



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: 9 April 2009
Original: English

IN THE APPEALS CHAMBER

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

Acting Registrar: Mr. John Hocking

Decision: 9 April 2009

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

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

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for the Accused:

Mr. Branislav Tapušković
Ms. Branislava Isailović

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 “Further Motion to Present Additional Evidence” (“Second Motion”), filed confidentially by Dragomir Milošević (“Milošević”) on 19 February 2009.¹ The Office of the Prosecutor (“Prosecution”) filed its confidential response on 19 March 2009.² Milošević filed his reply on 26 March 2009.³

I. PROCEDURAL BACKGROUND

2. On 12 December 2007, the Trial Chamber convicted Milošević 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.⁴ It imposed on him a single sentence of 33 years of imprisonment.⁵ Milošević appealed his conviction on twelve grounds.⁶ The Prosecution submitted a single ground of appeal concerning the sentence imposed by the Trial Chamber.⁷

3. On 10 November 2008, Milošević submitted a confidential motion to present additional evidence, pursuant to Rule 115 of the Rules requesting the Appeals Chamber to admit into evidence the Diary of United Nation Protection Force (“UNPROFOR”) officer Louis Fortin (“Diary”).⁸ Milošević further sought 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.⁹

¹ The English translation of the Second Motion was filed on 26 February 2009.

² Prosecution Response to Milošević’s Further Motion to Present Additional Evidence, 19 March 2009, (confidential) (“Response”).

³ *Conclusions [sic] en réplique des conclusions en réponse déposées par le Procureur le 19 mars 2009*, 26 March 2009 (“Reply”). The English translation of the Reply was filed on 8 April 2009. Milošević also applied for leave to file a reply under Rule 126bis of the Tribunal’s Rules of Procedure and Evidence (“Rules”). The Appeals Chamber recalls, as it has done on numerous occasions, that because the relevant Practice Direction does not require the moving party in a motion filed during an appeal from a judgement to seek leave prior to filing a reply, there is no such requirement in cases like the present one (see *e.g. Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006, para. 5, referring to Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev. 3, 16 September 2005, para. 14).

⁴ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgement, 12 December 2007 (“Trial Judgement”), paras 1006-1008.

⁵ Trial Judgement, para. 1008.

⁶ Defence Appeal Brief Including Confidential Annexes A and B and Public Annexes C and D, 14 August 2008 (partly confidential) (“Defence Appeal Brief”); public redacted version filed on 19 March 2009.

⁷ Prosecution Appeal Brief, 30 January 2008 (“Prosecution Appeal Brief”).

⁸ Motion to Present Additional Evidence with Confidential Annexes A and B, 10 November 2008 (confidential) (“First Motion”), p. 4; public redacted version filed on 19 March 2009.

⁹ First Motion, p. 4.

On 20 January 2009, the Appeals Chamber dismissed the First Motion.¹⁰ However, it invited Milošević, if he so wished, to file – no later than thirty days from the filing of the decision and pursuant to the standard identified therein – 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.¹¹

II. APPLICABLE LAW

4. Pursuant to Rule 115 of the Rules, a party may submit a request to present before the Appeals Chamber evidence which was unavailable at trial. The motion must be filed no 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.¹²

5. For additional evidence to be admissible under Rule 115 of the Rules 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.¹³ The applicant's duty to act with 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".¹⁴

6. The applicant must subsequently demonstrate that the evidence is both relevant to a material issue and credible.¹⁵ Evidence is relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence.¹⁶ Evidence is credible if it appears to be reasonably capable of belief or reliance.¹⁷ The

¹⁰ Decision on Dragomir Milošević's Motion to Present Additional Evidence, 20 January 2009 ("Decision on the First Motion"), p. 8.

¹¹ Decision on the First Motion, p. 8.

¹² Rule 115(A) of the Rules.

¹³ Rule 115(B) of the Rules; Decision on the First Motion, para. 6 and references cited therein.

¹⁴ Decision on the First Motion, para. 6, citing to *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.

¹⁵ Rule 115(B) of the Rules.

¹⁶ *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on Mile Mrkšić's Second Rule 115 Motion, 13 February 2009 ("*Mrkšić* Rule 115 Decision"), para. 7; *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. 6; *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* Decision of 26 June 2008"), para. 7; *Prosecutor v. Kupreškić et al.* IT-95-16-A, Appeal Judgement, 23 October 2001 (*Kupreškić et al.* Appeal Judgement), para. 62.

