



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: 8 September 2009

Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Decision: 8 September 2009

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

**DECISION ON DRAGOMIR MILOŠEVIĆ'S THIRD 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 "Motion to Present Additional Evidence with Confidential Annex A" ("Motion"), filed confidentially by Counsel for Dragomir Milošević ("Milošević") on 3 August 2009.¹ The Office of the Prosecutor ("Prosecution") filed its confidential response on 20 August 2009.² Milošević did not file a reply.

I. PROCEDURAL BACKGROUND

2. On 12 December 2007, Trial Chamber III convicted Milošević of the crime 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.³ It imposed on him a single sentence of 33 years of imprisonment.⁴

3. Milošević appealed his conviction on twelve grounds.⁵ The Prosecution submitted a single ground of appeal concerning the sentence imposed by the Trial Chamber.⁶ Under his fourth ground of appeal Milošević claims that he cannot be held responsible for planning and ordering incidents that took place between 6 August and 10 September 1995, while he was away from Sarajevo for medical treatment in Belgrade.⁷ Consequently, he asserts that the Appeals Chamber should not consider the attacks carried out by the Sarajevo-Romanija Corps of the VRS ("SRK") against the civilian population of Sarajevo during the aforementioned period in its assessment of his culpability.⁸

4. The parties' oral arguments in relation to their respective appeals were heard on 21 July 2009 ("Appeals Hearing"). During the Appeals Hearing, Milošević's counsel attempted to refer to a document allegedly relevant to his fourth ground of appeal but was not allowed to do so following an objection from the Prosecution on the ground that the document in question was not part of the

¹ The English translation of the Motion was filed on 5 August 2009.

² Prosecution Response to "Motion to Present Additional Evidence with Confidential Annex A" with Appendix, 20 August 2009 (confidential) ("Response").

³ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgement, 12 December 2007 ("Trial Judgement"), paras 1006-1008.

⁴ Trial Judgement, para. 1008.

⁵ Defence Notice of Appeal Against the Trial Judgement, French original filed on 11 January 2008 (confidential); the English translation filed on 16 January 2008; the public redacted version filed in French on 11 May 2009; Defence Appeal Brief Including Confidential Annexes A and B and Public Annexes C and D, French original filed on 14 August 2008 (confidential); the English translation filed on 11 September 2008; public redacted version filed in French on 11 May 2009 (jointly, "Defence Appeal Brief").

⁶ Prosecution Notice of Appeal, 31 December 2007; Prosecution Appeal Brief, 30 January 2008.

⁷ Defence Appeal Brief, para. 156. See also AT. 84-85.

⁸ Defence Appeal Brief, para. 157.

record.⁹ The Presiding Judge further clarified to Milošević that he could file a motion pursuant to Rule 115 of the Rules of Procedure and Evidence (“Rules”) and tender the document as additional evidence on appeal, provided that he satisfied all the requirements of the said provision.¹⁰

5. On 3 August 2009, Milošević submitted a confidential motion to present additional evidence pursuant to Rule 115 of the Rules, requesting that the Appeals Chamber admit into evidence Order No. 09/30/18-239 issued by General Ratko Mladić on 8 August 1995 to appoint Čedomir Sladoje (“Sladoje”) as commander of the SRK effective 8 August 1995 and until Milošević’s return from medical treatment in Belgrade (“Order”).¹¹

II. APPLICABLE LAW

6. 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

7. 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

8. 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

9. 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

⁹ AT. 85-88, 134-137.

¹⁰ AT. 87-88, 135-136.

¹¹ Motion, para. 1 and Annex A thereto.

¹² Rule 115(A) of the Rules.

¹³ Rule 115(B) of the Rules; Decision on Dragomir Milošević’s Further Motion to Present Additional Evidence, 9 April 2009 (“Decision on Second Motion”), para. 5 and references cited therein.

¹⁴ Decision on Second Motion, para. 5 (internal quotations omitted).

¹⁵ Rule 115(B) of the Rules.

¹⁶ Decision on Second Motion, para. 6 and references cited therein.

