



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-98-29/1-A
Date: 20 January 2009
Original: English

IN THE APPEAL CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Acting Registrar: Mr John Hocking

Decision of: 20 January 2009

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

**DECISION ON DRAGOMIR MILOŠEVIĆ'S
MOTION TO PRESENT ADDITIONAL EVIDENCE**

The Office of the Prosecutor:

Mr Paul Rogers

Counsel for the Accused:

Mr Branislav Tapušković
Ms Branislava Isailović

PK

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 “Motion to Present Additional Evidence with Confidential Annexes A and B” (“Motion”), filed confidentially by Dragomir Milošević (also, “Appellant”) on 10 November 2008. On 9 December 2008, the Prosecution confidentially filed its “Prosecution Response to Milošević’s Motion to Present Additional Evidence” (“Response”).¹

A. Background

2. On 12 December 2007, the Trial Chamber convicted the Appellant for the crimes of acts or threats of violence, the primary purpose of which is to spread terror among the civilian population as a violation of the laws or customs of war, and of murder and inhumane acts as crimes against humanity.² It sentenced him to 33 years of imprisonment.³ The Appellant appeals his conviction on twelve grounds.⁴

3. Pursuant to Rule 115 of the Rules of Procedure and Evidence (“Rules”), the Appellant seeks to have admitted into evidence the diary of Louis Fortin of the United Nations Protection Force (“Diary”).⁵ The Appellant further seeks to have witnesses Louis Fortin, W46, Rupert Smith and W156 called before the Appeals Chamber for the purposes of cross-examination on the contents of the Diary.⁶

4. The Appellant contends that the Motion relates to the following parts of the Defence Appeal Brief: alleged misapplication of the law and violation of his presumption of innocence (first ground of appeal) and to the findings by the Trial Chamber that areas of Sarajevo were “civilian zones” (sixth ground of appeal); that the Sarajevo Romanija Corps (“SRK”) was behind specific sniper fire (seventh ground of appeal) and mortar shelling (eighth ground of appeal); that the Army of Bosnia and Herzegovina did not have aerial bombs (ninth ground of appeal); that the SRK was responsible for certain aerial bombings (eleventh ground of appeal); as well as the Prosecution’s sole ground of appeal related to sentencing.⁷

¹ Public version filed on 10 December 2008.

² *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgement, 12 December 2007 (“Trial Judgement”), paras 1006-1008.

³ Trial Judgement, para. 1008.

⁴ Defence Appeal Brief Including Annexes A and B and Public Annexes C and D, 14 August 2008 (partly confidential) (“Defence Appeal Brief”).

⁵ Motion, p. 4, with reference to the document contained in Annex B to the Motion.

⁶ Motion, para. 15.

⁷ Motion, para. 3.

B. Applicable Law

1. Evidence unavailable at trial

5. The Appeals Chamber, pursuant to Rule 115 of the Rules, may admit evidence unavailable at trial, on submission of a motion by either party. The motion must be filed not later than thirty days from the date of filing of the brief in reply unless good cause or, after the appeal hearing, cogent reasons are shown for a delay.⁸

6. The applicant must first demonstrate that the additional evidence tendered on appeal was not available to him at trial in any form, or was not discoverable through the exercise of due diligence.⁹ The Appeals Chamber notes that due diligence includes “making appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the Tribunal to bring evidence on behalf of an accused before the Trial Chamber”.¹⁰

7. The applicant must subsequently demonstrate that the evidence is both relevant and credible.¹¹ Evidence is relevant if it relates to findings material to the Trial Chamber’s decision. Evidence is credible if it appears to be reasonably capable of belief or reliance.¹² The Appeals Chamber notes that a finding that evidence is credible demonstrates nothing about the weight to be accorded to such evidence.¹³

⁸ Rule 115(A) of the Rules.

