

IT.02-60-A
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21 July 2005

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**UNITED
NATIONS**



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-02-60-A
Date: 21 July 2005
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision: 21 July 2005

THE PROSECUTOR

v.

**Vidoje BLAGOJEVIĆ
Dragan JOKIĆ**

CONFIDENTIAL

**DECISION ON APPELLANT VIDOJE BLAGOJEVIĆ'S MOTION FOR ADDITIONAL
EVIDENCE PURSUANT TO RULE 115**

Counsel for the Prosecutor:

Mr. Norman Farrell

Counsel for the Accused:

**Mr. Vladimir Domazet for Mr. Vidoje Blagojević
Ms. Cynthia Sinatra for Mr. Dragan Jokić**

INTRODUCTION

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 ("International Tribunal") is seised of appeals from the Judgement of Trial Chamber I in the case of *Prosecutor v. Blagojević et al.*, Case No. IT-02-60, rendered orally on 17 January 2005 and in writing on 24 January 2005 ("Judgement"). Appeals have been filed by both Vidoje Blagojević and Dragan Jokić as well as by the Prosecution.

2. The Appeals Chamber is presently seised of a Motion for Additional Evidence ("Motion"), by Vidoje Blagojević ("the Appellant"), of 31 May 2005, filed under Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("Rule 115" and "the Rules", respectively). The Appellant seeks to introduce into evidence at the appeal stage three aerial images of Bratunac town—apparently produced from a single photograph presented at varying levels of magnification—taken at 14:00 on 13 July 1995. The images were so identified when they were disclosed to the Appellant by the Prosecution on 21 October 2004, according to correspondence appended to the Motion, and the Prosecution does not contest their identity or reliability. The Appellant alleges that the photograph disproves the Judgement's findings with respect to the presence of prisoners as well as numerous buses and trucks in the vicinity of a stadium in Bratunac.¹

3. The Prosecution argues in its Response to Blagojević's Motion to Present Additional Evidence ("Response"), filed on 10 June 2005, that the evidence was available at trial, such that it cannot be introduced now unless necessary to avert a miscarriage of justice; that the Appellant has failed to articulate the particular findings in the Judgement to which the images in question are relevant; and that the images are not in any event inconsistent with the Trial Chamber's findings, and therefore could not have affected the Judgement if introduced at trial.²

DISCUSSION

A. Timeliness of the Rule 115 Motion and the Reply Brief

¹ Motion paras. 3-4.

² Response paras. 13-18, 19-24, and 25-33, respectively.

4. At the outset, the Appeals Chamber must address two issues pertaining to timeliness. Paragraph (A) of Rule 115 requires that motions to present additional evidence at the appeal stage be filed within 75 days from the date of the Judgement, "unless good cause is shown for further delay." Here, calculating from the date of oral delivery of the Judgement on 17 January 2005,³ the deadline for filing a Rule 115 motion was 2 April 2005. The Appellant requests that his Motion nonetheless be treated as timely, noting that the new counsel who was appointed for the Appellant at the appeal stage did not receive the record of the case until 23 March 2005, and that the record was "extremely voluminous", consisting of 197 binders.⁴ The Prosecution does not oppose the extension of time, noting that the delay prejudiced neither the parties nor the administration of justice.⁵ The Appeals Chamber agrees that the change of counsel for the Appellant and counsel's need to review the extensive record constitute "good cause" for the delay in the submission of the Rule 115 Motion, and therefore treats the Motion as timely filed.⁶

5. The Appeals Chamber additionally notes that the Appellant filed his Response Brief on Prosecution's Brief About Additional Evidence ("Reply") on Monday, 20 June 2005; because the Prosecution's Response to the Appellant's Motion had been filed on 10 June 2005, the due date for the Reply, according to paragraph 16 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal⁷ ("Practice Direction"), was Tuesday, 14 June 2005. The Appellant states in his Reply that his counsel received the Prosecution's Response by fax on the day before he left for The Hague for a Status Conference in this case, and was unable to prepare the Reply while in transit.⁸ Counsel informed the Pre-Appeal Judge of the delay at the Status Conference, which was held on 17 June 2005, and filed his Reply on the next business day, 20 June 2005. The Appeals Chamber considers that the Appellant has

