

**UNITED
NATIONS**



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: 17 September 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: 17 September 2010

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR
RECONSIDERATION OF THE TRIAL CHAMBER'S
ORAL DECISIONS OF 15 AND 16 JULY 2010 ON
ADMISSION OF "FRESH EVIDENCE"**

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 seised of the Defence “Motion for Reconsideration of Trial Chamber Oral Decisions of 15 and 16 July 2010, Motion to Strike Testimony, and Motion to Limit the Purpose of ‘Fresh Evidence’ Exhibits” filed publicly on 12 August 2010 (“Motion”), and hereby renders its Decision.

I. PROCEDURAL BACKGROUND

1. On 15 July 2010, the Trial Chamber permitted the Prosecution to use, in its cross-examination of Dušan Kovačević, three documents (Rule 65ter 06399, 07346, and 08948) and decided, Judge Moloto dissenting, to admit them into evidence as P02916, P02918, and P02915 respectively (“Decision of 15 July 2010”).¹

2. On 16 July 2010, the Defence agreed to the Prosecution’s using of document XN358 as “fresh evidence”. However, the Defence objected to the Prosecution’s use of XN358 “not only to impeach the witness but for the substance of the contents of the document”.² The Trial Chamber decided to admit the document into evidence as P02917 (“Decision of 16 July 2010”).³

3. On 12 August 2010, the Defence filed its Motion, seeking reconsideration of the Trial Chamber’s Decisions of 15 and 16 July 2010 (“Impugned Decisions”).⁴

4. On 27 August 2010, the Prosecution filed publicly its “Request for Leave to Respond and Response to Defence Motion for Reconsideration of 12 August 2010” (“Response”),⁵ wherein the Prosecution requests the Trial Chamber for leave to respond to the Motion out of time and contends that the Motion be rejected in its entirety.⁶

II. SUBMISSIONS

i. Documents P02915, P02916 and P02918

¹ T. 12806-12810.

² T. 12827-12828.

³ T. 12830-12831.

⁴ Motion, para. 40.

⁵ The Trial Chamber notes that the Prosecution response was due by 26 August 2010. The Prosecution submits however, that due to an internal distribution problem during the court recess resulting in delayed receipt by the Prosecution of the Defence Motion, the Prosecution only submitted its response on 27 August 2010.

⁶ Response, paras. 2, 13.

5. The Defence seeks the removal of documents P02915, P02916, and P02918 from evidence, as well as the removal from the records of the testimony relating to these documents.⁷

6. The Defence points out that those documents were on the Prosecution's Rule 65 *ter* exhibit list but were not tendered into evidence during the Prosecution case.⁸ It submits that the Prosecution, as a general rule, is not entitled to present inculpatory evidence during the Defence phase of the case and should rather do so during its case-in-chief in order for the Defence to have a "fair opportunity" to challenge such evidence.⁹ The Defence argues that the Trial Chamber should only permit derogation from this rule in exceptional circumstances where the interests of justice so require.¹⁰

7. The Defence contends that it is necessary for the Prosecution to specify the purpose for which it seeks the admission of "fresh evidence" in order for the Trial Chamber to properly address the potential prejudice caused to the Defence.¹¹ The Defence argues that the risk of prejudice caused by the admission of "fresh evidence" inculpatory of the Accused is "potentially greater" as compared to the admission of fresh evidence admitted with the sole purpose of impeaching the witness.¹² It follows that when the purpose for admission is to inculcate the accused, the Prosecution has to meet a higher threshold for the admission of such evidence.¹³

8. The Defence argues that the Prosecution failed to make the requisite showing for these three documents as to the purpose of their admission and merely stated that "the documents will demonstrate that the VRS ammunition reserves and other materials reserves were exhausted"¹⁴ thereby leaving both the Defence and the Trial Chamber "to speculate regarding the intentions of the Prosecution".¹⁵

9. The Defence therefore submits that the Trial Chamber clearly erred in its reasoning in admitting those documents and allowing the Prosecution to use them in breach of the rules governing the presentation of "fresh evidence".¹⁶ The Defence argues that the Accused suffered an injustice as a result of the Impugned Decisions.¹⁷

⁷ Motion, para. 28.

⁸ Motion, paras 1, 6.

⁹ Motion, paras 20, 21.

¹⁰ Motion, para. 21, referring to the *Prlić* Appeal Decision, para. 24.

¹¹ Motion, para. 22.

¹² Motion, para. 22.

¹³ Motion, para. 22.

¹⁴ Motion, para. 23.

¹⁵ Motion, para. 23.

¹⁶ Motion, paras 27, 29.

¹⁷ Motion, paras 27, 29.