⁹ Rule 115(B) of the Rules; *see also Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Appellant Momčilo Krajišnik’s Motion to Present Additional Evidence, 20 August 2008 (“*Krajišnik* Rule 115 Decision of 20 August 2008”), para. 5 (all references to this decision are to the public version attached to the Order issued on 4 November 2008); *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Appellant Momčilo Krajišnik’s Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008, para. 4; *Prosecutor v. Jovica Stanišić and Franko Simatović*; Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008 (“*Stanišić and Simatović* Rule 115 Decision”), para. 6; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Blagoje Simić’s Motion for Admission of Additional Evidence, Alternatively for Taking of Judicial Notice, 1 June 2006, para. 12; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003 (“*Krstić* Rule 115 Decision”), p. 3; *Prosecutor v. Tihomir Blaškić*, Case No. It-95-14-A, Decision on Additional Evidence, 31 October 2003 (“*Blaškić* Rule 115 Decision”), p. 2.

¹⁰ *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Miroslav Bralo’s Motion for Admission of Additional Evidence, 12 January 2007 (confidential) (“*Bralo* Rule 115 Decision”), para. 9; *Tadić* Decision on Extension of Time Limit, para. 47; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškić et al.* Appeal Judgement”), para. 50; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, 9 December 2004, public redacted version, para. 21; *Ferdinand Nahimana v. The Prosecutor*, Case No. ICTR-99-52-A, *Décision sur les requêtes de Ferdinand Nahimana aux fins de divulgation d’éléments en possession du Procureur et nécessaires à la Défense de l’Appellant et aux fins d’assistance du Greffe pour accomplir des investigations complémentaires en phase de l’appel*, 8 December 2006, para. 24.

¹¹ Rule 115(B) of the Rules.

¹² *Krajišnik* Rule 115 Decision of 20 August 2008, para. 6; *Stanišić and Simatović* Rule 115 Decision, para. 7.

¹³ *Krajišnik* Rule 115 Decision of 20 August 2008, para. 6; *Bralo* Rule 115 Decision, para 10, fn 32; *Kupreškić et al.* Appeal Judgement, para 63.

PCU

8. The applicant bears the burden of specifying with sufficient clarity the impact the additional evidence could have had upon the Trial Chamber's decision.¹⁴ In accordance with Rule 115(A) of the Rules, the applicant must clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. The evidence may otherwise be summarily rejected.¹⁵ The Appeals Chamber will then consider whether the evidence could have been a decisive factor in reaching the decision at trial.¹⁶

9. The Appeals Chamber will admit the additional evidence if, considered in the context of the evidence admitted at trial, it could demonstrate that the conviction was unsafe.¹⁷

2. Evidence available at trial

10. If the applicant is unable to establish that the additional evidence tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence, the Appeals Chamber may admit the evidence in exceptional circumstances, pursuant to its inherent power to hear evidence in order to avoid a miscarriage of justice.¹⁸ The applicant bears the burden of establishing that the exclusion of the tendered evidence would lead to a miscarriage of justice, in that if it had been available at trial it *would* have affected the verdict.¹⁹

C. Submissions

11. The Appellant submits that the Diary is relevant to his first, sixth, seventh, eighth, ninth and eleventh grounds of appeal as well as the Prosecution's sole ground related to sentencing.²⁰ In his view, the Diary may establish that the SRK attacks were not directed against a civilian population,

¹⁴ *Bralo* Rule 115 Decision, para. 10; *Kupreškić et al.* Appeal Judgement, para. 69.

¹⁵ *Krajišnik* Rule 115 Decision of 20 August 2008, para. 7; *Stanišić and Simatović* Rule 115 Decision, para. 6; *Kupreškić et al.* Appeal Judgement, para. 69.

¹⁶ Rule 115(B); *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defense Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, 16 November 2005 ("*Mejakić et al.* Rule 115 Decision"), para. 11; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defense Second Motion for Additional Evidence Pursuant to Rule 115, 21 March 2005 ("*Galić* Decision of 21 March 2005"), para. 14; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, 26 February 2001 ("*Kupreškić et al.* Decision of 26 February 2001"), para. 28, para. 18; see also *Kupreškić et al.* Appeal Judgement, para. 58.

