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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-00-39-A  
Date: 8 October 2008  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Mehmet Güney  
Judge Andréia Vaz  
Judge Theodor Meron

**Registrar:** Mr. Hans Holthuis

**Decision of:** 8 October 2008

**PROSECUTOR**

v.

**MOMČILO KRAJIŠNIK**

***CONFIDENTIAL***

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**DECISION ON PROSECUTION'S MOTION TO ADDUCE  
REBUTTAL MATERIAL**

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**Counsel for the Prosecution:**

Mr. Peter Kremer QC

**The Appellant:**

Mr. Momčilo Krajišnik

**Amicus Curiae:**

Mr. Colin Nicholls QC

**Counsel for the Appellant on the matter of JCE:**

Mr. Alan M. Dershowitz

Mr. Nathan Z. Dershowitz

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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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of the “Prosecution’s Motion to Adduce Rebuttal Material”, filed confidentially by the Prosecution on 15 September 2008 (“Motion”). A “Response to Prosecution’s Motion to Adduce Rebuttal Material” was filed confidentially on 24 September 2008 (“Response”) by Momčilo Krajišnik (“Appellant”).

#### A. The Motion

2. In its “Decision on Appellant Momčilo Krajišnik’s Motion to Present Additional Evidence”,<sup>1</sup> the Appeals Chamber admitted the confidential statements of George Mano and Stefan Karganović as additional evidence on appeal (“Exhibit AD1” and “Exhibit AD2”, respectively).<sup>2</sup> In these statements, Mr. Karganović and Mr. Mano allege that Counsel Nicholas Stewart QC did not adequately represent the Appellant at trial.<sup>3</sup> Subsequently, the Appeals Chamber ordered the Prosecution to present any material in rebuttal to Exhibit AD1 and Exhibit AD2 by 15 September 2008.<sup>4</sup> In the Motion, the Prosecution adduces such rebuttal material and argues that the statements of Mr. Mano and Mr. Karganović should not be given any weight, as (i) they are unsworn and untested allegations of former members of the defence team of the Appellant; (ii) Mr. Mano and Mr. Karganović are currently assisting the Appellant in his appeal; and (iii) Mr. Karganović has not been officially assigned as he breached Registry regulations by impermissibly transmitting materials to the Appellant.<sup>5</sup>

##### 1. Exhibit AD2 (Statement of Mr. Karganović)

3. The Prosecution further argues that the allegations contained in Exhibit AD2 are unreliable and not credible for the following two reasons. First, it argues, Mr. Karganović materially misrepresented his personal qualifications in his *curriculum vitae*, when he stated, *inter alia*, that as a public defender he was representing clients in San Diego between 1981 and 1984.<sup>6</sup> Second, the

<sup>1</sup> Decision on Appellant Momčilo Krajišnik’s Motion to Present Additional Evidence, filed confidentially on 20 August 2008 (“Rule 115 Decision”).

<sup>2</sup> Letter by the Registry, Assignment of Exhibit Numbers Pursuant to Decision Dated 20 August 2008, filed confidentially on 21 August 2008.

<sup>3</sup> Exhibits AD1 and AD2.

<sup>4</sup> Order on Rebuttal Material, filed confidentially on 26 August 2008.

<sup>5</sup> Motion, para. 3.

<sup>6</sup> Motion, paras 8-9.

Prosecution alleges that Mr. Karganović was materially involved in putting false allegations to a key Prosecution witness, Milorad Davidović, during cross-examination at trial.<sup>7</sup>

4. In support of these allegations, the Prosecution seeks to admit as rebuttal evidence pursuant to Rule 115 of the Rules of Procedure and Evidence (“Rules”) the following seven documents (“Rebuttal Evidence”):

- Mr. Karganović’s *curriculum vitae* made available to the Prosecution in the *Popović et al.* case (Confidential Appendix 1);
- Letter from the San Diego County Department of the Public Defender, 5 September 2008 (Confidential Appendix 2);
- Letter of the State Bar of California, 25 August 2008 (Confidential Appendix 3);
- Declaration of Custodian of Records of Washington State Bar Association, 27 August 2008 (Confidential Appendix 4);
- Affidavit of Dr. Edina Alabajči Hujdurović, 6 July 2005 (Confidential Appendix 5);
- Affidavit of Dr. Jahija Alabajči, 6 July 2005 (Confidential Appendix 6); and
- Affidavit of Mirela Nakičević, 6 July 2005 (Confidential Appendix 7).<sup>8</sup>