10. In the alternative, the Defence submits that should the Trial Chamber deem that the documents under examination meet the strictures of “fresh evidence”, the purpose of their admission should be limited to impeachment only.¹⁸

11. In its Response, the Prosecution submits that the Trial Chamber exercised its discretion in the interests of justice to admit documents P02915, P02916, and P02918 for the truth of their contents.¹⁹ The Prosecution contends that the Trial Chamber’s decision to admit those documents was a proper exercise of the Trial Chamber’s discretion “based on the Chamber’s detailed knowledge of the issues in the trial and the state of the evidence before it”.²⁰ As a result, the Prosecution argues that the Defence’s request to strike the testimony related to the documents at hand is also without foundation.³¹

ii. Document P02917

12. In relation to P02917, the Defence contends that the Trial Chamber erroneously stated that the parties agreed as to the Prosecution’s purpose for using the document.²¹ The Defence submits that it only agreed to the document being used for the sole purpose of impeachment, since the Prosecution failed to make the requisite showing for the use of “the document for the purpose of the substance of the contents of the document”.²²

13. The Defence submits that it is in the interests of justice that P02917 be used solely for the purpose of impeachment and that anything more would result in a violation of the Accused’s right to a fair trial as guaranteed by the Statute of this Tribunal.²³

14. The Prosecution submits that the Defence request to limit the use of document P02917 to impeachment only is devoid of any merit and should be rejected.²⁴ The Prosecution contends that, in tendering the document, it explained to the Trial Chamber when it obtained the document and when it disclosed it to the Defence.²⁵ In particular, the Prosecution argues that it made it clear to the Trial Chamber that its purpose for tendering P02917 was for the truth of its contents and that all

¹⁸ Motion, para. 31.

¹⁹ Response, para. 6.

²⁰ Response, para. 7.

³¹ Response, para. 8.

²¹ Motion, para. 36.

²² Motion, para. 35.

²³ Motion, para. 39.

²⁴ Response, para. 9.

²⁵ Response, para. 11.

parties have been aware for months that the Prosecution would seek to tender certain excerpts of the *Mladić* diaries for such a purpose.²⁶

III. APPLICABLE LAW

15. According to the jurisprudence of the Tribunal, the 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.²⁷ Such circumstances may include new facts or arguments that have arisen since the issuance of a decision.²⁸

16. 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”.

17. The Appeals Chamber in the *Prlić* case held that the admission of “fresh evidence” after the closure of the Prosecution case-in-chief is permissible “only in exceptional circumstances where the interests of justice so require, such as the importance of the ‘new document’”.²⁹ More specifically, in terms of materials aimed at establishing the guilt of an accused, the Appeals Chamber held that “the Prosecution must also explain to the Chamber when and by which means it obtained these documents, when it disclosed them to the Defence and why they are being offered only after the conclusion of its case”.³⁰ The Chamber will then assess such request on a case-by-case basis, “after having permitted the Defence to challenge the evidence, particularly bearing in mind the potential infringement on the rights of the accused caused by the sought admission”.³¹ In striving to strike the appropriate balance between the need to guarantee the rights of the accused and its decision to

²⁶ Response, para. 11.

²⁷ 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.

²⁸ 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.

²⁹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73, Decision on the Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009, para.24, (“*Prlić* Appeal Decision”), citing *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 27 November 2008, para.20 (“*Prlić* Trial Decision”). The Appeals Chamber defines the notion of “fresh evidence” as “material that was not included in the Prosecution Rule 65 *ter* list and not admitted during the Prosecution’s case-in-chief but that is tendered by the Prosecution when cross-examining Defence witnesses”.

³⁰ *Prlić* Appeal Decision, para. 24, citing “*Prlić* Trial Decision”, para. 20.

admit such evidence, the Trial Chamber will have to consider “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”.³²

IV. DISCUSSION

18. At the outset, the Trial Chamber notes that the Response was filed after the fourteen days deadline as set in Rule 126 *bis* of the Rules. At the same time, it notes that the Prosecution’s miscalculation of the time allotted for filing its response was mitigated by the technical difficulties in distribution of the Motion.³³ Considering this fact and the importance of the issue raised in the Motion, the Trial Chamber pursuant to Rule 127 will exceptionally treat the Response as validly filed.

