

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-02-60-T
Date: 13 September 2004
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IN TRIAL CHAMBER I, SECTION A

Before: Judge Liu Daqun, Presiding
Judge Volodymyr Vassilenko
Judge Carmen Maria Argibay

Registrar: Mr. Hans Holthuis

Decision of: 13 September 2004

PROSECUTOR

v.

**VIDOJE BLAGOJEVIĆ
DRAGAN JOKIĆ**

PARTLY CONFIDENTIAL
(CONFIDENTIAL ANNEX)

**DECISION ON PROSECUTION'S MOTION TO ADMIT EVIDENCE
IN REBUTTAL AND INCORPORATED MOTION TO ADMIT
EVIDENCE UNDER RULE 92 *bis* IN ITS CASE ON REBUTTAL AND
TO RE-OPEN ITS CASE FOR A LIMITED PURPOSE**

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Vidoje Blagojević
Mr. Miodrag Stojanović and Mr. Branko Lukić for Dragan Jokić

I. INTRODUCTION

1. Trial Chamber I, Section A, (“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’s Motion to Admit Evidence in Rebuttal under Rule 85 (A) and Incorporated Motion to Admit Evidence under Rule 92 *bis* in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose,” filed confidentially on 26 August 2004 (“Motion”) in accordance with the Trial Chamber’s Scheduling Order of 30 July 2004.

2. The Defence for Dragan Jokić filed its “Response to the Prosecution’s Motion to Admit Evidence in Rebuttal under Rule 85 (A) and Incorporated Motion to Admit Evidence under Rule 92 *bis* in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose” confidentially on 2 September 2004 (“Jokić Response”). The Defence for Vidoje Blagojević filed “Vidoje Blagojević’s Redacted Response to the Prosecution’s Motion to Admit Evidence in Rebuttal under Rule 85 (A) and Incorporated Motion to Admit Evidence under Rule 92 *bis* in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose” confidentially on 3 September 2004 (“Blagojević Response”).¹

3. The Prosecution commenced the presentation of evidence in its case on 14 May 2003 and concluded on 27 February 2004. The Blagojević Defence concluded the examination of its last witness on 25 June 2004.² The Jokić Defence concluded presentation of evidence in its case on 23 July 2004.

II. APPLICABLE LAW

A. Evidence in Rebuttal

4. Rule 85 (“Presentation of the Evidence”) of the Rules of Procedure and Evidence (“Rules”) provides, in part:

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

(i) evidence for the prosecution;

¹ The Defence for Vidoje Blagojević had filed its response on 2 September 2004 in accordance with the Trial Chamber’s Scheduling Order of 30 July 2004. This response, however, exceeded the 10-page limit for responses provided for in the Practice Direction of 5 March 2002 (IT/184/Rev.1). Accordingly, upon an oral Order by the Trial Chamber, the Defence filed this redacted response in conformity with the Practice Direction.

² The Trial Chamber called for a hearing on 9 September 2004 to permit Vidoje Blagojević to make a statement pursuant to Rule 84 *bis*.

- (ii) evidence for the defence;
- (iii) prosecution evidence in rebuttal;
- (iv) defence evidence in rejoinder;
- (v) evidence ordered by the Trial Chamber pursuant to Rule 98; and
- (vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

5. In the *Čelebići* case, the Appeals Chamber established the standard for the admission of rebuttal evidence, stating that such evidence “must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated”.³ The Appeals Chamber further held that the Prosecution “cannot call additional evidence merely because its case has been met by certain evidence to contradict it”.⁴

6. The Appeals Chamber cited with approval prior decisions by various Trial Chambers in relation to rebuttal evidence.⁵ The Trial Chamber concurs with the *Kordić* Trial Chamber that “only highly probative evidence on a significant issue in response to Defence evidence and not merely reinforcing the Prosecution case in chief will be permitted. Evidence on peripheral and background issues will be excluded.”⁶ The Trial Chamber emphasises that the purpose of permitting evidence in rebuttal is not to provide the Prosecution with an opportunity to simply reinforce or fill gaps in the evidence presented during its case-in-chief; the Prosecution is under a duty to adduce all evidence critical to the proving of the guilt of the accused by the close of its case. As the Appeals Chamber held in the *Čelebići* case, evidence which goes to a matter that forms a fundamental part of the case the Prosecution was required to prove in relation to the charges brought in the Indictment should be brought as part of the Prosecution case-in-chief and not in rebuttal.⁷

³ *Prosecutor v. Zejnir Delalić, Zdravko Mucić also known as “Pavo”, Hazim Delić, Esad Landžo also known as “Zenga” (“Čelebići”)*, Case No. IT-96-21-A, Judgment, 20 February 2001 (*Čelebići* Appeal Judgment), para. 273.

⁴ *Čelebići* Appeal Judgement, para. 275, referring to the *Čelebići* Trial Chamber’s Decision on the Prosecution’s Alternative Request to Re-Open the Prosecution’s Case, 19 August 1998, para. 23 (“*Čelebići* Trial Chamber Decision”).

