



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-95-14/2-A
Date: 17 December 2004
Original: English

IN THE APPEALS CHAMBER

Before: Judge Wolfgang Schomburg, Presiding
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision of: 17 December 2004

PROSECUTOR

v.

DARIO KORDIĆ AND MARIO ČERKEZ

**DECISION ON PROSECUTION'S MOTION TO ADMIT ADDITIONAL EVIDENCE
IN RELATION TO DARIO KORDIĆ AND MARIO ČERKEZ**

Counsel for the Prosecutor:
Mr. Norman Farrell
Ms. Helen Brady

Counsel for Dario Kordić:
Mr. Mitko Naumovski
Mr. Turner T. Smith, Jr.
Mr. Stephen M. Sayers

Counsel for Mario Čerkez:
Mr. Božidar Kovačić
Mr. Goran Mikuličić

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 (“International Tribunal”);

BEING SEIZED OF the “Prosecution’s Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez”, filed confidentially by the Office of the Prosecutor (“Prosecution”) on 3 December 2004 (“Motion”), in which the Prosecution seeks the admission of various documents and two witness statements as additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence (“Rules”);

NOTING “Dario Kordić’s Brief in Opposition to Prosecution’s Motion to Admit Additional Evidence” (“Kordić Response”) and “Mario Čerkez’s Response to Prosecution’s Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez” (“Čerkez Response”), filed confidentially on 7 December 2004;

NOTING the Prosecution’s “Reply to Responses of Dario Kordić and Mario Čerkez to Prosecution’s Additional Evidence Motion” filed confidentially on 8 December 2004;

NOTING Rule 115 of the Rules¹ and Practice Direction IT/201 of 7 March 2002;

NOTING that all the parties seek leave, in their filings, to exceed the page limit applicable to their respective filings;²

CONSIDERING, however, that the Prosecution seeks to admit additional evidence at a highly advanced stage of the proceedings in this appeal, and well outside the time frame set out in Rule 115 of the Rules;

EMPHASIZING that a party which brings a Rule 115 motion after the conclusion of the appeals hearing must be aware that good cause for this exceptional relief must be demonstrated;

CONSIDERING that the good cause requirement obliges the moving party to demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in question as soon as possible after it became aware of the existence of the evidence sought to be admitted;

¹ That is, Rule 115 as it appeared prior to its amendment on 29 July 2002. *See also* Rule 6(D), which states that an amendment “shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.”

² *See* Practice Direction IT/184 Rev. 1, 5 March 2002, p. 3.

NOTING however that one of the documents, Exhibit P4, is, along with other documents sought to be admitted, part of what the Prosecution submits is a “new collection of documents”³, but that this exhibit was already available to the Prosecution in July 2004;

NOTING that Exhibits P5 and P6 are witness statements taken on 29 and 30 November 2004, respectively;

CONSIDERING, however, that the relevant time is not when a witness statement was in fact taken, but rather when the witness became available to give evidence to the moving party, and that diligent and continuous efforts must be made in relation to obtaining that evidence;

CONSIDERING that in light of the arguments advanced by the Prosecution on the issue of good cause, and the explanation contained in the declaration attached as Annex 12 to the Motion, good cause has not been shown;

CONSIDERING further that none of the evidence sought to be admitted relates to the Prosecution’s grounds of appeal,⁴ and that in principle, the Prosecution in such circumstances cannot seek to admit evidence pursuant to Rule 115 of the Rules to bolster a finding of conviction;⁵

CONSIDERING that the Decision of 30 May 2002 of Appeals Chamber of the International Criminal Tribunal for Rwanda in the *Bagilishema* case⁶ does not warrant a different conclusion, in that the situation and interests of a defendant facing a Prosecution appeal from an acquittal are distinct from that of the Prosecution facing a defendant’s appeal from a conviction;

NOTING in any event that, had the Motion been filed in accordance with the Rules, the Appeals Chamber’s analysis of the arguments and evidence contained therein would lead it to the conclusion that none of the evidence sought to be admitted, even if deemed unavailable at trial, could have affected the verdict, pursuant to Rule 115 of the Rules;⁷

³ Motion, para. 92.

⁴ See Practice Direction IT/201, para. 11.

⁵ *Cf. Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Evidence, 31 October 2003, p. 5. In *Blaškić*, the Prosecution did not appeal the Trial Judgement. However, it sought to admit rebuttal material in relation to the Appellant’s additional evidence submitted on appeal. In its decision, the Appeals Chamber stated that “rebuttal material is admissible if it directly affects the substance of the additional evidence admitted by the Appeals Chamber.” *Ibid.*, p. 5. Hence, “rebuttal material” that only goes to bolster a factual finding made by the Trial Chamber is inadmissible.

⁶ *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Decision on Motions Raised Under Rule 115, 30 May 2002.

⁷ The requirements of Rule 115 have been set out in numerous decisions of the Appeals Chamber. *See, e.g., Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Evidence, 31 Oct. 2003, p. 3; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 Aug. 2003, pp. 3-4; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Decision on the Request for Presentation of Additional Evidence, 18 Nov. 2003.

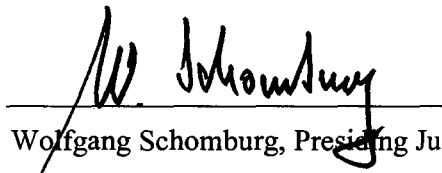
FOR THE FOREGOING REASONS,

GRANTS the parties' requests to extend the page limit applicable to their respective filings, and

REJECTS the Motion.

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

Dated this 17th day of December 2004,
At The Hague,
The Netherlands.


Wolfgang Schomburg, Presiding Judge

Judge Weinberg de Roca appends a Separate Opinion to this Decision.

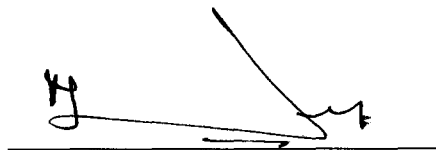
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SEPARATE OPINION OF JUDGE WEINBERG DE ROCA

I agree with the Disposition because no good cause has been shown.

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

Dated this 17th day of December 2004,
At The Hague,
The Netherlands.


Judge Weinberg de Roca

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