



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: 14 December 2010

Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr. John Hocking

Decision of: 14 December 2010

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON MR. PERIŠIĆ'S MOTION FOR THE
ADMISSION OF EVIDENCE PURSUANT TO RULE
92BIS REGARDING THE PROSECUTION MOTION TO
REOPEN**

The Office of the Prosecutor

Mr. Mark Harmon

Counsel for the Accused

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”) is seized of “Mr. Perišić’s Motion for the Admission of Evidence Pursuant to Rule 92 *bis* Regarding the Prosecution Motion to Reopen, with Public Annex A” filed publicly on 29 November 2010 (“Motion”) and hereby renders its Decision.

I. SUBMISSIONS

A. Defence Motion

1. On 29 November 2010, the Defence filed its Motion, in which it seeks the admission into evidence of Dušan Kovačević’s supplementary statement (“Proposed Statement”) pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence (“Rules”). The Proposed Statement clarifies and elaborates on an entry from the Mladić diaries as found in exhibit P2938.¹ The Defence submits that the evidence contained in the Proposed Statement is relevant, of probative value, serves the interests of justice and the goal of judicial economy.² Further, the Defence submits that the Proposed Statement does not discuss the alleged acts or conduct of the Accused and is certified according to the Rules.³
2. The Defence also argues that Mr. Kovačević initially testified on 12, 13, 14, 15, and 16 July 2010 and was cross-examined by the Prosecution on 15 and 16 July 2010.⁴ On 15 October 2010, the Prosecution moved to reopen its case and tender into evidence through a bar table motion numerous excerpts from the Mladić diaries.⁵ On 4 November 2010, the Trial Chamber granted the Prosecution Motion to Reopen.⁶
3. The Defence further avers that pursuant to the Trial Chamber’s ruling the Defence may seek to make submissions and recall particular witnesses to address the “fresh evidence” found in the Mladić diaries. Consequently, the Defence seeks to introduce Mr. Kovačević’s statement in order to address the handover of duties between General Mladić and General Kukanjac and the 11 May 1992 meeting between the two and Mr. Kovačević.⁷

¹ Motion, para. 1.

² Motion, paras 3-4.

³ Motion, para. 17.

⁴ Motion, para. 12.

⁵ Motion, para. 13; Motion to Reopen Prosecution Case and Tender Documents Through the Bar Table, Public with Public Annex A and Confidential Annex B, 1 October 2010 (“Prosecution Motion to Reopen”).

⁶ Motion, para. 15; Decision on Motion to Reopen the Prosecution Case and Tender Documents Through the Bar Table, 4 November 2010.

⁷ Motion, paras 15, 17.

4. The Defence finally submits that there will be no additional delay in the proceedings since there is no need to recall Mr. Kovačević, who has already been cross-examined by the Prosecution for two days.⁸ The Defence further contends that the Mladić diaries were available to the Prosecution as early as 11 May 2010, two months before Mr. Kovačević testified, and thus any issue concerning the diaries could have been raised during his testimony.⁹

B. Prosecution Response

5. On 1 December 2010, the Prosecution publicly filed its response in which it does not oppose the admission of the Proposed Statement into evidence, but requests that Mr. Kovačević be called for cross-examination.¹⁰

6. The Prosecution contends that in the Proposed Statement, Mr. Kovačević provides information which is contradictory to other evidence already in the trial record concerning the arming of volunteers who were part of the JNA or Territorial Defence.¹¹ In particular, the Prosecution takes issue with Mr. Kovačević's contention that the arming of 69,000 Serbs, which is mentioned in the Mladić diary entry, referred to "volunteers who were mobilized and admitted to the formations of the then JNA, and does not relate at all to the arming of any paramilitary units of the Serbian people."¹² The Prosecution avers that the trial record contains evidence to the contrary, as contained in P185 which provides that the JNA was distributing weapons to the "volunteer forces of the 2nd Military district" that were not part of the JNA or the Territorial Defence structure.¹³

7. The Prosecution further argues that the Proposed Statement relates to the material issue of whether the JNA was indiscriminately arming the Serbian people regardless of whether they were part of the JNA formation.¹⁴

8. The Prosecution also contends that at the time when Mr. Kovačević testified at trial, there was nothing to suggest that Mr. Kovačević would take a position on this issue contrary to the previous evidence adduced at trial and the entry in Mladić's diary. Consequently, the Prosecution "had no need to put the diary entry to Mr. Kovačević during his testimony."¹⁵

⁸ Motion, para. 18.

⁹ Motion, para. 18.

¹⁰ Prosecution Response to Defence Motion for Admission of Evidence Pursuant to Rule 92bis Regarding Prosecution Motion to Reopen, 1 December 2010 ("Response"), para. 2.