⁵ See, e.g., *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Transcript 29 May 1998, page 3676; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/2, Confidential Decision on Prosecutor’s Motion in Respect of Rebuttal Witness and Witness Protection Issued Pertaining to Disclosure and Testimony of Witness, 19 June 1998; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, Trial Transcript of 18 October 2000; and *Čelebići* Trial Chamber Decision.

⁶ *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Oral Decision of 18 October 2000 (“*Kordić* Oral Decision”), Transcript 26647.

⁷ *Čelebići* Appeal Judgement, para. 275. The Appeals Chamber also observed that the Trial Chamber was correct in stating that “where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it, then the Trial Chamber will be reluctant to exercise its discretion to grant leave to adduce such evidence,” referring to the *Čelebići* Trial Chamber Decision, para. 23.

B. Standard to Reopen a Case

7. The Appeals Chamber has held that “fresh evidence” may be adduced if certain criteria are established.⁸ Rule 89 (C) provides that “a Chamber may admit any relevant evidence which it deems to have probative value.” Rule 89 (D) provides that “a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.” The Trial Chamber recalls that Articles 20 and 21 of the Statute of the Tribunal provide, *inter alia*, that all accused shall be given a fair trial and tried without undue delay. To this end, Rule 90 (F) provides:

The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (i) make the interrogation and presentation effective for the ascertainment of the truth; and
- (ii) avoid needless consumption of time.

8. The *Čelebići* Appeals Chamber found that the primary consideration in determining an application for reopening a case is “whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it is shown that the evidence could *not* have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings.”⁹

9. The burden of establishing that the evidence sought to be adduced could not have been found with the exercise of reasonable diligence rests “squarely” on the party seeking to re-open the case.¹⁰

10. When considering a motion to re-open a case, the *Čelebići* Trial Chamber found that the following factors are relevant, cited with approval by the Appeals Chamber:

1. the advanced stage of the trial, i.e. the later in the trial that the application is made the less likely the Trial Chamber is to accede to the request;
2. the delay likely to be caused by the re-opening of the Prosecution case, and the suitability of a possible adjournment in the overall context of the trial; and

⁸ *Čelebići* Appeal Judgement, para. 276: “Where such evidence could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time, this does not render it admissible as rebuttal evidence. The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different basis of admissibility applies.”

3. the probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused.¹¹

11. The Trial Chamber recalls that the Appeals Chamber held that the “stage in the trial at which the evidence is sought to be adduced and the potential delay that will be caused to the trial are matters highly relevant to the fairness to the accused of admission of fresh evidence.”¹² In this regard, the Appeals Chamber considers as relevant the particular effect of bringing new evidence against one accused – and the subsequent evidence that may be called to challenge that evidence by the Defence – on the fairness of the trial of another accused in a multi-defendant case.¹³

III. DISCUSSION

12. In its Motion, the Prosecution seeks leave to call two witnesses in rebuttal. Furthermore, it requests permission to enter into evidence two witness statements under Rule 92 *bis* of the Rules as rebuttal evidence.

13. In addition, the Prosecution seeks that the Trial Chamber permits it to re-open its case for the limited purpose of leading evidence regarding alleged executions at the soccer stadium in Bratunac. The Prosecution seeks to call three witnesses to testify on this issue, one of whom it is also seeking to call to provide evidence in rebuttal.

14. The Trial Chamber will first discuss the motion for admission of evidence in rebuttal, before addressing the request to re-open the case. In order to protect the identity of the witnesses named in the Motion, the Trial Chamber refers to the witnesses by pseudonym, providing their identity in a confidential annex attached hereto.

A. Evidence in Rebuttal

15. In accordance with the *Čelebići* Appeals Chamber’s ruling, the Trial Chamber will admit evidence in rebuttal if it relates to a significant issue, and not a peripheral or background issue, which arises directly out of evidence brought by the Defence which could not have been

⁹ *Čelebići* Appeal Judgement, para. 283.

¹⁰ *Čelebići* Trial Chamber Decision, para. 26.

¹¹ *Čelebići* Appeal Judgement, para. 280, referring to *Čelebići* Trial Chamber Decision, para. 27. See *id.*, paras 281-293 for application of these factors by the Appeals Chamber.

¹² *Čelebići* Appeal Judgement, para. 290.

¹³ *Id.*

anticipated. Evidence of low probative value or evidence relating to a fundamental part of the Prosecution's case-in-chief is thus not admissible in rebuttal.¹⁴

1. Witness A

16. The Prosecution seeks to admit the statement of Witness A under Rule 92 *bis* of the Rules, in order to "rebut the Blagojević defence assertion that shelling of Srebrenica had not occurred prior to 11 July 1995 and, thus, that Colonel Blagojević was not aware of the shelling of Srebrenica prior to that date."¹⁵ The Prosecution submits that it could not have anticipated that the defence would dispute that the shelling began on 25 May 1995, in the face of documentary evidence to the contrary.¹⁶