¹⁷ *Bralo* Rule 115 Decision, para. 10; *Krstić* Rule 115 Decision, p. 3; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 5.

¹⁸ *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defense Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, 16 November 2005 ("*Mejakić et al.* Rule 115 Decision"), para. 11; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defense Second Motion for Additional Evidence Pursuant to Rule 115, 21 March 2005, para. 14; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, 26 February 2001 ("*Kupreškić et al.* Decision of 26 February 2001"), para. 28, para. 18; see also *Kupreškić et al.* Appeal Judgement, para. 58.

¹⁹ *Stanišić and Simatović* Rule 115 Decision, para. 8; *Krstić* Rule 115 Decision, p. 3.

²⁰ Motion, para. 3.

contrary to the Trial Chamber's findings in paragraphs 795 and 796 of the Trial Judgement.²¹ It may also provide reasonable doubt as to the Trial Chamber's findings on the origins of the shooting and bombing, and on the SRK's possession of aerial bombs.²² Additionally, the Appellant suggests that the Diary will demonstrate that he was unable to act between 6 August 1995 and 10 September 1995.²³

12. The Appellant contends that he had no knowledge of the Diary during the proceedings before the Trial Chamber. He claims that he only learnt that Louis Fortin kept a diary – from May 1994 to the end of the conflict in and around Sarajevo – and that the Prosecution had this diary in its possession by following the proceedings in what he describes as the “Srebrenica” case.²⁴

13. Certain extracts of the Diary had been disclosed to Milošević's Counsel pursuant to Rule 68 of the Rules on 27 September 2007, between the end of the evidentiary hearing (on 25 September 2007) and the closing arguments by the Parties (on 9 and 10 October 2007).²⁵ On 8 October 2007, Milošević requested the admission of the extracts before the Trial Chamber pursuant to Rules 73(A) and 89(C) of the Rules.²⁶ This request was later granted and the evidence admitted.²⁷ However, the Appellant claims that at the time he was unaware that the author of the diary, Louis Fortin, had already testified before the Trial Chamber, in January 2007.²⁸

14. The Appellant claims to have received a full copy of the Diary on 7 April 2008, after requesting it from the Prosecution on 19 February 2008.²⁹ He contends that the Prosecution did not provide the full copy earlier in the proceedings, specifically to prevent the Defence from effectively cross-examining Louis Fortin, W46, Rupert Smith and W156 on its contents.³⁰

15. The Prosecution responds that the Motion should be dismissed in its entirety. The Prosecution notes that parts of the Diary were admitted at trial and accordingly cannot be admitted as additional evidence.³¹ As to the remainder of the Diary, Milošević fails to identify any specific part that would support his assertions as to the factual findings on shelling, sniping and the possession of aerial bombs. Rather, the Prosecution contends that the Diary does not contradict in

²¹ Motion, paras 4-5.

²² Motion, para. 6.

²³ Motion, para. 7.

²⁴ Motion, para. 8.

²⁵ Motion, para. 10; see also T. 9415 (closing arguments, 9 October 2007).

²⁶ Motion, para. 11, with reference to the document contained in Annex A to the Motion.

²⁷ Motion, para. 12, referring to Exhibit D527.

²⁸ Motion, para. 11.

²⁹ Motion, para. 9.

³⁰ Motion, para. 14.

³¹ Response, paras 5-7.

any part the findings of the Trial Chamber.³² Similarly, the Prosecution maintains that Milošević does not identify any specific part of the Diary that would show that he was prevented from acting during the period from 6 August 1995 to 10 September 1995.³³ Accordingly, the Prosecution submits that Milošević has failed to demonstrate how the Diary could have been a decisive factor at trial.