¹⁷ *Id.*

given at trial, it could show that the decision was unsafe.¹⁸ 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.¹⁹

10. If the evidence was available at trial or could be obtained through the exercise of due diligence, it may still be admissible on appeal if the applicant can meet the burden of establishing that exclusion of the evidence would lead to a miscarriage of justice, in that if it had been available at trial it *would* have affected the verdict.²⁰

11. In both cases, 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

12. 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 trial.²³

III. DISCUSSION

A. Submissions of the parties

13. Milošević tenders the Order as additional evidence on appeal pursuant to Rule 115 of the Rules.²⁴ With respect to the late submission of the Motion, he avers that despite his request of 5 April 2006 to the Ministry of Defence of Serbia and Montenegro for the provision of all documents concerning his military career, he only received the proffered evidence on 14 July 2009.²⁵ Milošević argues that the evidence relates to the fourth sub-ground of his fourth ground of appeal and is "likely to prove the nature of the appointment of Čedo Sladoja [*sic*] as commander of the [SRK] following the departure of Dragomir Milošević to the hospital".²⁶

14. The Prosecution responds that the Motion should be dismissed as (i) it is filed out of time with no cogent reasons to justify the delay; (ii) the proffered material could have been obtained during trial through the exercise of due diligence; and (iii) the Order neither could nor would have

¹⁸ *Ibid.*, para. 7 and references cited therein.

¹⁹ *Id.*

²⁰ See, e.g., *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. 13.

²¹ Decision on Second Motion, para. 8.

²² *Id.*

²³ *Ibid.*, para. 9.

²⁴ Motion, para. 1.

²⁵ Motion, para. 3.

had any impact on the verdict of the Trial Chamber.²⁷ The Prosecution further submits that even if Milošević succeeded in showing that he had exercised the required diligence at trial but failed to obtain the Order, the information contained therein could easily be presented before the Trial Chamber through other sources, such as evidence from Sladoje, a military expert or Milošević himself.²⁸ The Prosecution also suggests that the Motion be summarily dismissed for lack of specificity required under Rule 115 of the Rules.²⁹ Finally, the Prosecution asserts that the Order cannot show that Milošević's conviction is unsafe because (i) Sladoje was appointed merely as a stand-in commander; (ii) the Trial Chamber found that Milošević's temporary absence could not relieve him from the responsibility for the campaign of shelling and sniping; and (iii) the Order neither sheds any light onto Milošević's abilities during his medical treatment nor onto his relationship with Sladoje during that period.³⁰

B. Analysis

15. At the outset, the Appeals Chamber finds that the parties have not submitted any arguments as to why the proffered evidence and the relevant submissions should be kept confidential and the Appeals Chamber cannot discern any such reasons. Considering that under Rules 78 and 107 of the Rules, all proceedings before an Appeals Chamber, including the Appeals Chamber's orders and decisions, shall be public unless there are exceptional reasons for keeping them confidential,³¹ the Appeals Chamber lifts the confidential status of the Motion and the Response and renders the present decision publicly.

16. The Appeals Chamber recalls that because Milošević filed his Motion on 3 August 2009, that is, after the Appeals Hearing, he must show cogent reasons for the delayed filing.³² In this respect, the Appeals Chamber observes that the evidence sought to be admitted was obtained by Milošević on 14 July 2009,³³ seven days before the Appeals Hearing and 21 days before the date of filing of the Motion. The Appeals Chamber notes Milošević's claim that the Order was unavailable during trial on account of his having recently received it from the Ministry of Defence of Serbia and

²⁶ Motion, paras 4-5.

²⁷ Response, paras 1-2.

²⁸ Response, paras 16-21.

²⁹ Response, para. 22.

³⁰ Response, paras 23-28.

³¹ *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, fn. 4, referring to *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Order Withdrawing Confidential Status of Pre-Review Orders and Decisions, 5 December 2005, p. 2, citing *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, 4 May 2005, p. 3.

³² See *supra*, para. 6.

³³ Motion, para. 3.

Montenegro.³⁴ It recalls, however, that in order to have additional evidence admitted at this highly advanced stage of the proceedings, Milošević has the responsibility of demonstrating that he (i) could not have obtained the proffered material despite the exercise of the due diligence and (ii) submitted the present motion as soon as possible after he became aware of the existence of the evidence he seeks to admit.³⁵ Milošević fails to elaborate on the due diligence requirement and does not provide any reasons whatsoever for the delay of 21 days following the receipt of the document, a delay which occurred despite the clarifications provided to him by the Presiding Judge during the Appeals Hearing urging him to tender the material.³⁶ Consequently, the Appeals Chamber finds that Milošević has not demonstrated cogent reasons for the delayed filing of the Motion.

