



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: 10 February 2009

Original: English

IN TRIAL CHAMBER I

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

Acting Registrar: Mr. John Hocking

Decision of: 10 February 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**FILING OF PUBLIC REDACTED AND CORRECTED
VERSION OF 2 DECEMBER 2008 DECISION FOR
DEPOSITION PURSUANT TO RULE 71**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

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”);

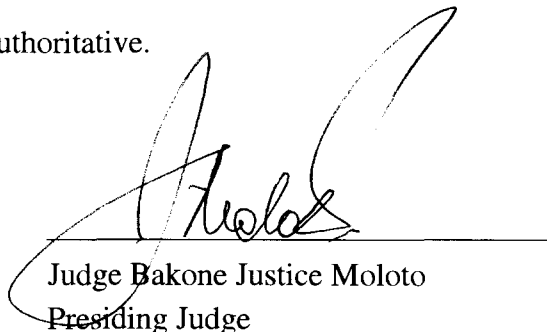
NOTING the “Decision on Prosecution Motion for Deposition Pursuant to Rule 71” filed confidentially on 2 December 2008 (“Decision”);

CONSIDERING that the Decision contained minor inaccuracies, including in the name of the witness;

CONSIDERING FURTHER that the Decision need not remain confidential any longer;

HEREBY FILES a public redacted and corrected version of the Decision.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this tenth day of February 2009

At The Hague

The Netherlands

[Seal of the Tribunal]

**UNITED
NATIONS**

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MOMČILO PERIŠIĆ

PUBLIC REDACTED AND CORRECTED VERSION

**DECISION ON PROSECUTION MOTION FOR
DEPOSITION PURSUANT TO RULE 71**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

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 “Prosecution Motion for Deposition Pursuant to Rule 71, with Annex A” (“Motion”) filed confidentially on 25 November 2008 in which it requests the Trial Chamber to order that witness Nikola Tošović be heard by deposition pursuant to Rule 71 of the Rules of Procedure and Evidence (“Rules”).

I. SUBMISSIONS OF THE PARTIES

1. In its Motion, the Prosecution requests that the Trial Chamber exercise its discretion to grant the Prosecution leave to depose witness Nikola Tošović in [redacted].¹ In support of its Motion, the Prosecution submits that:

- a) Due to his acute health conditions, Mr. Tošović is unable to travel to The Hague to testify before the Trial Chamber in person or to travel to [redacted] to testify via video-link. It is therefore in the interests of justice that the Trial Chamber order a deposition to be taken pursuant to Rule 71 (A) of the Rules.²
- b) Mr. Tošović’s testimony is of significant evidentiary value.³ In its Motion, the Prosecution provides a summary of the matters on which the witness is to be examined. It states that Mr. Tošović was assigned to the Vogošća Brigade of the Sarajevo Romanija Corps (SRK). It is submitted that Mr. Tošović will testify with regard to a meeting in Vogošća on 8 January 1994 at which the Accused was present along with General Ratko Mladić, high-ranking officers of the SRK including General Stanislav Galić, Rajko Koprivika, Ratko Hadžić, Mirko Krajišnik and Panić, Commander of the Special Unit from Pančevo.⁴ Mr. Tošović’s testimony relating to the meeting in Vogošća is directly relevant to the allegations in paragraph 44(d) of the Indictment and to the Accused’s knowledge of crimes committed by his subordinates⁵
- c) Mr. Tošović’s current health condition constitutes circumstances justifying the taking of a deposition pursuant to Rule 71 of the Rules.⁶

¹ Motion, para. 1.

² Motion, para. 15.

³ Motion, para. 9.

⁴ Motion, para. 11(a).

⁵ Motion, para. 11.

⁶ The Prosecution attaches detailed medical certificates showing that the witness suffers from an acute heart condition and is therefore unable to travel long distances, Motion, para. 13; Annex A.

2. Finally, the Prosecution requests that the Trial Chamber reduce the time for filing the Defence response from 14 days to four days pursuant to Rule 127 and seeks to depose the witness “as soon as possible”, proposing Sunday 7 December as a convenient date to conduct the deposition.⁷

3. On 27 November the Defence responded orally to the Motion (“Response”).⁸ The Defence does not oppose the merits of the Motion, although it argues that attempts should be made to call the witness *viva voce* before the Trial Chamber.⁹ The Defence also questions the urgency of the Motion, by submitting that although the documentation supplied by the Prosecution demonstrates that the witness does suffer from a serious medical condition, it does not demonstrate that his condition is deteriorating.¹⁰ The medical documents show that the witness is unable to travel but does not establish that the matter is urgent and therefore that the Trial Chamber should order a date for the deposition at this stage.¹¹ Further, also in view of the fact that the witness’s testimony will likely last more than one day, the Defence submits that the date of the deposition be set for Spring 2009.¹²

II. APPLICABLE LAW

4. Rules 71(A) and (B) of the Rules provide that

(A) Where it is in the interests of justice to do so, a Trial Chamber may order, *proprio motu* or at the request of a party, that a deposition be taken for use at trial whether or not the person whose deposition is sought is able physically to appear before the Tribunal to give evidence. The Trial Chamber shall appoint a Presiding Officer for that purpose.