17. In objecting to the admission of this statement, the Blagojević Defence submits that: (a) the Prosecution mischaracterizes the evidence; (b) the admission of the statement does not prove that Mr. Blagojević either ordered the shelling of Srebrenica or was necessarily aware that such an order was issued to units of the Bratunac Brigade; and (c) there are no charges against Vidoje Blagojević relating to that incident in the Indictment.¹⁷

18. The Prosecution submits that the statement of Witness A is intended to rebut evidence that Srebrenica was not shelled prior to 11 July 1995. This does not appear to be a contested issue in the trial. Furthermore, the Indictment does not charge Vidoje Blagojević with the shelling of Srebrenica on 25 May 1995. As such, the test of whether the evidence in question is a significant issue which arises directly out of the defence evidence or which could not reasonably have been anticipated is not satisfied. Furthermore, the Trial Chamber recalls that evidence on background issues generally will be excluded in rebuttal.¹⁸ Therefore, the Trial Chamber finds that the statement of Witness A should not be accepted as evidence in rebuttal.

2. "Statement" of Helge Brunborg, Ewa Tabeau and Arve Hetland

19. The Prosecution seeks to introduce a statement, in the form of an expert report, prepared by Helge Brunborg, Ewa Tabeau and Arve Hetland, under both Rule 92 *bis* and Rule 94 *bis* of the Rules,¹⁹ in order to rebut the testimony of the Defence demographic expert Dr. Radovanović. The three specific issues that are to be addresses in this statement are: (a) the allegation that the

¹⁴ See, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance, 4 May 2001, para. 11.

¹⁵ Motion, para. 2(i).

¹⁶ Motion, para. 10(i).

¹⁷ Blagojević Response, para. 4.

¹⁸ *Kordić* Oral Decision, T. 26647.

¹⁹ Motion, para. 2. On 26 August 2004, the Prosecution filed the "Prosecution's Notice of Disclosure of Expert Witness Statement under Rule 94 *bis*," under seal.

methodology of the Prosecution's demographic expert, Helge Brunborg, is flawed; (b) that the expert report by the Prosecution's demographic expert contains duplicate records of missing persons; and (c) that the Prosecution's expert report and the ICRC list contain two fictitious names.²⁰

20. The Prosecution submits that the new report rebuts the allegation that Helge Brunborg ignored or failed to use resources that were available in his assessment of the number of victims of Srebrenica, the allegation of which "could not have been anticipated by the Prosecution as there was no reason to believe that Dr. Radovanović would suggest that such sources could have been used in the circumstances arising out of the Srebrenica massacre."²¹ Furthermore, in relation to the charge that two fictitious names are included in the Prosecution and ICRC missing persons lists, the Prosecution asserts that the evidence in the new report shows that Dr. Radovanović's methodology "lacks credibility and is flawed" and that it could not have anticipated her evidence as "there was no reason to believe that the Defence would suggest that names on the ICRC missing list were fictitious."²² The Prosecution does concede that the Prosecution's list of missing persons does contain certain duplicate names which should be deleted.²³

21. The Blagojević Defence objects to the admission of this statement. It submits that if the new report were to be admitted, then it want to cross-examine at least one of the experts who contributed to the report and will have to hire a demographic expert to challenge the proposed rebuttal evidence, which would cause "a significant delay."²⁴ Furthermore, the Blagojević Defence asserts that the evidence provided by its expert, Dr. Radovanović, could have been anticipated by the Prosecution based on the cross-examination of Helge Brunborg and the information requested of the Prosecution by Dr. Radovanović.²⁵

22. As a preliminary matter, the Trial Chamber recalls that in its 7 November 2003 Decision, it found that Rule 94 *bis* is the *lex specialis* for expert witness statements, and therefore, when an expert report is tendered under both Rule 92 *bis* and Rule 94 *bis*, it will accept such report under Rule 94 *bis* only.²⁶

23. The Trial Chamber has before it expert demographic reports submitted by both the Prosecution and Blagojević Defence.²⁷ Helge Brunborg and Svetlana Radovanović both appeared

²⁰ Motion, para. 2 (ii).

²¹ Motion, para. 10 (ii).

²² Motion, para. 10 (ii).

²³ Motion, para. 10 (ii).

²⁴ Blagojević Response, paras. 5-6.

²⁵ Blagojević Response, para. 7.

²⁶ Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003, para. 28.

²⁷ See Exhibits P725, P726 and D204/1.

before the Trial Chamber and were both subjected to cross-examination by the opposing party.²⁸ It is for the Trial Chamber to assess the probative value of both reports in light of the evidence before it; additional evidence to supplement or fill a gap in the evidence already before it is not appropriate. Moreover, as the Defence for Vidoje Blagojević asked numerous questions regarding methodology during cross-examination of the Prosecution demographer,²⁹ the Prosecution could have reasonably anticipated the evidence presented by the Defence demographic expert. The Trial Chamber therefore denies the Prosecution's Motion to admit this new demographic report into evidence in rebuttal.