19. Turning to the documents in question, the Trial Chamber notes that the Prosecution in seeking to admit documents P02915, P02916, and P02918 during the hearing of 15 July 2010, provided the Trial Chamber with information relating to when it obtained these documents, when it disclosed them to the Defence and why they are being offered only after the conclusion of its case.³⁴ Furthermore, by stating that “[it is] seeking to admit these because of the testimony of this witness who raises in this trial for the first time the depletion of material assets in the VRS at the end of 1993” and that “the documents will demonstrate that the VRS ammunition reserves and other materials reserves were exhausted”³⁵ the Prosecution expressed the purpose for tendering P02915, P02916, and P02918 into evidence in a way that was clearly understood by the Trial Chamber as being for the truth of their contents rather than merely for impeaching the witness. The Trial Chamber also notes that the Defence on that day was given the opportunity to challenge that evidence.³⁶

20. Considering the submissions of the Parties, the fact that the documents were on the Prosecution 65 *ter* list, and in balancing the probative value of P02915, P02916, and P02918 as well

³¹ *Prlić* Appeal Decision, para. 24, citing “*Prlić* Trial Decision”, paras 20-22, 24, 26.

³² See *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decisions on Admissions of Exhibits 1316 and 1317, 15 April 2008, para. 23.

³³ Response, para. 2.

³⁴ T. 12807. The Prosecution stated that it received documents P02915 on 22 October 2006 and disclosed it to the Defence by DVD on 29 February 2008; P02916 on 22 January 2000 and disclosed it to the Defence by DVD on 2 February 2007; P02918 on 7 July 2006 and disclosed it twice to the Defence by CD on 10 August 2007 and 16 November 2007. The Prosecution also justified its tendering of these documents into evidence after the conclusion of its case-in-chief by stating that “[it is] seeking to admit these because of the testimony of this witness who raises in this trial for the first time the depletion of material assets in the VRS at the end of 1993”.

³⁵ Motion, para. 23.

³⁶ T. 12807-12810.

as the potential infringement on the rights of the Accused, the Trial Chamber, Judge Moloto dissenting, decided to use its discretionary powers to admit these documents into evidence for the purpose of the truth of their contents. The Trial Chamber, Judge Moloto dissenting, therefore finds no error in its reasoning to justify a reconsideration of its Decision of 15 July 2010 in order to prevent an injustice. The Trial Chamber also notes that, since the issuance of the Impugned Decision, the Defence has not provided any new fact or argument to concretely demonstrate how the admission of this evidence would be prejudicial or otherwise infringe on the Accused's right to a fair trial.

21. With regard to P02917, the Trial Chamber acknowledges the fact that the Trial Chamber erred in assuming that there was an agreement between the parties as to the purpose of the Prosecution's use of this document.³⁷ The Trial Chamber is of the view that this error justifies a reconsideration of the oral Decision of 16 July 2010.

22. In reconsidering the oral Decision of 16 July 2010, the Trial Chamber recalls the procedure governing the admission of "fresh evidence" as set out in the *Prlić* Appeal Decision.³⁸ The Trial Chamber notes that, in tendering this document into evidence, the Prosecution sufficiently explained when and by which means it obtained these documents, when it disclosed them to the Defence and why they are being offered only after the conclusion of its case.³⁹ Moreover, the intention of having this document in evidence for the purpose of the truth of its content was clearly expressed by the Prosecution.⁴⁰

23. Consequently, the Trial Chamber finds that regardless of the absence of an agreement between the parties as to the purpose of the Prosecution's use of P02917, the Prosecution has made out a case for the admission of the document as "fresh evidence" during the cross-examination of a Defence witness, thereby adhering to the proper procedure governing admission of "fresh evidence" as defined in the *Prlić* Appeal Decision.

³⁷ T. 12828-12830. The Defence agreed to the Prosecution using the document albeit solely for the purpose of impeaching the witness. However, the Prosecution stated that it was "seeking this document not only to impeach the witness but for the substance of the contents of the document". This resulted in the Trial Chamber misunderstanding the parties and stating that "[...] then we will call on the witness, and so we will proceed as you both have agree (*sic*), and the ruling of the Chamber have (*sic*) approved".

³⁸ *Prlić* Appeal Decision, para. 24.

³⁹ T. 12814, 12828-12829. The Prosecution stated that it received this document on 29 March, 2010, and disclosed it to the Defence by CD on 9 April, 2010 and that the "diary is obviously in a language the accused understood and in a language that many members of his team understood". The Trial Chamber further notes that, although the Prosecution did not expressly state by what means it obtained document P02917, nor why it is seeking the admission of this document only after the conclusion of its case-in-chief, the reference to the document as being part of the "*Mladić* Diary" suffices to provide the Trial Chamber, as well as the Defence with the required information. The "*Mladić* Diaries" were seized as a result of a house search conducted by the Government of the Republic of Serbia at the premises of the family of Ratko Mladić on 23 February 2010.

⁴⁰ T. 12830.