16. The Prosecution further submits that Milošević has not demonstrated why it would be necessary to recall witnesses Louis Fortin, W46, Rupert Smith and W156 for further cross-examination. In particular, Milošević has not indicated how their responses to questioning or the evaluation of their credibility would have been different.³⁴

D. Discussion

1. Availability at trial

17. The Appeals Chamber notes that part of the Diary was admitted into evidence by the Trial Chamber, at the request of the Appellant, on 9 October 2007, effectively at the end of the trial proceedings³⁵ but that Louis Fortin was called to give evidence at a much earlier stage, *i.e.*, on 16 January 2007.³⁶ The Appeals Chamber further notes that the correspondence to the Appellant of 27 September 2007, in which the extract of the Diary was provided, indicated that the Diary extends to 472 pages, of which only three were provided.³⁷ The Appellant has not indicated that he attempted to discover the additional material, although the short timing between the disclosure and the end of the trial proceedings and the fact that the material provided was still being cleared under Rule 70 of the Rules are factors to be taken into account.

18. On the other hand, the Appeals Chamber notes that, from the arguments of the Prosecution, it remains unclear whether, if requested, the Prosecution would have been able to disclose more than the extracts actually provided on 27 September 2007. The Prosecution provides no reason for its failure to engage in the necessary contact with the provider at an earlier time, especially considering that Louis Fortin was a witness during some of the first hearings at trial. Taking into account these circumstances, the Appeals Chamber finds that the material was unavailable at trial to the Appellant.

³² Response, para. 9.

³³ Response, para. 10.

³⁴ Response, para. 12.

³⁵ Oral Decision, T. 9494.

³⁶ See T. 474 ff.

³⁷ Response, para. 6 and references therein.

200

2. Specific identification of findings of fact

19. As discussed above, the applicant of a motion pursuant to Rule 115 of the Rules must “clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed”; the applicant bears the burden of specifying with sufficient clarity the impact the evidence could have had.³⁸ The Appeals Chamber notes that the Appellant has referred to paragraphs 795 and 796 of the Trial Judgement and, generally, to the Trial Chamber’s findings on the nature of the attacks by the SRK on the civilian population of Sarajevo. The Appeals Chamber considers that the Appellant has not identified the manner in which the Diary could have affected these findings or even which particular portions of the Diary would be relevant to such findings.

20. Accordingly, the Appeals Chamber finds that the Appellant has not demonstrated that the evidence could have been a decisive factor in reaching the verdict at trial. There is therefore no need to consider the other criteria further.

21. Since the Diary may not be admitted as additional evidence at this stage due to these failures, the Appeals Chamber will not order the further cross-examination of the witnesses identified by the Appellant.

22. However, the Appeals Chamber notes that the Diary was disclosed only on 7 April 2008, together with the identity of its author.³⁹ Recalling that Louis Fortin was called as a witness at trial well before such disclosure, this was an extremely extended delay. Although the delay could be said not to be entirely imputable to the Prosecution, the Appellant should not suffer prejudice from it, in particular in a case where he did file the Motion in time. Emphasising the importance of disclosure obligations under Rule 68 of the Rules, the Appeals Chamber considers that these circumstances give rise to good cause to allow the Appellant thirty additional days to argue which specific portions of the diary could have affected the verdict, pursuant to the criteria identified above. On this basis, he might also wish to address the necessity of recalling certain witnesses pursuant to the criteria discussed above.

³⁸ See *supra*, para. 8.

³⁹ Motion, para. 9; Response, fn. 8.

qu

E. Disposition

For the foregoing reasons, and pursuant to Rules 115 and 127 of the Rules,

The Appeals Chamber

DISMISSES the Motion; and

INVITES the Appellant, if he so wishes, to file an amended motion seeking: (i) the admission of the portions of the Diary which, in his view, could have affected the verdict, and (ii) the recall of the witnesses whose testimony is implicated by those same portions of the Diary, both on the basis of the standards above and no later than thirty days from the filing of this decision.

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

Done this 20th day of January 2009,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding

[Seal of the Tribunal]