17. Moreover, the Appeals Chamber notes that the Motion contains no arguments as to the conditions of admissibility of additional evidence on appeal recalled above.³⁷ The general assertion that the proffered material is relevant to an argument raised on appeal and is likely to prove a fact that the Trial Chamber considered immaterial for the conviction,³⁸ does not suffice for these purposes. The Appeals Chamber finds that Milošević's Counsel's failure to at least attempt to satisfy any of the requirements of Rule 115 of the Rules, especially after his previous motions filed under the same provision were rejected for similar reasons,³⁹ amounts to professional negligence. The Appeals Chamber thus finds the Motion frivolous in the sense of Rule 73(D) of the Rules⁴⁰ and issues a warning to Milošević's counsel under Rule 46(A) of the Rules.

18. The Appeals Chamber recalls however that an appellant should not be held responsible for the negligence of his counsel.⁴¹ The Appeals Chamber further recalls that it invited the parties to

³⁴ Motion, para. 3.

³⁵ *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Prosecution's Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 17 December 2004, p. 2.

³⁶ AT. 87-88:

JUDGE POCAR: Mr. Tapuskovic, if you got the document a couple of days ago, why didn't you motion the Chamber to have the document admitted two days ago?

MR. TAPUSKOVIC: Your Honours, we received it only a few days ago, but there is a formal omission. It was only yesterday that we received its complete version and there was no way for us to present it to the Trial Chamber before this hearing. I am not saying that I should enter the --

JUDGE POCAR: [Previous translation continues] ... beginning of the hearing?

MR. TAPUSKOVIC: It is an omission on my part, I agree, but I believe that it's never late, or rather, it's better -- but I'm starting from the facts that the Trial Chamber has established as being proven beyond reasonable doubt -- [...]

JUDGE POCAR: If you want to, you still have the possibility of submitting a motion in writing during the break, for instance.

³⁷ See *supra*, paras 6-12.

³⁸ See Trial Judgement, para. 975.

³⁹ Decision on Second Motion, paras 18-20.

⁴⁰ Cf. *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006, para. 19.

⁴¹ Cf. *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICRT-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 31, referring to *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-

elaborate during the Appeals Hearing on the issue of Milošević's temporary replacement.⁴² Considering that the tendered material appears relevant to this issue and that the trial record does not contain a similar source, the Appeals Chamber finds that in order to avoid a possible miscarriage of justice, it should examine whether, if the Order had been before the Trial Chamber, it would have affected the verdict.

19. The Order appoints Sladoje to the "vacancy formation post" of SRK commander for the period from 8 August 1995 "up to [Milošević's] return [...] from treatment and sick leave", in accordance with Articles 72 and 156 of the Law on the Army of Republic of Srpska.⁴³ The Appeals Chamber is satisfied that the proffered evidence is *prima facie* credible and relevant to the finding of the Trial Chamber that Milošević's absence from Sarajevo and the fact that his responsibilities had been taken over by the SRK Chief of Staff did not relieve him of criminal responsibility for the crimes committed in the period from 6 August to 10 September 1995.⁴⁴

20. However, the Appeals Chamber is not satisfied that, if available at trial, the Order would have affected the verdict. Indeed, the Appeals Chamber notes that the Trial Chamber did consider Milošević's submission that he was absent from Sarajevo and Sladoje was in charge of the SRK command during his absence. However, it found that Milošević's mere absence from the site of the crimes between 6 August and 10 September 1995, and the fact that his responsibilities had been taken over by Sladoje, did not relieve him of criminal responsibility.⁴⁵ The Appeals Chamber concurs with the Prosecution that the Order does not contain any new information and would thus not have affected the Trial Chamber's conclusion. The Appeals Chamber emphasises that the present conclusion pertains merely to the admissibility of the proffered material and is in no way indicative of the Appeals Chamber's considerations in relation to the merits of Milošević's fourth ground of appeal.

IV. DISPOSITION

21. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion in its entirety, **FINDS** the Motion to be frivolous and **IMPOSES A SANCTION** against Milošević's Counsel, pursuant to Rule 73(D) of the Rules, in the form of non-payment of fees associated with the Motion.

52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006, para. 12.

⁴² *Addendum* to the Order Scheduling the Appeals Hearing, 6 July 2009, p. 3, para. 2.

⁴³ Annex A to the Motion.

⁴⁴ Trial Judgement, paras 975-976.

⁴⁵ Trial Judgement, para. 975.

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

Done this 8th day of September 2009,
At The Hague,
The Netherlands.



Judge Fausto Pocar, Presiding

[Seal of the Tribunal]