## 2. Exhibit AD1 (Statement of Mr. Mano)

5. The Prosecution does not seek the admission of any rebuttal evidence with respect to Exhibit AD1.<sup>9</sup> It submits, however, that the exhibit should not be given any weight because the allegations contained therein were brought to the attention of the Trial Chamber by Counsel Nicholas Stewart QC, who described them as untruthful and “scurrilous attacks”.<sup>10</sup> The Prosecution argues that he handed time sheets to the court refuting the allegation that he was not working full time on the case; in response, the Trial Chamber stated that it was willing to accept that he was hard working and spending time on the case.<sup>11</sup>

<sup>7</sup> Motion, para. 11.

<sup>8</sup> Motion, para. 4.

<sup>9</sup> Motion, para. 14.

<sup>10</sup> Motion, para. 14, with reference to T. 9599-9602 (28 February 2005).

<sup>11</sup> Motion, para. 14, with reference to T. 9601 (28 February 2005).

6. The Prosecution also disputes Mr. Mano's allegation<sup>12</sup> that Counsel Nicholas Stewart QC agreed to facts detrimental to the Appellant, although the Prosecution had conceded to remove them from the list of agreed facts.<sup>13</sup> It argues that this allegation is refuted by the fact that there were substantial negotiations on agreed facts between the parties, and no facts had been finally agreed upon during the negotiation process.<sup>14</sup>

### B. The Response

7. The Appellant responds that the Motion should be dismissed because (i) Mr. Mano and Mr. Karganović could be heard *viva voce* on the accuracy of their hitherto unsworn and untested allegations against former counsel; (ii) Mr. Karganović did not misstate his legal qualifications; (iii) his credibility is not affected by his "involvement" in any false allegations against witness Milorad Davidović; and (iv) Mr. Karganović was not aware of any breach of a Registry regulation regarding an allegedly improper transmission of materials to the Appellant. On this last issue, a memorandum prepared by Mr. Karganović is appended to the Response.<sup>15</sup>

### C. Discussion

8. The Prosecution adduces the Rebuttal Evidence to rebut Exhibit AD2, a statement by Mr. Karganović, in which he alleges that Counsel Nicholas Stewart QC was incompetent to conduct the Appellant's defence at trial. The Appellant introduced this statement to show that the alleged unprofessional behaviour of Counsel Nicholas Stewart QC deprived him of a high quality defence at trial. According to the Appellant, this behaviour resulted in a violation of his right to a fair trial.<sup>16</sup>

9. The Appeals Chamber finds that the Rebuttal Evidence satisfies the standard for the admission of rebuttal evidence. The documents "directly affect the substance of the additional evidence admitted by the Appeals Chamber"<sup>17</sup> inasmuch as the Prosecution argues that they impeach the reliability and credibility of Exhibit AD2.

10. The Prosecution further argues that should the Appeals Chamber nevertheless consider Exhibit AD2 reliable or credible, then Mr. Karganović should be heard *viva voce* and the

<sup>12</sup> See Exhibit AD1, pp 1-2.

<sup>13</sup> Motion, para. 15, with reference to *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006, para. 1236.

<sup>14</sup> Motion, para. 15.

<sup>15</sup> Response, paras 6-16.

<sup>16</sup> Rule 115 Decision, para. 11.

<sup>17</sup> *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on the Admissibility of Material Presented by the Prosecution in Rebuttal to Rule 115 Evidence Admitted on Appeal, 19 November 2003, para. 2; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Evidence, 31 October 2003, p. 5. *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Prosecution's Motion for Leave to Call Rebuttal Material, 13 December 2006 (public redacted version), para. 7.