¹⁷ Decision on the First Motion, para. 7 and references cited therein.

Appeals Chamber recalls that a finding that evidence is credible has no bearing on the weight to be accorded to such evidence.¹⁸

7. The applicant must further demonstrate that the evidence *could* have had an impact on the decision, in other words, the evidence must be such that, if considered in the context of the evidence given at trial, it could show that the decision was unsafe.¹⁹ A decision will be considered unsafe if the Appeals Chamber ascertains that there is a realistic possibility that the Trial Chamber's verdict might have been different if the new evidence had been admitted.²⁰

8. The applicant bears the burden of identifying with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and of specifying with sufficient clarity the impact the additional evidence could have had upon the Trial Chamber's decision.²¹ The evidence may otherwise be summarily rejected.²²

9. Finally, the Appeals Chamber has repeatedly recognised that the evidence shall not be assessed in isolation but in the context of the evidence given at the trial.²³

III. DISCUSSION

A. Submissions of the parties

10. Milošević first seeks the admission into evidence of certain portions of the Diary which, in his view, could have affected the verdict.²⁴ In particular, the Appeals Chamber understands Milošević to argue that the identified portions of the Diary could have affected the Trial Chamber's findings relating to: (i) the impact that the movement of the Army of Bosnia and Herzegovina ("ABiH") soldiers and the number of ABiH military targets had on the civilian status of the urban areas within the confrontation lines in Sarajevo;²⁵ (ii) the origin of sniper fire against civilians

¹⁸ Decision on the First Motion, para. 7 and references cited therein.

¹⁹ Decision on the First Motion, paras 8-9; *Mrkšić* Rule 115 Decision, para. 8; *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 ("*Krajišnik* Rule 115 Decision of 16 October 2008"), para. 6; *Krajišnik* Rule 115 Decision on 20 August 2008, para. 7; *Stanišić* Decision of 26 June 2008, para. 7; *Bralo* Rule 115 Decision, para. 10.

²⁰ *Stanišić* Decision of 26 June 2008, para. 7; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.1, Confidential Decision on Prosecution's Application to Present Additional Evidence in its Appeal against the Re-assessment Decision, 10 March 2006, para. 17; *Prosecutor v. Zeljko Mejakić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, 16 November 2005 ("*Mejakić et al.* Rule 115 Decision"), para. 10.

²¹ *Mrkšić* Rule 115 Decision, para. 8; Decision on the First Motion, para. 8; *Krajišnik* Rule 115 Decision on 20 August 2008, para. 7; *Bralo* Rule 115 Decision, para. 10; *Kupreškić et al.* Appeal Judgement, para. 69.

²² Decision on the First Motion, para. 8 and references cited therein.

²³ *Mrkšić* Rule 115 Decision, para. 10; *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. 14.

²⁴ Second Motion, para. 6.

²⁵ Second Motion, pp. 2-7, referring to the Trial Judgement, paras 896-898 and the Defence Appeal Brief, paras 33(f), 79-80, 87-89.

within the confrontation lines;²⁶ (iii) the origin of the modified air bomb that hit Safeta Hadžića Street on 26 May 1995;²⁷ (iv) the cause of the explosion at the Markale market on 28 August 1995;²⁸ and (v) the dismissal of the alibi defence.²⁹ Milošević further submits that portions of the Diary could have supported the findings of the Trial Chamber with regard to the factors to be considered in mitigation disputed by the Prosecution.³⁰ Finally, he notes that the entire Diary has not yet been disclosed to him because the entries from 26 August to 15 September 1995, including the dates, have been redacted by the Prosecution.³¹

11. Milošević further seeks to have witnesses Louis Fortin, W46, Rupert Smith and W156 called before the Appeals Chamber for the purpose of testifying on the contents of the Diary.³² He contends that the late disclosure of the Diary prevented him from proving his defence theory in the cross-examination of the aforementioned witnesses when they testified at trial³³ and points out that had the Diary been disclosed to him at the relevant time, the direct and cross-examination of these witnesses “would have been fundamentally different from those on the trial record.”³⁴ The Diary shows, he argues, that the international representatives considered the ABiH and the Sarajevo Romanija Corps (“SRK”) as belligerents fighting on an equal footing, a fact which, in his view, was distorted by these witnesses when testifying before the Trial Chamber.³⁵ He concludes that the proper administration of justice requires all the aforementioned witnesses to be recalled, and in particular Louis Fortin and Rupert Smith.³⁶