³ As noted previously, the full Trial Judgement was delivered in writing on 24 January 2005; a written summary had been available in the interim. In prior decisions in this case, the date of oral delivery of the Judgement, 17 January, has been treated as the date of the Judgement for the purpose of calculating deadlines under the Rules, although the parties were granted extensions for filing their notices of appeal to account for the delay in issuance of the written Judgement. *See, e.g.*, Decision on Defence Motion for Extension of Time in Which to File the Defence Notice of Appeal, 15 February 2005; Decision on Prosecution Motion for Extension of Time in Which to File the Prosecution Notice of Appeal, 15 February 2005. This practice has been consistent with the arguments of all of the parties, and the Appeals Chamber will continue to follow it here, observing that whether the date of 17 January or 24 January is employed is not in any event critical to the question whether the Rule 115 motion was timely filed, as even using the later date the motion would have been due on 9 April 2005.

⁴ Motion, paras. 7-8.

⁵ Response, para. 5.

⁶ The Appellant has been granted extensions of time for his pleadings for the same reason. *See* Decision on Vidoje Blagojević's Motion for Extension of Time in Which to File His Notice of Appeal and on Dragan Jokić's Motion for Extension of Time in Which to File His Appeal Brief, 14 April 2005; Decision on Vidoje Blagojević's Expedited Motion for Extension of Time in Which to File His Notice of Appeal, 16 February 2005.

⁷ IT/155 rev.2, 21 February 2005.

⁸ Reply, paras. 2-3.

demonstrated “good cause” for this short delay within the meaning of Rule 115 of the Rules, and recognizes the Reply as timely filed.

B. Availability of the Evidence at Trial

6. New evidence that was unavailable at trial to the party seeking its admission will be admitted at the appeal stage if the party demonstrates that it is “relevant and credible” and that, if considered at trial, it “could have been a decisive factor in reaching the decision”.⁹ If the evidence in question *was* available to the party at trial, the Appeals Chamber will not admit it unless the party additionally demonstrates that a “miscarriage of justice” would occur absent its admission.¹⁰ The Appeals Chamber has interpreted this as imposing a heightened prejudice requirement: instead of merely showing that the evidence *could* have affected the decision if admitted, the party seeking admission of evidence that was available at trial must show that it *would* have affected the decision. That is, he must show the probability and not the mere possibility of prejudice.¹¹

7. In order to demonstrate that evidence was not available at trial, a party seeking its admission at the appeal stage must show not only that he did not possess the evidence during the trial proceedings, but also that he could not have obtained it through the exercise of due diligence. The duty to exercise due diligence incorporates the responsibility to take advantage of “all mechanisms of protection and compulsion available under the Statute and Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber.”¹²

8. The Appellant offers just one argument as to the unavailability at trial of the images he seeks to introduce: that they were not disclosed by the Prosecution to the Appellant’s trial counsel until 21 October 2004. At that point, the parties—having rested their cases and given their closing arguments in proceedings that had ended on 4 October 2004—were awaiting the Judgement of the Trial Chamber, which was announced on 17 January 2005. The question thus arises whether evidence that becomes available after the parties have concluded their presentations at trial, but before the Trial Chamber issues its Judgement, is “available at trial” for the purpose of Rule 115(B).

⁹ Rule 115(A).

¹⁰ See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, 21 March 2005, para. 14 (“*Galić* Decision”).

¹¹ *Id.*

¹² *Id.* at para. 9; see also *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on the Appellant’s Motion for Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, paras. 40, 44-45, 47; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 50.

