



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-95-5/18-T

Date: 26 April 2012

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 26 April 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO RECALL JOHANNES RUTTEN

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS 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 Accused’s “Motion to Recall Johannes Rutten”, filed on 3 April 2012 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 28 November 2011, Colonel Johannes Rutten (“Witness”) testified before the Chamber pursuant to Rule 92 *ter* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) about events he witnessed in the Srebrenica enclave during his service as a member of a Dutch Battalion III (“DutchBat”) between January and July 1995.¹ In his witness statement, dated 8 November 2011, tendered pursuant to Rule 92 *ter* of the Rules, the Witness stated that he took pictures in and around the “White House”, a house in Potočari where Bosnian Muslim men were gathered in July 1995, and that, after returning to the Netherlands, he was informed that “something happened to the film during the development process”.² Both during his testimony before the Chamber and in his witness statement, the Witness stated that he observed the belongings and identification papers of Bosnian Muslim men burning outside the White House.³

2. During the course of his testimony in these proceedings, the Witness indicated, *inter alia*, that he kept “a small book with [...] notes” regarding events in Srebrenica (“Notes”) and that he had reviewed the Notes prior to his testimony in each case before the Tribunal, including these proceedings, in order to prepare for his testimony and refresh his memory.⁴ On cross-examination, the Witness stated that he did not wish to provide a copy of the Notes to the Accused.⁵ On 30 November 2011, the Accused filed a “Motion for Order for Production of Colonel Rutten’s Notes”, and, in response to two letters from the Chamber requesting that the Witness voluntarily provide a copy of the Notes, the Witness did so on 9 March 2012.

3. In the Motion, the Accused now moves to recall the Witness for further cross-examination on both the material from the Notes and the roll of film containing pictures from the White House (“Film”).⁶ With regard to the Notes, the Accused identifies four areas where the Witness would have been cross-examined, had the Accused been in possession of the Notes: (1) an entry regarding

¹ T. 21979–22052 (28 November 2011).

² P3948 (Witness statement of Johannes Rutten dated 8 November 2011), para. 101.

³ P3948 (Witness statement of Johannes Rutten dated 8 November 2011), paras. 66–67; T. 22039–22046 (28 November 2011).

⁴ T. 22000–22002 (28 November 2011).

⁵ T. 22001 (28 November 2011).

⁶ Motion, paras. 1, 22.

Bosnian Muslim forces' attempts to involve the DutchBat in their defence on 8 July 1995; (2) an entry regarding tension between the Drina wolves and other Serb forces near the White House from 11 to 13 July 1995; (3) an entry from 15 July 1995 regarding the number of Bosnian Serbs killed by Bosnian Muslims over the previous two and a half years; and (4) the lack of any entry regarding the confiscation or burning of the identification of Bosnian Muslim men outside the White House.⁷ With regard to the Film, the Accused states that, the night after the Witness testified, he located the Witness's earlier statement of 18 August 1998 ("August 1998 Statement"), in which the Witness stated that the Film "had been destroyed".⁸ The Accused acknowledges that he should have put the August 1998 Statement to the Witness during cross-examination, but contends that he did not do so because he did not have sufficient time to review materials relating to the Srebrenica component of the case.⁹

4. The Accused maintains that the statements, or lack thereof, made in the Notes as well as the statement regarding the Film go both to the Witness's credibility and "issues related to whether the executions at Srebrenica were done with the intent to destroy the Bosnian Muslims as such".¹⁰ The Accused thus contends that he has met the test required to recall a witness pursuant to Tribunal jurisprudence and that of the International Criminal Tribunal for Rwanda.¹¹

5. In the "Prosecution Response to Motion to Recall Johannes Rutten", filed confidentially on 17 April 2012 ("Response"), the Office of the Prosecutor ("Prosecution") argues that the Motion should be denied because the Accused has failed to show good cause for his request to recall the Witness.¹² With regard to the Notes, the Prosecution contends that the Accused had information about the Notes' existence as early as March 2009, and thus does not now adequately justify why he could not have requested them earlier.¹³ The Prosecution also argues that the Accused has failed to substantiate how the three entries in the Notes either implicate the Witness's credibility or the intent behind the executions in Srebrenica.¹⁴ The Prosecution also contends that the alleged omission of any entry regarding the confiscation or burning of the identification documents of Muslim men is minor and does not seriously affect the Witness's credibility because of the consistency between the Witness's testimony and contemporaneous statement regarding the

⁷ Motion, Confidential Annex.