12. The Prosecution responds that the Second Motion should be dismissed in its entirety.³⁷ It argues that Milošević fails to show how the evidence he seeks to have admitted could have had an impact on the verdict.³⁸ Furthermore, it submits that Milošević fails to identify the precise portions of the Diary which support his assertions, therefore failing to meet the required specificity standard. According to the Prosecution, most of Milošević’s Motion should be dismissed on this ground

²⁶ Second Motion, pp 3-7, referring to the Trial Judgement, para. 794.

²⁷ Second Motion, p. 3, referring to the Trial Judgement, paras 531-533.

²⁸ Second Motion, p. 7, referring to the Trial Judgement, para. 723.

²⁹ Second Motion, p. 5, referring to the Trial Judgement, para. 977.

³⁰ Second Motion, pp. 5-7, referring to the Trial Judgement, para. 1003.

³¹ Second Motion, para. 7, referring to the Diary, entries from 26 August to 15 September 1995.

³² Second Motion, paras 7-12. Milošević refers in particular to the following entries in the Diary: 5, 9, 10, 15, 17, 18 and 22 June 1995; 6 and 26 July 1995; 11, 13, 15 and 20 August 1995; 21 and 25 September 1995; 1, 2, 6 and 16 October 1995; 1, 4 and 23 December 1995.

³³ Second Motion, para. 7.

³⁴ Second Motion, para. 9.

³⁵ Second Motion, para. 10.

³⁶ Second Motion, para. 11.

³⁷ Response, paras 1, 43.

³⁸ Response, para. 1.

alone.³⁹ Additionally, the Prosecution submits its detailed arguments as to why each portion of the Diary is inadmissible.⁴⁰

13 The Prosecution further argues that Milošević's request to recall witnesses should be denied.⁴¹ It contends that, despite the clear instructions provided by the Decision on the First Motion, Milošević fails to specify the exact portions of the Diary which could affect the witnesses' testimony, and fails to demonstrate which parts of the testimony could be different and how this could affect the verdict.⁴²

14 Concerning the redacted portions of the Diary, the Prosecution asserts that Milošević's complaint is without merit.⁴³ It argues that, as indicated in the disclosure letter dated 1 April 2008, the redactions are of "entirely irrelevant information relating to Fortin's private life" and almost all of them refer to a period when Fortin was on leave from duty.⁴⁴

15 Finally, the Prosecution notes that the English translation of the Diary tendered by Milošević with the First Motion does not contain those parts which were already written in English in the original French version of the Diary. Accordingly, the Prosecution argues that references to entries which are contained only in the original French-English version of the Diary and which are not before the Appeals Chamber should be dismissed.⁴⁵ However, for the purpose of fully responding to Milošević's Motion, the Prosecution attached to its Response the relevant parts of the original French-English version of the Diary.⁴⁶

16 In reply, Milošević submits that, contrary to the Prosecution's assertion, he has identified with precision the portions of the Diary he is referring to, as well as the impact they could have had on the verdict.⁴⁷ He further argues that, with the exception of the Diary entry for 1 July 1995, the portions of the Diary he is referring to are very brief, and he was unable to request the admission into evidence of isolated phrases from those portions as that would have distorted their meaning.⁴⁸ Concerning the completeness of the Diary annexed to his First Motion, Milošević submits that he had no control over the contents of the Diary and that he submitted it before the Appeals Chamber

³⁹ Response, para. 2.

⁴⁰ Response, paras 11-37.

⁴¹ Response, para. 3.

⁴² Response, para. 3.

⁴³ Response, para. 4.

⁴⁴ Response, para. 4.

⁴⁵ Response, para. 5.

⁴⁶ Response, para. 6 and Appendix.

⁴⁷ Reply, paras 9, 14.