3. Witness B

24. The Prosecution seeks to introduce *viva voce* evidence of Witness B, a member of the Bratunac Brigade Military Police. The Prosecution submits that Witness B assisted in guarding prisoners at the Vuk Karadžić school, and that while there, he saw two members of the 2nd Battalion of the Bratunac Brigade also guarding prisoners.³⁰ The Prosecution asserts that this evidence is to rebut the Blagojević Defence assertion that apart from the Military Police platoon, units from the Bratunac Brigade did not participate in the detention of prisoners.³¹ The Prosecution argues that this "is a critical point because it establishes that Colonel Blagojević's soldiers participated in the detention of prisoners from which, together with other adduced evidence one can infer Blagojević's knowledge of and responsibility for, these prisoners."³²

25. The Prosecution avers that it "could not have anticipated that the Defence would suggest that only the Military Police were involved in detaining prisoners."³³ It further asserts that "[t]his witness was only discovered recently despite diligent efforts to investigate members of the Brigade who were involved in the forcible confinements of the Bosnian Muslim men of Srebrenica," recalling the size of the investigation and the number of persons involved in the "massacre."³⁴

26. At the time of filing its Response, the Blagojević Defence had not been served with the statement of Witness B, and therefore, it is not clear about the exact evidence to be presented by this witness.³⁵ The Blagojević Defence submits that the Prosecution's claim that it has been diligent in trying to locate witnesses such as Witness B is "unfounded and not supported by the

²⁸ Helge Brunborg testified on 3-4 February 2004 and Svetlana Radovanović testified on 21-22 June 2004.

²⁹ See for instance T. 7011-14; T. 7029-32 and T. 7041-44

³⁰ Motion, para. 4.

³¹ Motion, paras 4 and 10 (iii)

³² Motion, para. 10 (iii).

³³ Motion, para. 10 (iii).

³⁴ Motion, para. 10 (iii).

disclosure material.”³⁶ In particular, the Blagojević Defence submits that as Witness B had been on its witness list and this witness’s statement has been tendered into evidence pursuant to Rule 92 *bis*, the Prosecution has been aware of the existence of this witness since at least mid-May 2004.³⁷

27. The Blagojević Defence further submits that is “disingenuous” for the Prosecution to claim that it could not have anticipated the Defence position since the Indictment only makes reference to Military Police guarding the prisoners.³⁸

28. The Trial Chamber observes that a statement of Witness B tendered by the Blagojević Defence has been admitted into evidence pursuant to Rule 92 *bis*. It further observes that the Prosecution sought that this witness be called for cross-examination on the basis that “this witness’s potential evidence goes directly to key issues raised in the indictment, such as the involvement of the Bratunac Brigade in dealing with the detained Muslim men in Bratunac town,”³⁹ but that the Trial Chamber denied this request.⁴⁰

29. The Prosecution purportedly seeks to call Witness B to rebut the defence assertion that the only unit from the Bratunac Brigade guarding prisoners at the Vuk Karadžić school was the Military Police. The Trial Chamber is not convinced that this is an issue arising directly out of the defence evidence which could not reasonably have been anticipated. The Trial Chamber understands the Prosecution’s aim to be broader than simply rebutting a defence claim: it seeks to introduce evidence that members of the 2nd Battalion of the Bratunac Brigade were guarding prisoners at the Vuk Karadžić school. Applying the Appeals Chamber standard, the Trial Chamber finds that the evidence proposed as rebuttal evidence touches upon a fundamental part of the Prosecution case, namely, the presence of troops from the Bratunac Brigade at a detention site where killings are alleged to have occurred. As Vidoje Blagojević is charged pursuant to Article 7(1) and 7(3) of the Indictment for crimes alleged to have occurred at this location, this evidence should have been brought as part of the Prosecution case-in-chief, not in rebuttal.⁴¹

³⁵ Blagojević Response, paras 9-10. In particular, the Blagojević Defence submits that it is not clear if Witness B spoke with the members of the 2nd Battalion who are alleged to have been at the school, and if so, whether they indicated in what capacity they were there.

³⁶ Blagojević Response, para. 12.

³⁷ Blagojević Response, paras 11-12 and fn. 24.

³⁸ Blagojević Response, para. 13. The Blagojević Defence cites Indictment, para. 45.

³⁹ Prosecution’s Response to Vidoje Blagojević’s Motion to Amend Witness List and Incorporated Motion to Admit Evidence under Rule 92 *bis*, filed confidentially on 28 May 2004, page 5.

⁴⁰ Decision on Vidoje Blagojević’s Motion to Amend Witness List and Incorporated Motion to Admit Evidence under Rule 92 *bis* (confidential), 17 June 2004.

⁴¹ If the Prosecution intended that this evidence be considered as “fresh evidence” such that it requires the Trial Chamber to permit it to re-open its case, while recognising the difficulties the Prosecution is facing in an investigation of this scope, the Trial Chamber is not satisfied, based on the Prosecution’s submissions, that it exercised the necessary diligence to locate this witness.