⁸ Motion, para. 8.

⁹ Motion, paras. 9–11.

¹⁰ Motion, para. 12.

¹¹ Motion, paras. 13–21.

¹² Response, paras. 1, 18.

¹³ Response, paras. 5–8.

¹⁴ Response, para. 9.

matter.¹⁵ Finally, the Prosecution contends that the evidence that the Accused seeks to elicit is duplicative of the evidence of four other witnesses, as well as of adjudicated facts.¹⁶

6. With regard to the Film, the Prosecution notes that the Accused has been in possession of the August 1998 Statement since 16 March 2009 and could have found the statement easily using the electronic index provided to him.¹⁷ The Prosecution also argues that the Accused has failed to show that the August 1998 Statement is of sufficient probative value to justify recalling the Witness, as it has no relation to genocidal intent.¹⁸ In addition, the Film was allegedly destroyed by someone other than the Witness, and the essence of the Witness's testimony—that photographs were destroyed—remains essentially uncontradicted.¹⁹

II. Applicable Law

7. Pursuant to Rule 89(B) of the Rules, a Chamber shall apply “rules of evidence which best favour a fair determination of a matter before it and are consonant with the spirit of the Statute and the general principles of law”. Rule 90(F) of the Rules provides that:

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. In order to determine a request to recall a witness, the Chamber must consider whether the requesting party has demonstrated good cause to recall that witness.²⁰ In doing this, the Chamber must take into consideration the purpose of the evidence that the requesting party expects to elicit from the witness, as well as the party's justification for not eliciting that evidence when the witness

¹⁵ Response, para. 9.

¹⁶ Response, paras. 10–11.

¹⁷ Response, paras. 14–15.

¹⁸ Response, para. 16.

¹⁹ Response, para. 16.

²⁰ Decision on Accused's Motion to Recall Twelve Municipalities Witnesses, 20 January 2012, paras. 8–9; Decision on Accused's Requests in Relation to Notes Taken by Witness Adrianus Van Baal, 17 February 2011 (“Van Baal Decision”), paras. 7–8; Decision on Accused's Motion to Recall Harry Konings for Further Cross-examination, 11 February 2011, para. 8 (“Konings Decision”); *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Reasons for Decision to Recall Witness JF-047, 31 March 2011 (“*Stanišić and Simatović* Decision”), para. 6; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution Motion to Recall Marko Rajčić, 24 April 2009 (“*Gotovina* Decision”), para. 10; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-examination, 19 September 2005 (“*Bagosora* Decision”), para. 2.

originally testified.²¹ Furthermore, the right to be tried without undue delay as well as concerns for judicial economy demand that a request to recall a witness “should not be granted lightly and only when the evidence is of significant probative value and not cumulative in nature”.²² If the witness is to be recalled in order to show inconsistencies between his or her testimony and his or her subsequent statements, the requesting party must demonstrate that prejudice was sustained due to its inability to put inconsistencies to the witness.²³ The witness will not be recalled if the inconsistency is minor or its nature is self-evident.²⁴

III. Discussion

9. As a preliminary matter, the Chamber considers that the confidentiality of the Annex to the Motion is warranted because it reproduces the text of the Notes. However, the Chamber considers that the Response need not be confidential and therefore orders that it be reclassified as a public document.

10. Turning now to the substance of the Motion, with regard to the Notes, the Chamber notes that, according to the Prosecution, the Accused was aware of the existence of the Notes as early as March 2009. However, the Chamber considers that there is some justification as to why the evidence could not have been elicited earlier, namely that the Accused only appears to have learned during the Witness’s testimony that the Witness relied on the Notes to refresh his memory before testifying in this and previous cases.