9. First, it bears noting that the Appellant's submissions on this point are scant; he does not specifically address the legal standards for unavailability, even in reply to the arguments of the Prosecution, but simply repeats in his Reply the bare assertion from his Motion that the images were not turned over to his counsel until "after a trial."¹³ The Appellant bears the burden of demonstrating that the evidence he seeks to introduce on appeal was unavailable at trial—including that he exercised due diligence to obtain and introduce it, a point on which he includes no submissions whatsoever—and such minimal submissions fall short of meeting this burden. Moreover, submissions that do not address the relevant legal standards do not meet the requirements of the Practice Direction, which requires parties filing motions on appeal to specify "the grounds on which the ruling or relief is sought."¹⁴

10. Furthermore, the Appeals Chamber agrees with the Prosecution that under the circumstances of this case, the evidence received by the Appellant's trial counsel several months before the Judgement was rendered was "available at trial" for the purposes of Rule 115. The Appeals Chamber considers that evidence is "available at trial" if it becomes available at a stage when it is still reasonably possible for the relevant party to seek to introduce it before the Trial Chamber. Depending on the circumstances, evidence received after closing arguments in a case may meet this standard.

11. Here, reproductions of a single photograph at three levels of magnification were turned over to the Appellant nearly three months before the Trial Judgement was rendered. During that period, the Appellant had ample time to file a motion requesting that the Trial Chamber reopen the proceedings to consider the evidence.¹⁵ Such a motion was presented in the *Furundzija* case, and the Trial Chamber ordered that the interests of justice required the reopening of proceedings, after closing arguments, in order to consider some potentially exculpatory evidence that had been disclosed by the Prosecution to the Defence in the interim. It subsequently heard four days of witness testimony on the issue, several months after closing arguments.¹⁶

¹³ Reply, para. 5.

¹⁴ Practice Direction, para. 13(c).

¹⁵ Although procedures for reopening trial proceedings are not specified under the Rules, the Trial Chamber might permit reopening in unusual cases where the demands of justice so require, relying on its general authority under Rule 89(B) of the Rules, which provides that in "cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

¹⁶ See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Judgement, 10 December 1998, paras. 90-95. In many other cases, Trial Chambers have permitted the reopening of a party's case in order to add "fresh evidence" during the

12. Such motions to reopen closed proceedings, which are unusual, might well be denied in the Trial Chamber's discretion, including circumstances in which Rule 115 consideration of the evidence in question remains appropriate on appeal. Had the Trial Chamber refused to reopen the proceedings (on grounds not otherwise disposing of any subsequent Rule 115 motion), the Appellant could then reasonably have argued that the evidence should be considered unavailable at trial for Rule 115 purposes. As it is, however, having not made any effort to introduce the evidence before the Trial Chamber, he cannot claim to have exercised due diligence, taking advantage of all procedural mechanisms available under the Statute and Rules of the International Tribunal.

13. The Appeals Chamber's approach on this issue is consistent with a Decision of the Appeals Chamber in the *Galić* case, which held that a letter the Appellant had received from the International Committee of the Red Cross (ICRC) during the period the parties were awaiting judgement was available at trial for the purposes of Rule 115.¹⁷

14. For these reasons, the Appeals Chamber holds that the images that the Appellant seeks to introduce were "available at trial" within the meaning of Rule 115. It will thus proceed to consider whether the images should nonetheless now be admitted on the grounds that failure to do so would cause a miscarriage of justice.

C. Admissibility Pursuant to the Miscarriage of Justice Standard

15. The Appellant's Motion and Reply do not specifically argue that a refusal to admit the images in question would result in a miscarriage of justice. Indeed, he fails to explain how the factual findings to which the images allegedly relate affected the Trial Chamber's ultimate findings concerning his responsibility. Again, this failure to address the applicable legal requirements is inconsistent with the Practice Direction. However, in the interests of justice, the Appeals Chamber will consider the allegations the Appellant did make pertaining to the importance of the images in order to consider whether, in fact, the standard is satisfied.

rebuttal stage. See, e.g., *Prosecutor v. 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. 38; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14-A, Appeal Judgement, 17 December 2004, paras. 211-230; *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 283.

¹⁷ *Galić* Decision at para. 10 & fn. 22, para. 15.

