2007 Decision"), para 14; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, "Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court", 29 October 2008, para 23.

¹⁴ *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, "Decision on Tarčulovski's Second Motion for Admission of Exhibits from the Bar Table with Annex A", 7 April 2008, para 5.

¹⁵ Response, para 5.

01651, 01655, 02807 02810, 02811, 04310, 01738, 04011, 05221, 05222, 05223, 05224, 05225, 05230, 05300, 05319, 02153, 02585, 04173, 04261, 04196, 04479, 04480,¹⁶ 05280, 05281, 05282, 05285, 05289, 05291, 05292, 05296, 05297, 05299, 00796, 00800, 00801, 04089, 04009, 01854, 01857, 02659, 02660, 02661, 02814, 04040, 01948.

8. The Chamber is satisfied that the above-mentioned documents have sufficient indicia of reliability and relevance to be admissible and will grant leave to admit them.

2. Documents subject to objection

(a) Rule 65ter number 00808

9. Rule 65ter number 00808 is a UN report on the “Situation of Human Rights in the Territory of the Former Yugoslavia” prepared by the UN Special Rapporteur of the Commission on Human Rights and transmitted by UN Secretary General to the UN General Assembly and UN Security Council on 17 November 1992. In preparing the report, the Special Rapporteur took into account materials prepared and provided by governments, intergovernmental organisations, non-governmental organizations,¹⁷ and from many victims of and witnesses to human rights violations.¹⁸ Paragraphs 99 to 114 of the report relate specifically to Kosovo. The report details, *inter alia*, the tense situation in Kosovo in 1992, in particular regarding the different forms of discrimination being suffered by the Albanian population. It also discusses the changes to the education system imposed by Serbian authorities, including the establishment of a Serbian curriculum and the prohibition of teaching in the Albanian language in many schools. The report notes that Serbian authorities limited broadcasts and publications in Albanian language. In addition, the report recounts that over 300,000 Albanians left in the three years prior to the date of the report and that many Albanians dismissed from their job were replaced by Serbs and Montenegrins. Lastly, the report states that a large and increasing number of Yugoslav troops were stationed in Kosovo at this time.

10. The Prosecution submits that this report is relevant to the development of the crisis in Kosovo and explains the historical and political background of the conflict in 1998 and 1999.¹⁹ The Prosecution submits that, because this is report from the UN Secretary General, it is a document originating from an official source and is, therefore, reliable.²⁰ The Prosecution also submits that

¹⁶ This document was tendered by the Defence in court on 12 February 2009 and subsequently admitted into evidence as Exhibit D404 (Court Session, 12 February 2009, T 9474). A decision in respect of this specific document is, therefore, moot.

¹⁷ Including Amnesty International and Helsinki Watch, Rule 65ter 00808, para 5.

¹⁸ Rule 65ter number 00808, para 5.

¹⁹ Motion, para 90; *see also* Pre-Trial Brief, paras 10-21.

²⁰ Motion, para 90.

this report was referred to at para 19 of its Pre-Trial Brief²¹ and that this report was admitted in *Milutinović et al.*²²

11. The Defence submits that taken out of context, Rule 65ter 00808 has little probative value to the case.²³ The Defence submits that the Prosecution should have called a witness, such as the author of the report, or other witnesses that came to testify for the Prosecution, to provide context to the document.²⁴ The Defence notes that, in the Prosecutions 65ter submissions, the Prosecution noted that it would seek admission of this document through Baton Haxhiu, who was called as a witness in these proceedings but was not asked to comment on the report. The Defence also submits that because it does not know the sources of the information contained in the report, it can not investigate or challenge them.²⁵

12. The Chamber accepts that this report contains information that is of some relevance to the background and context of the allegations in the Indictment.²⁶ The report was prepared by the UN Special Rapporteur of the Commission on Human Rights and transmitted by UN Secretary General to the UN General Assembly and UN Security Council. In addition, the report details the sources from which information was drawn, including governmental sources, NGOs, witnesses, victims, intergovernmental sources, and human rights organisations such as Amnesty International, Helsinki Watch, and others.²⁷ It is desirable that documents be tendered for admission through witnesses who would be in a position to comment on them, however, this cannot be viewed as some inflexible rule, and having carefully reviewed the document, the Chamber is of the view that the document itself speaks of its relevance and probative value. The relevant subject matter of the report has also been the subject of other evidence. The Chamber is also convinced that the absence of explanatory evidence of the period between 1992 and 1998 in no way vitiates that relevance and probative value. Therefore, Rule 65ter 00808 will be admitted into evidence.