30. The Trial Chamber notes that paragraph 45 of the Indictment, cited by the Blagojević Defence, begins: “VRS and MUP officers and soldiers committed a number of opportunistic killings of Bosnian Muslim prisoners temporarily detained in Bratunac schools, buildings, and vehicles parked along the road.” Paragraph 45 further alleges: “Members of the Bratunac Brigade Military Police Company under the command and control of Vidoje Blagojević and under the direction of Momir Nikolić participated in guarding the prisoners and escorting them to holding and execution sites in the Zvornik Brigade zone of responsibility.” The Prosecution has not provided the Trial Chamber with a sufficient explanation as to why the evidence put forward by the Blagojević Defence in relation to this location could not reasonably have been anticipated.

31. Accordingly, the Trial Chamber therefore denies the Prosecution’s Motion with respect to Witness B.

4. Bruce Bursik

32. The Prosecution seeks to call Bruce Bursik, an investigator with the Office of the Prosecutor, to testify about the exact location of certain members of the 2nd Company of the 2nd Battalion of the Bratunac Brigade as seen on a video tendered into evidence by the Prosecution⁴² in order to rebut the testimony of several Defence witnesses from this unit who testified, according to the Prosecution, that they were not in “central” Potočari.⁴³ Mr. Bursik has “visited the sites depicted” in the video and therefore is “in a position to establish the exact locations of these soldiers in relation to the crime scene.”⁴⁴ The Prosecution asserts that it “could not have anticipated that the defence witnesses would deny that they were at a particular location in Potočari despite having been captured on video tape” and that it is “necessary to present the precise location of these soldiers as a matter of record.”⁴⁵

33. The Blagojević Defence objects to this witness because he is not an eye-witness and cannot provide relevant additional evidence beyond which the Trial Chamber can see on the video or has already heard described by other witnesses.⁴⁶ Furthermore, the Blagojević Defence submits that the Prosecution could have called Mr. Bursik in its case-in-chief to present this evidence.⁴⁷

34. The Trial Chamber finds that the evidence to be adduced by Bruce Bursik does not satisfy the standard for the admission of rebuttal evidence. As Mr. Bursik is not an eye-witness to the

⁴² Prosecution Exhibit 21.

⁴³ Motion, para. 5.

⁴⁴ Motion, para. 5.

⁴⁵ Motion, para. 11.

⁴⁶ Blagojević Response, para. 16.

⁴⁷ Blagojević Response, para. 16.

events, and in light of all other evidence and information before the Trial Chamber in this case,⁴⁸ it does not find that his testimony is highly probative and related to a significant issue arising directly out of defence evidence. It is for the Trial Chamber to weigh and consider the evidence before it, including evidence which may be conflicting. Furthermore, Mr. Bursik could have been called during the Prosecution's case-in-chief to discuss Prosecution exhibit 21, as was a former investigator of the Office of the Prosecutor, Jean-Rene Ruez.

B. Re-Opening the Prosecution Case

35. The Prosecution seeks to re-open its case and present "fresh evidence" for the "limited purpose" of presenting evidence of executions in the Bratunac soccer stadium on 13 July 1995.⁴⁹ In assessing the proposed evidence the Trial Chamber will apply the test of whether, with reasonable diligence, this evidence could have been identified and presented in the Prosecution's case-in-chief. It will further consider the probative value of the proposed evidence and the fact that the presentation of evidence in the trial of Vidoje Blagojević and Dragan Jokić, which commenced on 14 May 2004, has concluded.

36. As a preliminary matter, the Trial Chamber observes that the Prosecution seeks to introduce both rebuttal and new evidence through Witness P-130. The Trial Chamber will consider both aspects of the Prosecution's Motion in relation to this witness below. Furthermore, as the evidence of the other two witnesses the Prosecution seeks to call should it be permitted to re-open its case, namely Witness B and Witness C, is largely to corroborate the testimony of Witness P-130, the Trial Chamber will consider the evidence of all witnesses below.

1. Evidence Related to the Soccer Stadium in Bratunac

37. The Prosecution seeks to re-call Witness P-130, who testified as a Prosecution witness in January 2004. The Prosecution submits that Witness P-130, an officer in the security branch of the Zvornik Brigade, will testify that Muslim prisoners were detained at the soccer stadium in Bratunac on 13 July 1995 and that some of these men were executed by members of the VRS army, including members of the Bratunac Brigade. Witness P-130 will further testify that he and two others – a member of the Bratunac Brigade Military Police and an officer from the Bratunac Brigade who has testified in the Prosecution's case-in-chief – killed some of the men at the stadium.⁵⁰ The

⁴⁸ The Trial Chamber recalls that the Prosecution cross-examined the witnesses cited in its Motion.

⁴⁹ Motion, para. 6.

⁵⁰ Motion, para. 6(i).