11. Regarding the three entries in the Notes referred to in the Motion, the Chamber notes that the Accused wishes to cross-examine the Witness regarding Bosnian Muslim forces’ attempts to involve the DutchBat in their defence on 8 July 1995, tension between the Drina wolves and other Serb forces near the White House from 11 to 13 July 1995, and Muslims’ killing of Serbs between early 1993 and July 1995. However, the Accused does not provide any concrete argument regarding how these either implicate the Witness’s credibility or go to whether the executions at Srebrenica were done with the intent to destroy the Bosnian Muslims. Furthermore, the Chamber considers that other Witnesses have already testified about the relationship between the DutchBat and the Army of Bosnia and Herzegovina, as well as Bosnian Muslim attacks on Bosnian Serb

²¹ Van Baal Decision, para. 8; Konings Decision, para. 8; *Stanišić and Simatović* Decision, para. 6; *Gotovina* Decision, para. 10; *Bagosora* Decision, para. 2.

²² *Gotovina* Decision, para. 10; *Bagosora* Decision, para. 2.

²³ Van Baal Decision, para. 8; Konings Decision, para. 8; *Bagosora* Decision, para. 3.

²⁴ *Bagosora* Decision, para. 3.

soldiers.²⁵ Additionally, regarding the Drina Wolves entry, the Chamber notes that the Witness's statement already states that private cars appeared in front of the White House carrying soldiers wearing "different uniforms," specifically black uniforms.²⁶ It also indicates the relationship between those individuals and Bosnian Serb soldiers and notes the Witness's perception that there was one man who, in conjunction with others, was giving instructions to both Bosnian Serb soldiers and soldiers in black uniforms.²⁷ The Accused thus had an opportunity to—but did not—cross-examine the Witness on this issue. Accordingly, the Chamber considers that the evidence the Accused seeks to elicit lacks considerable probative value and is cumulative in nature.

12. Additionally, regarding the lack of any entry in the Notes regarding the Witness's testimony about the confiscation or burning of the identification documents of Bosnian Muslim men outside the White House, the Chamber does not consider that the lack of such a reference in the Notes is of such importance that it warrants recalling the Witness. This is a matter of weight for the Chamber to consider in view of the totality of the trial record.

13. Finally, with regard to the August 1998 Statement, the Chamber considers that it was disclosed to the Accused in March 2009 and that—as the Chamber has already indicated—²⁸ the Accused cannot now rely on the argument that he lacked sufficient time to prepare for the Srebrenica component of the case. The Chamber thus considers that there is no justification for the Accused's failure to present the August 1998 Statement to the Witness during his testimony. In addition, even though the testimony goes to the Witness's credibility, any inconsistency is of such a minor nature that the Chamber does not consider it necessary to hear the Witness's explanations in this regard.

14. The Chamber thus considers that the Accused has failed to demonstrate good cause for the recall of the Witness.

IV. Disposition

15. Accordingly, the Chamber, pursuant to Rules 54, 89, and 90 of the Rules, hereby **DENIES** the Motion and **ORDERS** the Registry to reclassify the Response as public.

²⁵ *See, e.g.*, Joseph Kingori, T.2292022921 (13 January 2012); Paul Groenewegen, T. 22988–22990 (13 January 2012). Additionally, the Chamber questions the relevance of evidence related to Bosnian Muslim attacks on Bosnian Serb soldiers.

²⁶ P3948 (Witness statement of Johannes Rutten dated 8 November 2011), para. 95.

²⁷ P3948 (Witness statement of Johannes Rutten dated 8 November 2011), paras. 95–100.

²⁸ T. 22075–22077 (29 November 2011); Decision on Accused's Motion for Suspension of Proceedings Prior to Start of Srebrenica Evidence, 22 November 2011.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-sixth day of April 2012
At The Hague
The Netherlands

[Seal of the Tribunal]