(b) 65ter number 01725

13. Rule 65ter number 01725 is a "Request to solve problems that affect combat readiness of the Priština Corps." The document dated 4 June 1999 was apparently sent to the Supreme Command Staff by General Nebojša Pavković. Each page bears a stamp. The document suggests

²¹ See also Pre-Trial Brief, paras 10-21 regarding the historical and political background of the conflict in Kosovo in 1998 and 1999.

²² Motion, para 90; *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para 51 (admitted as 65ter number 4423 in *Milutinović, et al.*) ("Milutinović Decision").

²³ Response, para 7.

²⁴ Response, paras 8 and 10.

²⁵ Response, para 9.

²⁶ Indictment, para 88.

that, having visited some of the Priština Corps units from 23 to 26 May 1999, Pavković requested that several “problems” be solved at the Supreme Command level, including that MUP forces were not being re-subordinated to appropriate VJ commands because they did not receive appropriate orders from their superior MUP commands, and other matters related to MUP forces.

14. The Prosecution submits that this document bears the official stamp of the VJ Belgrade Military Archives.²⁸ The Defence objects to the admission of 01725 and submits that, although the document bears the stamp of the VJ Belgrade Military Archives, it is missing the log book stamp, thus indicating that it is a forgery.²⁹ The Defence submits that the proposed document was handed over to the Prosecution on General Pavković’s behalf by the then Prime Minister Đinđić as an attempt by Pavković to “exculpate himself or those he may have been protecting”.³⁰ It submits that the document does not bear a signature of General Pavković or General Stojimirović, the latter being the person who would generally give the approval to send a document of this nature by telegram.³¹ The Defence further submits that, since this document is labelled strictly confidential 872-172/3, that this is apparently the third document in a series and that, in order to ascertain the authenticity, it would be relevant to see the log book and determine if the previous documents in the series were of the same nature.³²

15. The Chamber is satisfied that Document 01725 is relevant to the existence of the alleged Joint Criminal Enterprise as it discusses the subordination of MUP units to VJ units.³³ In accordance with a decision dated 1 October 2009³⁴, this Chamber has taken into account the evidence of witness Philip Coo who testified about documents given to the Prosecution on behalf of General Pavković. Philip Coo testified that none of the documents, including the proposed document, suggested that they had been subject to tampering or forgery.³⁵ Consistent with the reasoning of that decision, the Chamber deems that Document 01725 possesses sufficient indicia of reliability and authenticity for admission. However, the weight to be given to this document, and the other documents referred to by Mr Coo will be determined at a later stage. Document 01725 will be admitted.

²⁷ 00808, para 5.

²⁸ Motion, para 42.

²⁹ Response, para 11.

³⁰ Response, para 12.

³¹ Response, para 14. The Defence further submits that the font on the original copy of the Document indicates it was sent by transmitter as a telegram.³¹ It submits that the telegram would have the stamp of the organ that received it.

³² Response, para 14.

³³ Document 01725, p 1, Items 1-2; Indictment, para 23.

³⁴ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Decision on Prosecution’s Oral Motion for Admission of Evidence Tendered Through Witness Phillip Coo”, 1 October, 2009, paras 15-16.

³⁵ Philip Coo, T 8609-8612.

D. Disposition

16. For these reasons, and pursuant to Rules 54 and 89 of the Rules, the Chamber

GRANTS leave to exceed the word limit in the Response;

DECIDES as follows: documents bearing Rule 65ter numbers: 01146, 01162, 01425, 01429, 01434, 00927, 00922, 00926, 04154, 05268, 05269, 05272, 05279, 05283, 05284, 05298, 05275, 05286, 05293, 05294, 05295, 04260, 01041, 01929, 01946, 01930, 02574, 02575, 02801, 03081, 04050, 04052, 02591, 04311, 04306, 02930, 01148, 01138, 04053, 04307, 04138, 04101, 04168, 01063, 04046, 01651, 01655, 02807 02810, 02811, 04310, 01738, 04011, 05221, 05222, 05223, 05224, 05225, 05230, 05300, 05319, 02153, 02585, 04173, 04261, 04196, 04479, 05280, 05281, 05282, 05285, 05289, 05291, 05292, 05296, 05297, 05299, 00796, 00800, 00801, 04089, 04009, 01854, 01857, 02659, 02660, 02661, 02814, 04040, 01948, 00808, and 01725 will be received and admitted into evidence;

REQUESTS the Registry to assign exhibit numbers to the received documents and to inform the Chamber and the Parties in writing accordingly.

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

Dated this 7th day of December 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]