24. The Trial Chamber, having considered the above factors, notes that the Defence would potentially have suffered prejudice as a result of document P02917 being admitted during the cross-examination of a Defence witness. However, this prejudice could be mitigated in several ways such as recalling the witness or adducing further evidence to challenge that document. In this regard, the Trial Chamber further notes that the Defence case is still in progress with more than 20 witnesses to be called. This gives the Defence sufficient time to investigate opposing evidence and present it to the Trial Chamber. Should the Defence wish to avail itself of any of the procedures for rebutting document P02917, the Trial Chamber would consider such a request.

V. DISPOSITION

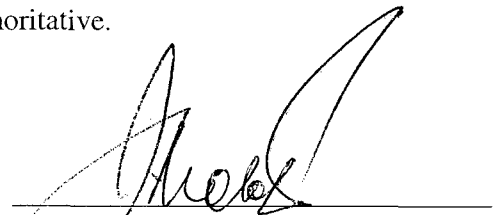
25. For the foregoing reasons and pursuant to Rule 85(A), Rules 89 (C) and (D), the Trial Chamber, Judge Moloto partly dissenting hereby:

GRANTS the Leave to Respond, and

DENIES the Motion in part:

- 1) Denies, Judge Moloto dissenting, the request to reconsider the admission of documents P02915, P02916 and P02918;
- 2) Grants the reconsideration of P02917, but denies admitting it for the limited purpose of impeachment;
- 3) Denies the Motion in all other respects.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this seventeenth day of September 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

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PUBLIC

**DISSENTING OPINION BY PRESIDING JUDGE
BAKONE JUSTICE MOLOTO TO THE DECISION ON
DEFENCE MOTION FOR RECONSIDERATION OF
THE TRIAL CHAMBER'S ORAL DECISIONS OF 15
AND 16 JULY 2010 ON ADMISSION OF "FRESH
EVIDENCE"**

The Office of the Prosecutor

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Mr. Novak Lukić
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The majority of the Chamber denied the Defence “Motion for Reconsideration of Trial Chamber Oral Decisions of 15 and 16 July 2010, Motion to Strike Testimony, and Motion to Limit the Purpose of ‘Fresh Evidence’ Exhibits” (“Motion”).

As I respectfully do not agree with the denial of the Motion, I state hereunder the reasons for my disagreement. The Defence Motion relates to documents admitted by the Trial Chamber on 15 July 2010 (P02915, P02916 and P02918) and on 16 July 2010 (P02917).

i. Documents P02915, P02916 and P02918

1. In my view, these documents do not constitute “fresh evidence” within the meaning of the *Prlić* Appeal Decision jurisprudence for the reason that the Prosecution was in possession of these documents even before the start of the trial and listed them in its 65 *ter* exhibit list. The documents are old evidence and deal with a life issue in the trial which the Prosecution sought to establish during its case-in-chief. Moreover, witness Dušan Kovačević was on the Prosecution witness list and the Prosecution was aware of the fact that witness Kovačević stated that: “until the end of 1993 the VRS had enough food, fuel, ammunition, but we did not have enough clothes or boots mostly”.¹ As a result, the documents, the purpose of which is to, “demonstrate that the VRS ammunition reserves and other materials reserves were exhausted”,² cannot be seen to constitute “fresh evidence”.

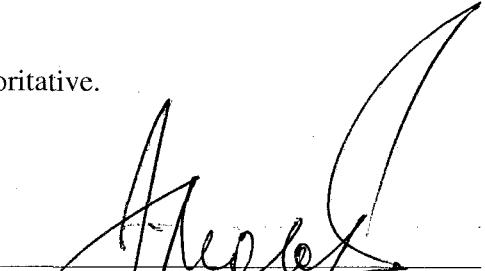
The majority states that “since the issuance of the Impugned Decision the Defence has not provided any new fact or argument to concretely demonstrate how the admission of this evidence would be prejudicial or otherwise infringe on the Accused’s right to a fair trial. With respect, the prejudice is clear. It is the element of “surprise”. The Defence is entitled to notice of the Prosecution’s case in order that it may prepare its defence accordingly. The jurisprudence of the Tribunal is clear that where a Trial Chamber admits “fresh” or “new” evidence by the Prosecution during cross-examination of a Defence witness, it must afford the Defence an opportunity to mitigate the resultant injustice. This may be done by granting the Defence a postponement to adduce rebutting evidence or an opportunity to recall the witness or any other measure which the Trial Chamber deems appropriate. The majority did not afford the Defence this opportunity.

It is my respectful view that, in the circumstances of this case, the Trial Chamber committed an error in reasoning, justifying a reconsideration by expunging exhibits P02915, P02916 and P02918 from the record together with the testimony related to them.

¹ T. 12809.

² Motion, para. 23.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this seventeenth September 2010

At The Hague

The Netherlands

[Seal of the Tribunal]