Prosecution submits that this is evidence of “another major crime scene... in the Bratunac Brigade area of responsibility, close to the Brigade Headquarters.”⁵¹

38. The Prosecution submits that Witness B heard noises and shooting coming from within the soccer stadium in Bratunac, and therefore could corroborate the evidence of Witness P-130.⁵² Additionally, it submits that Witness C will testify that he was near the Bratunac soccer stadium and saw Muslim men being beaten and shot in the stadium.⁵³

39. The Prosecution asserts that the evidence of the executions in the soccer stadium also serves as rebuttal evidence, as one witness called by the Blagojević Defence testified that he never heard of any prisoners detained in the soccer stadium.⁵⁴

40. The Blagojević Defence objects to calling Witness P-130 to either provide new evidence about executions in the soccer stadium or to provide rebuttal evidence about men being detained in the soccer stadium. On the latter point, the Blagojević Defence states that “[i]t has never been contested that prisoners were kept [in the football stadium in Bratunac].”⁵⁵ For this reason, the Blagojević Defence submits that the testimony of Witness B would not be critical to or supportive of P-130’s testimony, as it is not contested that prisoners were held at the soccer stadium.⁵⁶

41. In relation to the Prosecution’s Motion to re-open the case to hear Witness P-130, the Blagojević Defence argues: (i) the Prosecution has failed to demonstrate how Witness P-130 “impulsively, came to the realization that he should confess to having committed perjury while testifying in the Prosecution’s case-in-chief”;⁵⁷ that the probative value of Witness P-130’s testimony is directly affected because he “knowingly, voluntarily and intentionally misrepresented the truth when he previously testified under oath in this case”;⁵⁸ and that while the Prosecution had expressed its intention to re-open its case on 24 May 2004, it did not do so until now, and that “it is unrealistic to expect the Defence to investigate the “fresh evidence” absent a decision from the Trial Chamber permitting the re-opening of the Prosecution’s case.”⁵⁹ The Blagojević Defence submits that Witness C’s redacted statements are inconsistent with Witness P-130’s testimony.⁶⁰ If the

⁵¹ Motion, para. 6 (i). See also, Motion, para. 13.

⁵² Motion, para. 6 (iii).

⁵³ Motion, para. 6 (ii).

⁵⁴ Motion, para. 7.

⁵⁵ Blagojević Response, para. 14.

⁵⁶ Blagojević Response, para. 14.

⁵⁷ Blagojević Response, para. 18.

⁵⁸ Blagojević Response, para. 19.

⁵⁹ Blagojević Response, para. 20.

⁶⁰ Blagojević Response, para. 23.

Prosecution Motion is granted, the Blagojević Defence submits that it would need to call at least two witnesses in its re-joinder case.⁶¹

2. Evidence Related to Other Incidents and Locations in Bratunac and Zvornik Municipalities

42. Apart from the evidence related to the soccer stadium, the Prosecution submits that Witness P-130 will testify that Momir Nikolić told him that members of the Bratunac Brigade Military Police had “an assignment” at the Kravica warehouse, and that Witness P-130 then went to the Kravica warehouse with members of the Bratunac Brigade Military Police, where he saw bodies lying around the warehouse and Muslim men inside the warehouse. It is submitted that he will testify that he left the Kravica warehouse while others, including a member of the Bratunac Brigade Military Police, remained behind.⁶²

43. Witness P-130 will further testify that he participated in overseeing the detention, transport and execution of Muslim prisoners in the Zvornik area. The Prosecution submits that he will testify that at least one member of the Bratunac Brigade Military Police – apparently the same person with whom he went to the Kravica warehouse – participated in some of the executions in the Zvornik area. The Prosecution asserts that this evidence further serves to rebut the Blagojević Defence position that members of the Bratunac Brigade were not involved in the killings in the Zvornik area.⁶³

44. Finally Witness P-130 is expected to testify that he and members of the Zvornik Brigade Engineering Company assisted in the clean up and burial process at some execution sites. The Prosecution submits that these aspects of his testimony provide “additional information relating to the involvement of the Zvornik Brigade Engineering Company and the creation of mass graves in the Zvornik area.”⁶⁴

45. The Jokić Defence objects to calling Witness P-130, and particularly to the evidence related to the Zvornik Engineering Company’s involvement in the clean-up and burial operations. The Jokić Defence submits that it is “hard to believe that the testimony of [Witness P-130] can be considered as ‘evidence’”, as it submits that his various statements and former testimony contain

⁶¹ Blagojević Response, para. 21.

⁶² Motion, para. 6(i). See also, Motion, para. 13.

⁶³ Motion, para. 7.

⁶⁴ Motion, para. 6(i). See also, Motion, para. 13.

substantial differences and that there is, therefore “no reliability to this so-called ‘evidence’.”⁶⁵ The Jokić Defence further calls on the Prosecution to indict Witness P-130 for perjury.⁶⁶

46. The Jokić Defence challenges the Prosecution’s assertion that no prejudice to the Defence would result from calling Witness P-130 at this stage of the proceedings,⁶⁷ stating that it was not informed that the Prosecution would move to re-open its case to call this witness and that therefore it will need additional time to prepare its rejoinder case.⁶⁸ If the Prosecution’s Motion were granted, the Jokić Defence submits that it would need to call ten witnesses, who it identifies as either persons implicated as co-perpetrators by Witness P-130 or persons who gave contradicting evidence during the trial, to testify before the Trial Chamber.⁶⁹ The Jokić Defence contends that Dragan Jokić’s rights under Articles 20 and 21 of the Statute would be jeopardized by the “substantial delay” caused by re-opening the Prosecution’s case.⁷⁰