16. The Appellant claims that the images demonstrate that, at the time the photograph was taken on 13 July 1995 at 14:00, only two trucks were present at Bratunac stadium and the nearby Vuk Karadžić School, and that there were no large crowds of prisoners present in the stadium. The Appeals Chamber is not certain that this level of detail can be seen in the images. However, even assuming that the Appellant can show that the images indeed depict what he says, the Appeals Chamber holds that the Appellant has failed to demonstrate that these facts, if accepted as true, would have altered the Trial Chamber's decision.

17. The section of the Judgement to which the images are purportedly relevant is section E, "Detention and killings in Bratunac town," located at paragraphs 264 through 290 of the Judgement.¹⁸ In that section, the Trial Chamber held that from the evening of 12 July 1995 through the night of 13 July 1995, large numbers of Bosnian Muslim men were detained in the town of Bratunac. Some of these men were murdered or made to suffer other abuses while in detention. The Trial Chamber subsequently held that the Appellant was aware of these events,¹⁹ and that he aided and abetted them.²⁰

18. The images of Bratunac town, even as interpreted by the Appellant, are not inconsistent with the findings of the Trial Chamber concerning the presence of prisoners. Contrary to the Appellant's assertion, the Trial Chamber did not find that many prisoners were being held in the stadium field during the early afternoon of 13 July 1995. Although it listed the stadium among a number of locations wherein detainees were present at some point over the course of 12 and 13 July,²¹ it did not specify when during that period they were there. Rather, its specific findings concerning the events of 13 July during the day—and indeed, all of its findings that detailed the abuses that prisoners underwent in Bratunac town during that period—referred to prisoners being kept inside a number of indoor locations, including the Vuk Karadžić School building and a nearby warehouse, as well as on buses.²² Prisoners present inside buses or buildings would not, of course, have been visible in an aerial view, and thus their absence from the images proffered by the Appellant does not undermine the Trial Chamber's findings.

19. Nor are the images inconsistent with the Trial Chamber's findings concerning the presence of buses or trucks in Bratunac town. The Trial Chamber found—in the only specifically identified

¹⁸ See Reply, para. 11 (specifically citing paragraphs 266 and 267 of the Judgement).

¹⁹ Judgement, paras. 492-494.

²⁰ See, e.g., *id.* paras. 747-749 (holding that the Appellant aided and abetted murders in Bratunac town).

²¹ Judgement, para. 264.

paragraphs of the Judgement that the Appellant challenges, paragraphs 266 and 267—that “many” buses were present in the vicinity of the stadium on the evening of 12 July 2005, and that approximately 80 to 120 buses and trucks were present in the whole of the town on the evening of 13 July 2005. The Appellant suggests that it is implausible that these buses would have been present on two consecutive nights but would have disappeared during the day in between.²³ However, as the Prosecution points out—and the Appellant does not dispute—two witnesses for the *defence* testified that a large number of buses that were present during the night of 12 July left before the morning.²⁴ One specified that the buses had headed to Konjević Polje. The images proffered by the Appellant are perfectly consistent with this account, and with the findings of the Trial Chamber.

20. Moreover, the Trial Chamber’s findings with regard to the Appellant’s knowledge of and responsibility for the events that took place in Bratunac did not in any respect turn on the presence of buses or prisoners in locations visible from the air on the afternoon of 13 July 2005. To the contrary, the Trial Chamber referred repeatedly to the Appellant’s presence in the town on the “nights” of July 12 and 13, and to the visible buses and trucks and the audible gunshots and screams that would have been perceived by “anyone walking the streets of Bratunac on the nights of 12 and 13 July”.²⁵ The proffered images are thus irrelevant to the ultimate question of the Appellant’s responsibility.

21. For these reasons, the Appellant has not demonstrated that the introduction of the proposed evidence at trial would have altered the result reached by the Trial Chamber.

DISPOSITION

The Appellant’s Motion is hereby **DENIED**.

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

²² See *id.* paras. 271-282.

²³ Reply, para. 12.

²⁴ See, e.g., T. 7711 (testimony of defence witness that buses “vanished” by morning).

²⁵ Judgement, paras. 492-494.



Judge Theodor Meron
Presiding

Dated 21 July 2005
At The Hague
The Netherlands

[Seal of the Tribunal]