



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-99-36-A
Date: 3 March 2006
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Christine Van Den Wyngaert

Registrar: Hans Holthuis

Decision: 3 March 2006

PROSECUTOR

v.

RADOSLAV BRĐANIN

**DECISION ON DEFENCE MOTION TO ADMIT ADDITIONAL
EVIDENCE PURSUANT TO RULE 115**

The Office of the Prosecutor:

Mr Mark J. McKeon

Counsel for the Accused:

Mr. John Ackerman

Introduction

1. The Appeals Chamber of the International Criminal 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”) is seized of a “Motion to Admit Additional Evidence Pursuant to Rule 115”, filed by the Appellant Radoslav Brdanin (“Appellant”) on 17 October 2005 (“Motion”). The Appellant seeks to introduce four documents as additional evidence on appeal, pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”).

2. In his Appeal Brief in this case, the Appellant has argued that the Trial Chamber erred in citing a particular document, trial exhibit P116, in reference to the chain of command within the Serb-controlled Krajina region of Bosnia and Herzegovina (“Autonomous Region Krajina”, or “ARK”).¹ He argues that exhibit P116 pertains to events in the Serbian Autonomous District of Krajina (“SAO Krajina”), a region within Croatia then controlled by Serbs, and not to the ARK.² In its Response Brief,³ the Prosecution argues that the references in exhibit P116 to “SAO Krajina” must be understood in context to refer to the ARK.⁴ This fact, the Prosecution contends, was made clear by the document’s references to Bosnia and Herzegovina, by trial testimony, and by the fact that, at the time exhibit P116 was produced in February 1992, the “SAO Krajina” entity in Croatia no longer existed.⁵

3. The four documents the Appellant now seeks to introduce make reference in various contexts to the Croatian entity of SAO Krajina. He asserts, without further explanation, that the documents “clarify the matter [of what exhibit P116 refers to] and make it abundantly clear” that his position is correct.⁶ The Prosecution opposes the Appellant’s motion, arguing that it is untimely and fails to demonstrate that the requirements of Rule 115 are satisfied.⁷ The Appellant has not filed a reply.

Discussion

4. Until 23 November 2005, Rule 115(A) of the Rules provided that a motion to present additional evidence before the Appeals Chamber must “be served on the other party and filed with

¹ Appellant Brdanin’s Brief on Appeal, 25 July 2005 (“Appeal Brief”), para. 33.

² *Ibid.*, 33-35.

³ Prosecution Response Brief, 3 October 2005.

⁴ *Ibid.*, paras 6.25-6.27.

⁵ *Ibid.*, para. 6.27.

⁶ Motion, para. 5.

the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay". In this case, the Judgement of the Trial Chamber was entered on 1 September 2004, and the Appellant filed his Motion almost a year later, on 17 October 2005. The Motion was therefore clearly untimely when filed.

5. On 23 November 2005, however, Rule 115 was amended, and under the amended Rule 115 motions to admit additional evidence must be "served on the other party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause" is "shown for a delay". The rule change occurred more than 30 days after the reply brief in this case was filed.⁸ Hence, the Appellant could not have filed a timely motion after Rule 115 was amended. Nonetheless, the Appellant's Motion, clearly untimely when filed, was filed within 30 days of the reply brief.

6. In this decision, the Appeals Chamber has no need to consider whether the change to Rule 115 retroactively made the Appellant's Motion timely, or whether, if the Motion was not timely, the Appellant had good cause for filing late. Even if the Appeals Chamber were to treat the Motion as timely, the proposed evidence would not be admitted.

7. Because the evidence at issue was disclosed to the Appellant during the pre-trial phase of the case,⁹ it was clearly available at trial. Therefore, the evidence can be admitted only if the Appellant shows that exclusion of it on appeal would lead to a miscarriage of justice, in that if it had been considered at trial, it would have affected the verdict.¹⁰ In the Motion, however, the Appellant offers no argument as to why this standard is satisfied. Rather, the Appellant simply asserts that the additional evidence will demonstrate that his argument in the Appeal Brief concerning Exhibit P116 is "neither incorrect [n]or misleading";¹¹ the Appellant leaves it to the Appeals Chamber to piece together how this evidence might do so and why this might be important. The Appeals Chamber infers that the Appellant thinks references in the proposed evidence to the Croatian entity of SAO Krajina show that exhibit P116 cannot refer to the ARK – and that the Trial Chamber therefore erred in citing this exhibit as evidence about the chain of command in the ARK. Yet in light of other indications about what exhibit P116 refers to – such as the date the exhibit was written and its references to Bosnian Serb institutions¹² – the proposed additional evidence would

⁷ Prosecution Response to Brđanin's Motion to Admit Additional Evidence pursuant to Rule 115, 26 October 2005.

⁸ See Brđanin Reply to Prosecution Response Brief, 18 October 2005.

⁹ Motion, para. 2.

¹⁰ *Prosecutor v. Stanišić & Simatović*, Case Nos. IT-03-69-AR65.1, IT-03-69-AR65.2, Decision on Prosecution's Application Under Rule 115 to Present Additional Evidence in its Appeal Against Provisional Release, 11 November 2004, para. 8; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003, p. 4.

¹¹ Motion, para. 5.

¹² See Tr. Ex. P116.

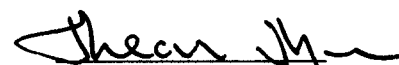
not have precluded the Trial Chamber from concluding that exhibit P116 provides information about the chain of command in the ARK.

8. In sum, the Motion fails to establish “the grounds on which the ruling or relief is sought”¹³ and, specifically, to meet the Appellant’s “burden to establish that the evidence is material and that its exclusion on appeal would lead to a miscarriage of justice”.¹⁴

Disposition

9. For the foregoing reasons, the Motion is **DISMISSED**.

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



Judge Theodor Meron,
Presiding

Dated this 3rd day of March 2006,
At The Hague,
The Netherlands

[Seal of the International Tribunal]

¹³ Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, No. IT/155/Rev.3, 16 September 2005, para. 12(c).

¹⁴ *Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-A, Decision on the Appellant’s Rule 115 Motion and Related Motion by the Prosecution, 21 October 2005, para. 10.