47. Finally, the Jokić Defence challenges the characterisation of this evidence as rebuttal evidence. It argues that the evidence to be presented by Witness P-130 does not arise directly and specifically out of defence evidence, and that similar evidence has already been introduced by the Prosecution.⁷¹

3. Trial Chamber’s Findings

(a) New Evidence

48. In relation to that evidence which the Prosecution describes as fresh evidence, namely evidence related to the Bratunac soccer stadium killings, evidence related to the Kravica warehouse and evidence relating to detentions, executions and mass burials between 15 and 18 July 1995, the Prosecution asserts that it “could not have known about this evidence before the close of its case” because Witness P-130 did not inform it of this information until 23 May 2004.⁷² On this date, the Prosecution spoke with Witness P-130 “as part of the continuing investigation of the Srebrenica case,” and this witness “acknowledged that he had not told the OTP and the Trial Chamber the entire truth regarding his knowledge and involvement in the criminal events after the fall of Srebrenica and that as a consequence, some of his prior statements and testimony were not true and

⁶⁵ Jokić Response, paras 6 and 8.

⁶⁶ Jokić Response, para. 7.

⁶⁷ See, Motion, para. 15.

⁶⁸ Jokić Response, para. 9.

⁶⁹ Jokić Response, para. 10.

⁷⁰ Jokić Response, para. 11.

⁷¹ Jokić Response, paras 12-13.

⁷² Motion, para. 12.

complete.”⁷³ While the Prosecution does not clarify which aspects of Witness P-130’s former testimony are “not true and complete,” it does assert that “[g]iven the importance of his prior testimony and current statements, it is crucial that the Trial Chamber hear all the information [Witness P-130] has to offer, in order to fully evaluate the information provided by [him].”⁷⁴

49. The Prosecution avers that “without witnesses coming forward” it would not have known about this information and therefore, this evidence meets the first part of the test set out by the Appeals Chamber in *Čelebići*, namely that the evidence could not have been presented in the Prosecution’s case-in-chief.⁷⁵ It submits that this evidence meets the second part of the *Čelebići* test in that the evidence of Witness P-130 is “highly probative”, particularly as it “shows the overall co-operation among the different units of the VRS army in the murder operation,” the probative value of which is not outweighed by any consideration relating to the need to ensure a fair trial.⁷⁶ The Prosecution further submits that evidence relating to an additional crime scene is significant as it “provides additional circumstantial evidence of Colonel Blagojević’s knowledge of the murder operation as this was the first large scale massacre that occurred in his area of responsibility involving soldiers of his Brigade,” and has historical significance which would contribute to the historical record.⁷⁷

50. The Trial Chamber has numerous concerns about the evidence which the Prosecution seeks to introduce as new evidence by way of re-opening its case. While the Prosecution did bring this new information from Witness P-130 to the attention of the Defence and the Trial Chamber on 24 May 2004, there is no explanation of why it was only after the close of both Defence cases that the Prosecution actually moved to re-open its case.⁷⁸ Re-opening a case after the presentation of all evidence, especially when it may be expected that the Defence will be required to call witnesses in rebuttal, is likely to result in delay and therefore impacts on the right of the accused to a fair and expeditious trial.

51. The Prosecution maintains that “even though there was some evidence that men were detained at the soccer stadium, the Prosecution did not discover that the men were in fact murdered at the stadium without witnesses coming forward with this information” despite its investigations.⁷⁹ The Trial Chamber accepts that, as Witness P-130 did not tell the Prosecution all the information he

⁷³ Motion, fn. 19.

⁷⁴ Motion, fn. 19.

⁷⁵ Motion, para. 12.

⁷⁶ Motion, para. 14.

⁷⁷ Motion, para. 14.

⁷⁸ See Transcript of proceedings, 24 May 2004, T. 9751-53 (private session). See also, Transcript of proceedings, 25 May 2004, T. 9907-9916 and Transcript of proceedings, 22 July 2004, T. 12121-12123.

⁷⁹ Prosecution’s Motion, para. 12 (references omitted).

now does either during prior interviews or during his testimony, the Prosecution could not have known about this information before its case was concluded. The Prosecution does not, however, provide any explanation on why it did not call Witness C during its case-in-chief – a witness who also is to testify that he saw men shot in the stadium. The Prosecution has not provided any additional information on what other efforts it has undertaken to investigate what happened at the soccer stadium, beyond relying on witnesses “coming forward” with information. It is not clear why the Prosecution did not investigate the events at the soccer stadium, if indeed it never has investigated this location, especially considering the information it has gathered regarding Muslim men being killed in and around detention sites in Bratunac. The Trial Chamber is not satisfied that the Prosecution acted with reasonable diligence in obtaining information concerning the soccer stadium.