Prosecution given the opportunity to cross-examine him.<sup>18</sup> Given the “unsworn and untested”<sup>19</sup> nature of his statement, the Appeals Chamber considers that Mr. Karganović himself may provide information relevant to the assessment of the reliability and credibility of his statement, in addition to that proffered by the Prosecution. Therefore, the Appeals Chamber finds it necessary to hear Mr. Karganović *viva voce* as a witness of the Appeals Chamber pursuant to Rules 98 and 107 of the Rules<sup>20</sup> in order to shed more light on his allegations about the alleged incompetence of Counsel Nicholas Stewart QC to conduct the Appellant’s defence at trial. This will be done in the course of a hearing (“Evidentiary Hearing”).

11. Furthermore, the Appeals Chamber *proprio motu* finds it necessary to hear Mr. Mano *viva voce* as a witness of the Appeals Chamber pursuant to Rules 98 and 107 of the Rules at the Evidentiary Hearing in order to further explore his allegations about the “convincing evidence [...] that Mr. Stewart should not be left to handle this case”.<sup>21</sup> At the Evidentiary Hearing, the Prosecution, the Appellant and *Amicus Curiae* will be given the opportunity to cross-examine both Mr. Karganović and Mr. Mano.

12. The Appeals Chamber emphasises that the above findings in no way are expressive of its view on the merits of the appeals, which will be determined in the Appeal Judgement.

13. In relation to the Appellant’s Response and Mr. Karganović’s memorandum appended thereto, the Appeals Chamber observes that Rule 115 of the Rules does not entitle a party to seek admission of rejoinder evidence to rebuttal material.<sup>22</sup> Therefore, the Appeals Chamber will only allow admission of rejoinder evidence where the particular circumstances of the case so require for a fair determination of the matter before it.<sup>23</sup>

14. In the present case, the Appeals Chamber has found that it will hear Mr. Karganović *viva voce* as a witness of the Appeals Chamber during the Evidentiary Hearing.<sup>24</sup> At this Evidentiary Hearing, the Appellant will be given the opportunity to cross-examine Mr. Karganović on the issues contained in his memorandum which is annexed to the Response. Therefore, the Appeals Chamber is not convinced that the admission of the memorandum as rejoinder evidence would be required for

<sup>18</sup> Motion, para. 8.

<sup>19</sup> Motion, para. 3.

<sup>20</sup> Cf. *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on the Prosecutor’s Motion for an Order and Directives in Relation to Evidentiary Hearing on Appeal Pursuant to Rule 115, filed confidentially on 14 June 2006, p. 3.

<sup>21</sup> Exh. AD1, p. 3. The Appeals Chamber notes that the Appellant does not oppose any request to hear Mr. Karganović and Mr. Mano *viva voce*: Response, paras 12, 15.

<sup>22</sup> Cf. *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Hassan Ngeze’s Motion for Leave to Present Rejoinder Evidence, filed confidentially on 12 January 2007 (“Ngeze Decision”), para. 6.

<sup>23</sup> Cf. Ngeze Decision, para. 6.

<sup>24</sup> See above para. 10.

a fair determination of the assessment of the credibility and reliability of Mr. Karganović's statement.


**D. Disposition**

15. For the foregoing reasons, the Appeals Chamber **GRANTS** the Motion in part and **DECIDES** that the Rebuttal Evidence is admitted as rebuttal material pursuant to Rule 115 of the Rules. The Appeals Chamber **INSTRUCTS** the Registrar to assign exhibit numbers to the seven documents contained in the Rebuttal Evidence. The remainder of the Motion is **REJECTED**.

16. The Evidentiary Hearing at which Mr. Karganović and Mr. Mano will be heard as witnesses of the Appeals Chamber pursuant to Rules 98 and 107 of the Rules will take place on 3 and 5 November 2008. The Appellant, the Prosecution and *Amicus Curiae* will be given the opportunity to cross-examine Mr. Karganović and Mr. Mano. A further order will be issued in due course setting out the specific schedule for this Evidentiary Hearing.

17. The Appellant, the Prosecution and *Amicus Curiae* may file a supplemental brief on the impact of Exhibit AD1 and Exhibit AD 2, the Rebuttal Evidence and the *viva voce* evidence of Mr. Karganović and Mr. Mano by 14 November 2008. There is no right of response to a supplemental brief.

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



Judge Fausto Pocar  
Presiding Judge

Dated this eighth day of October 2008,  
At The Hague, The Netherlands.

**[Seal of the Tribunal]**