⁴⁸ Reply, para. 10.

in the way it was disclosed to him by the Prosecution.⁴⁹ Finally, Milošević submits that the Prosecution arguments relating to the different portions of the Diary should be dismissed.⁵⁰

B. Analysis

17. At the outset, the Appeals Chamber recalls its earlier finding that, in the circumstances of the case, the evidence sought to be admitted was unavailable to Milošević at trial.⁵¹

18. The Appeals Chamber reiterates that a party seeking the admission of additional evidence on appeal must provide the Appeals Chamber with the evidence sought to be admitted.⁵² The Appeals Chamber accepts the portions of the Diary annexed to the First Motion only inasmuch as they correspond to the excerpts mentioned in the Second Motion. However, the Appeals Chamber notes that certain portions of the Diary referred by Milošević are not contained in the parts of the Diary annexed to his First Motion, and instead were brought before the Appeals Chamber by the Prosecution.⁵³ For the reasons set out below, it is not necessary for the Appeals Chamber to decide whether to accept those parts of the Diary not annexed to the First Motion.

19. The Appeals Chamber recalls that it dismissed the First Motion because Milošević did not identify the manner in which the Diary could have affected the Trial Chamber's findings referred to in the First Motion "or even which particular portions of the Diary would be relevant to such findings".⁵⁴ Considering the special circumstances related to disclosure of the Diary by the Prosecution, the Appeals Chamber decided to give Milošević a further opportunity to substantiate his claim.⁵⁵ However, the Appeals Chamber finds that the Second Motion also fails to meet the requirements of the specificity recalled above.⁵⁶ In particular, instead of "specifying with sufficient clarity the impact the additional evidence could have had upon the Trial Chamber's decision", Milošević provides a list of the Diary portions identified by dates, often with no reference to a particular part of the entry, which, in his view, could contradict certain paragraphs of the Trial

⁴⁹ Reply, para. 11.

⁵⁰ Reply, paras 12-13, 15.

⁵¹ Decision on the First Motion, para. 18.

⁵² *Mrkšić* Rule 115 Decision, para. 13; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 18; *Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Decision on Appellant Hasan Ngeze's Motion for Leave to Present Additional Evidence, 14 February 2005, p. 3.

⁵³ Confidential Appendix to the Response. These portions include, *inter alia*, the Diary entries for 1 July 1995, 20 September 1995 and 4 December 1995. The Appeals Chamber notes that, despite Milošević's assertion that he submitted the Diary before the Appeals Chamber in the way it was disclosed to him by the Prosecution (Reply, para. 11), in his Second Motion he refers to portions of the Diary not included in Annex B to his First Motion. By way of example, the reference to points 11, 13 and 16 of the Diary entry for 4 December 1995 (Second Motion, p. 7) are not contained in the Diary annexed to Milošević's First Motion but only in the Confidential Appendix to the Response submitted by the Prosecution.

⁵⁴ Decision on the First Motion, para. 19.

⁵⁵ Decision on the First Motion, paras 22 and p. 8.

⁵⁶ *See supra*, para. 8.

Judgement. Significantly, he does not specify *why* the Trial Chamber could have come to a different conclusion despite the existence of the evidence it relied upon in the Trial Judgement. This approach does not meet the requirements for the purposes of a motion filed pursuant to Rule 115 of the Rules. In the instances where Milošević refers to the arguments presented in the Defence Appeal Brief regarding the alleged impact on the civilian status of Sarajevo,⁵⁷ the Appeals Chamber finds these references insufficient for the purposes of a motion under Rule 115 of the Rules, given that those paragraphs mainly reiterate his arguments rejected by the Trial Judgement without explaining why the Trial Chamber's relevant conclusions could be different.⁵⁸

20. Consequently, the Appeals Chamber rejects Milošević's request to have the portions of the Diary admitted as additional evidence on appeal without further analysis. His request for recalling the aforementioned witnesses is therefore moot.

IV. DISPOSITION

21 For the foregoing reasons, the Second Motion is **DISMISSED** in its entirety. The Appeals Chamber emphasizes that its findings in this Decision pertain strictly to the admissibility of the proffered evidence and not to the merits of the appeals filed by the parties.

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

Done this 9th day of April 2009,
At The Hague, The Netherlands.



Judge Fausto Pocar, Presiding

[Seal of the Tribunal]

⁵⁷ *See supra*, para. 10.

⁵⁸ In particular, Milošević does not address the fact that the Trial Chamber took into account the fact that there were military targets, population fluctuations and confrontation lines within Sarajevo but concluded that they did not ultimately alter the civilian status of the relevant urban areas (Trial Judgement, paras 889-913, as well as paras 141-173, describing the supporting evidence).