(B) The Motion for the taking of a deposition shall indicate the name and whereabouts of the person whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the circumstances justifying the taking of the deposition.

5. Rule 71 (C) requires that the party requesting the deposition provide the other party “reasonable notice” and that the other party shall have the right to attend the taking of the deposition and cross-examine the person whose deposition is being taken. Rule 71 (D) states that the “deposition evidence may be taken either at or away from the seat of the Tribunal, and it may also be given by means of video-conference”.

⁷ Motion, para. 14. However, during the hearing of 27 November 2008, the Prosecution made it clear that the examination of the witness would cover two days.

⁸ T. 2082-2083 (Hearing of 27 November 2008).

⁹ T. 2083-2084 (Hearing of 27 November 2008).

¹⁰ T. 2083 (Hearing of 27 November 2008).

¹¹ T. 2083-2084 (Hearing of 27 November 2008).

¹² T. 2083-2084 (Hearing of 27 November 2008).

6. Rule 71 is an exception to the general principle expressed in Rule 90(A) of the Rules that a witness should testify directly before the Trial Chamber.¹³ Article 21 (4) of the Statute of the Tribunal sets out that:

- 4) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [...]
- (c) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing [...]
- (e) to examine, or have examined, the witnesses against him and to obtain the attendance and the examination of witnesses on his behalf under the same conditions as witnesses against him;

III. DISCUSSION

7. Rule 71 (A) gives the Trial Chamber broad discretion to permit evidence by way of deposition; the only requirement is that it is “in the interests of justice to do so”.¹⁴ The Trial Chamber is satisfied that the witness, due to his acute medical condition, is unable to travel to The Hague or to deliver testimony via video-link in [redacted]. The Trial Chamber is also satisfied that the Prosecution has met the requirements of Rule 71 (B) and (C) by providing details of his expected testimony as well a reasonable notice to the Defence. The Trial Chamber finds therefore that the requirements for ordering a deposition have been met.

8. In respect of the date on which the deposition is to be taken, the Trial Chamber notes that the Prosecution has not provided sufficient reasons that this should occur in December 2008. The Trial Chamber therefore enjoins the Parties, in consultation with the Registry, to agree on a suitable date.

IV. DISPOSITION

9. **FOR THE FOREGOING REASONS and PURSUANT TO** Rules 71(A) and 54 the Rules, the Trial Chamber

GRANTS the Motion in part;

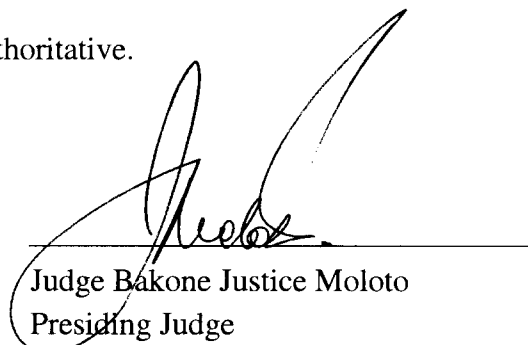
ORDERS the witness Nikola Tošović be deposed at [redacted] on a date to be agreed upon by the Parties and in consultation with the Registry;

¹³ *Naletilić and Martinović* Decision p. 2.

¹⁴ Rule 71 (A); *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-PT, Decision on Prosecution’s Motion to take Depositions For use at Trial (Rule 71), 10 November 2000 (“*Naletilić and Martinović* Decision”), p. 4. On 7 December 1999 Rule 71 of the Rules was amended to make deposition evidence more widely available as a tool for expediting proceedings by removing the requirement for “exceptional circumstances”. The amendment was adopted during the Twenty-first Plenary Session, held from 15-17 November 1999; see *Naletilić and Martinović* Decision, p. 4.

APPOINTS the Senior Legal Officer of Trial Chamber I, or a person designated by the Senior Legal Officer, as Presiding Officer under Rule 71 (E) of the Rules who is empowered, in consultation with the Parties and the Registry, to make all practical arrangements in respect of the deposition.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this tenth day of February 2009

At The Hague

The Netherlands

[Seal of the Tribunal]

¹⁴ *Naletilić and Martinović* Decision p. 2.