¹¹ Response, para. 4.

¹² Motion, para.7..

¹³ Response, para. 4.

¹⁴ Response, para. 6.

¹⁵ Response, para. 5.

C. Defence Reply

9. On 6 December 2010, the Defence publicly filed its Reply, asking for leave to reply to the Prosecution Response, in order to “clarify incorrect assertions made in the Prosecution response.”¹⁶

10. In its Reply, the Defence avers that the Prosecution submission whereby during Mr. Kovačević’s testimony there was nothing to suggest that he would take a position contrary to the earlier evidence already in the trial record is inaccurate. The Defence points out that in Mr. Kovačević’s testimony in July he already contradicted earlier evidence by stating:

The units received ethnic Serbs, for the most part those who were with the Territorial Defence or were volunteers. As for these volunteers, we would organise the files. We would give them their supplies and their weapons as part of JNA units, according to the war assignment, each unit as had originally been planned.¹⁷

11. The Defence further contends that the Mladić diaries were readily available to the Prosecution during Mr. Kovačević’s testimony in July 2010, however the Prosecution chose not to question him about them.¹⁸ Consequently, it is the Defence’s position that, by requesting to cross-examine Mr. Kovačević at the current stage of the proceedings, the Prosecution violates the Rules.¹⁹

II. APPLICABLE LAW

12. The Trial Chamber incorporates by reference the requirements for admission of evidence under Rule 92 *bis* as set out in a previous decision by this Trial Chamber.²⁰

III. DISCUSSION

13. Having analysed the Proposed Statement, the Trial Chamber finds it to be relevant and of probative value. The Trial Chamber further considers that the Proposed Statement does not go to the acts and conduct of the accused. Consequently, the Trial Chamber is satisfied that the Proposed Statement meets the requirements of Rule 92 *bis*, as well as the general requirements of admissibility. Accordingly, the Trial Chamber admits the written statement of Mr. Kovačević into evidence pursuant to Rule 92 *bis*.

14. The Trial Chamber will now turn to examine the Prosecution request to cross-examine Mr. Kovačević. The Trial Chamber notes that the excerpt from Mladić diary, was admitted into

¹⁶ Defence Reply to Prosecution Response to Defence Motion for the Admission of Evidence Pursuant to Rule 92 *bis* Regarding Prosecution Motion to Reopen, 6 December 2010 (“Reply”).

¹⁷ Reply, para. 8.

¹⁸ Reply, para. 9.

¹⁹ Reply, para. 9.

²⁰ See Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92 *bis*, 2 October 2008, para. 10.

evidence as exhibit P2938 on 4 November 2010, three months after Mr. Kovačević's testimony. The Proposed Statement provides an interpretation of a diary entry contained in exhibit P2938. The Trial Chamber considers that the Proposed Statement is generally consistent with the trial testimony of Mr. Kovačević in respect of the evidence that the JNA was only arming JNA Serb volunteers.²¹

15. Further, the Trial Chamber is of the view that Mr. Kovačević's testimony at trial contradicted previous evidence already in the trial record.²² In fact, Mr. Kovačević's testimony on the arming of the Serbs by the JNA directly contradicted the evidence contained in Exhibit P185.

16. The Trial Chamber therefore considers that the proper procedure to elicit testimony from Mr. Kovačević about the arming of the Serbs by the JNA should have been by putting to him questions about Exhibit P185 and the diary entries as contained in P2938 during Mr. Kovačević's trial testimony.

17. Finally, the Trial Chamber emphasizes its discretionary power in determining whether there is a need for a witness to appear for cross-examination pursuant to Rule 92 *bis*. In exercising this discretion, in addition to the foregoing considerations, the Trial Chamber also finds that the evidence in question is not sufficiently pivotal to the Prosecution's case so as to warrant cross-examination of the witness, in particular in light of the fact that the contested point relates to pre-indictment period. The Trial Chamber further considers that allowing the Prosecution to cross-examine Mr. Kovačević once again will only unnecessarily delay the proceedings.

IV. DISPOSITION

18. For the reasons set out above, and pursuant to 89 and 92 *bis* of the Rules, the Trial Chamber hereby

GRANTS leave to the Defence to file the Reply;

GRANTS the Motion to admit the Proposed Statement into evidence;


DENIES the Prosecution request to cross-examine Mr. Kovačević; and

REQUESTS the Registry to assign an exhibit number to the Proposed Statement admitted into evidence.

²¹ See T. 12549; Proposed Statement, para. 7.

²² Response, para. 5.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this fourteenth day of December 2010

At The Hague

The Netherlands

[Seal of the Tribunal]