52. The Trial Chamber finds the fact that Witness P-130 acknowledges that he did not give wholly truthful and complete testimony when appearing before it to be, at minimum, concerning. Furthermore, the Prosecution does not provide any explanation to the Trial Chamber on why Witness P-130 provides this information now – and indeed why he did not provide this information when he testified under oath in January 2004. As there are questions as to why Witness P-130 did not provide this information when he testified, the Trial Chamber believes that the Prosecution is under a certain obligation to assure the Trial Chamber that this new evidence is credible.⁸⁰ Recalling that evidence of limited probative value will not satisfy the requirements for re-opening a case, the issue of the probative value of Witness P-130’s testimony is relevant.

53. One way which the Prosecution could have done this is to provide corroborating evidence from the persons identified by Witness P-130 as having taken part in the executions and other activities described. As one of the persons identified by Witness P-130 is another Prosecution witness, the Trial Chamber finds the absence of any information or explanation from the Prosecution on whether it spoke to this witness about Witness P-130’s allegations or proposed testimony troubling. If the Prosecution did speak to this witness and the witness was unable to confirm Witness P-130’s account, the Trial Chamber would have expected the Prosecution to inform it of this information. If the Prosecution did not speak to this witness, the Trial Chamber would have expected the Motion to provide an explanation of why it did not do so, as such a follow-up interview would be considered to be part of the Prosecution’s duty to the Trial Chamber to present credible evidence, as well as part of its larger duty to act with reasonable diligence. That

⁸⁰ The Trial Chamber recognises that Witnesses B and C may be of some assistance, at least in relation to crimes alleged to have occurred at the soccer stadium.

the Defence can call this Prosecution witness to either rebut – or corroborate – the testimony of Witness P-130 is not sufficient.

54. Additionally, the Trial Chamber observes that the Bratunac soccer stadium, referred to by the Prosecution as “another major crime scene” is not mentioned in either the Indictment or the Prosecution’s Pre-Trial Brief. The Trial Chamber would be hesitant to permit the Prosecution to adduce evidence of “another major crime scene” without the Accused being put on notice of the allegations against him.⁸¹

55. For the foregoing reasons, the Prosecution’s Motion to re-open its case to call P-130, Witness B and Witness C is denied.

(b) Rebuttal evidence

56. In relation to the evidence proposed by the Prosecution to rebut the Defence evidence that men were never detained in the soccer stadium,⁸² the Trial Chamber recalls that the Blagojević Defence submits that it has never contested the detention of men in the soccer stadium.⁸³ Accordingly, the evidence of Witness P-130 and Witness B on this point is unnecessary.

57. The Prosecution submits that the evidence of Witness P-130 related to the participation of at least one member of the Bratunac Brigade Military Police participating in executions in the Zvornik area is rebuttal evidence “given that the Blagojević defence position is that members of the Bratunac Brigade were not involved in the Zvornik killings.”⁸⁴ The Prosecution does not identify specific evidence adduced during the Blagojević Defence but rather seeks to rebut the “defence position”. Recalling the Appeals Chamber test for the admission of evidence in rebuttal, the Trial Chamber finds that evidence of the involvement of members of the Bratunac Brigade in killings in the Zvornik area is evidence which touches upon a fundamental part of the Prosecution case, and as such, should have been brought in the Prosecution’s case-in-chief. Furthermore, the “defence position” on this point could have reasonably been anticipated. For these reasons, it is not appropriate to permit the Prosecution to call this evidence in rebuttal.

58. Finally, the “additional” evidence which the Prosecution seeks to adduce through Witness P-130 on the involvement of the Zvornik Brigade Engineering Unit appears to be presented in the Motion as both new evidence and rebuttal evidence. To the extent that it is presented as new

⁸¹ See, e.g., *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 88.

⁸² See, *supra* para. 39.

⁸³ See, *supra* para. 40.

⁸⁴ Motion, para. 7.

evidence, the Trial Chamber finds it is inadmissible for the reasons set out above.⁸⁵ To the extent that it is presented as rebuttal evidence, the Trial Chamber finds that it is inadmissible as this issue does not arise directly out of Defence evidence and it relates to a fundamental part of the Prosecution's case upon which it has already adduced evidence.

IV. DISPOSITION

FOR THE FOREGOING REASONS, the Trial Chamber hereby:

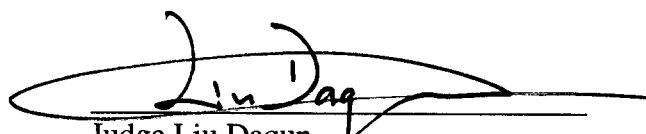
DENIES the Motion;

VARIES the Scheduling Order of 30 July 2004; and

ORDERS that:

1. Final Briefs shall be filed by Wednesday, 22 September 2004; and
2. Closing arguments shall be heard beginning on Wednesday, 29 September 2004, with each Party permitted 4.5 hours in which to present its argument, and 30 minutes for rebuttal or rejoinder arguments, if any.

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



Judge Liu Daqun
Presiding

Dated this thirteenth day of September 2004,
At The Hague
The Netherlands

[Seal of the Tribunal]

⁸⁵ See, *supra* paras 50, 52-53.