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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: IT-98-29-T
Date: 4 February 2003
Original: English

IN THE TRIAL CHAMBER

Before: Judge Alphons Orie, Presiding
Judge Amin El Mahdi
Judge Rafael Nieto-Navia

Registrar: Mr Hans Holthuis

Decision of: 4 February 2003

PROSECUTOR

v.

STANISLAV GALIĆ

CONFIDENTIAL

DECISION ON PROSECUTION'S MOTION FOR THE TRIAL CHAMBER TO TRAVEL
TO SARAJEVO

Office of the Prosecutor:

Mr. Mark Ierace

Counsel for the Defence:

Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin

1- Introduction

1. Trial Chamber I, Section B (the "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 (the "Tribunal") is seized of the Prosecution's "Motion for the Trial Chamber to Travel to Sarajevo", dated 14 July 2000, whereby the Prosecution requests that the Trial Chamber consider travelling to Sarajevo and its immediate surroundings in Bosnia and Herzegovina at a time after the filing of the Parties' pre-trial briefs but prior to the start of the trial (the "Motion to Travel").

2- Procedural Background

2. The pre-trial Chamber issued a first scheduling order on 4 October 2000 requesting the Prosecution and the Defence (the "Parties") to prepare to discuss the Motion to Travel,¹ and held four successive Status Conferences to discuss the matter.² The pre-trial Chamber issued a second scheduling order in February 2001 requiring the Parties to inform the Trial Chamber of the results of their negotiations on the Draft Travel Protocol within four weeks.³ In the meantime, the Prosecution filed a modified version of the Prosecution's Draft Travel Protocol on 15 March 2001 (the "Travel Protocol"), which was presented to the Defence and the pre-trial Chamber during a Status Conference held the same day.⁴ Noting in a third scheduling order that no progress in respect

¹ "Scheduling Order and Order on the Prosecution "Motion for the Trial Chamber to Travel to Sarajevo"" dated 4 October 2000 whereby the Trial Chamber orders the Parties to negotiate a draft protocol for the proposed travel to Sarajevo and its surroundings which is to be discussed at a Status Conference (the "Draft Travel Protocol").

² A first Status Conference was held on 18 October 2000 to discuss, *inter alia*, the Motion to Travel. During that Status Conference, a number of practical details contained in the Motion to Travel were discussed as well as whether the presence of the Accused General Galić (the "Accused") during the Trial Chamber's visit to Sarajevo (the "On-site Visit") was required. In this respect, the Defence submitted that if the On-site Visit is "a part of the litigation, a part of the judicial process [...] under Article 21(4)(d), [the Accused] would need to be present", Transcript, p 191-192. The same issue was discussed again during three other Status Conferences, as follows. During the Status Conference of 25 October 2000, the Prosecution informed the Trial Chamber that the Accused agreed on the proposed itinerary of the On-site Visit contained in the Draft Travel Protocol, Transcript, p 239. During the Status Conference of 27 November 2000, the Defence announced that in view of the recent change of counsel, it was not able to discuss the Draft Travel Protocol, Transcript, p 278 (the Registrar withdrew the appointment of Mr Kostich on 20 November 2000 and appointed Ms Pilipović to represent the Accused). During the Status Conference of 30 January 2001, the Defence submitted that an outstanding issue to be discussed between the Parties concerned whether the presence of the Accused was indispensable during the On-site Visit, Transcript, p 297.

³ "Scheduling Order and Order on the Prosecution's 'Motion for the Trial Chamber to Travel to Sarajevo'" dated 21 February 2001.

⁴ During that Status Conference, the Defence emphasised that it needed several weeks to examine the Travel Protocol and submitted that "the purpose of this [visit] is for the [Trial] Chamber to familiarise itself with the sites and the environs but not to inform themselves on the possible directions of snipers and artillery weapons as is indicated in certain points of the Prosecution's Protocol. It is my opinion that this should be established during the Trial through presentation of evidence", Transcript, p 321.

of the Travel Protocol was achieved between the parties,⁵ the pre-trial Chamber issued a fourth scheduling order requesting again the Parties to reach an agreement between themselves regarding the Travel Protocol.⁶ On 7 September 2001, the pre-trial Chamber announced that a Trial Chamber of a different composition would hear the case, so that the issue of the On-site Visit should be brought to the attention of the new Trial Chamber once it is formed.⁷

3. The present Trial Chamber considered the Motion to Travel last July 2002. The Trial Chamber asked the Parties to indicate their position on a possible On-site Visit,⁸ and both the Prosecution⁹ and the Defence¹⁰ indicated that they were in favour of conducting such a visit.¹¹ The Trial Chamber then announced that such a visit could take place around mid-September 2002,¹² and that it would be a “silent visit”¹³ of the locations of interest for the trial in order to allow the Trial Chamber to observe and “get a better tri-dimensional impression of the locations, not to get any additional information from witnesses [...]”.¹⁴ The Defence filed its first written “Defence Submission Regarding a Possible Trip to Sarajevo” on 18 July 2002. However, at the end of the Prosecution case, the Trial Chamber could not yet decide on the Motion to Travel.

4. In December 2002, at the request of the Trial Chamber, the Parties submitted again their views on a possible On-site Visit.¹⁵ The Defence emphasized that the positions of the Parties in relation to an on-site visit were discussed during the pre-trial phase and that it “sticks also in this phase of the proceedings”.¹⁶ The Trial Chamber notes, however, that following the Prosecution’s Submission, the Defence has reversed its position in respect of certain issues.¹⁷

⁵ “Scheduling Order and Order on the Prosecution’s ‘Motion to Travel to Sarajevo’” dated 26 April 2001.

⁶ “Scheduling Order and Order on the Prosecution’s ‘Motion to Travel to Sarajevo’” dated 8 June 2001.

⁷ Transcript, pp. 420-421.

⁸ See e.g., Transcript, p 11575; Transcript, p. 11677.

⁹ *Ibid.*

¹⁰ Transcript, p. 11680

¹¹ On the same day, the Defence asked the Trial Chamber whether its experts could accompany the Defence on the On-site Visit, if it takes place, Transcript, p. 11680, and the Trial Chamber responded that it could not see how the presence of Parties’ experts would be necessary, Transcript, p. 11681.

¹² Transcript, p. 11679.

¹³ A “silent visit” is explained in *Richard May*, *Criminal Evidence*, 4th Ed., Sweet & Maxwell (1999), 2-07, to mean that places or things are examined on site “without anything being said. A witness or defendant may give a demonstration, but must make no communication to the jury. (footnote omitted) If any question arise on the view or if the jury have any question about it, the usual course is for such questions to be asked in court after the view is over.”

¹⁴ Transcript, p. 11681.

¹⁵ “Prosecution’s Submissions Concerning the Proposed Site Visit by the Trial Chamber” dated 3 December 2002 (the “Prosecution’s Submissions”) and “Defence’s Response on Prosecution’s Submissions Concerning the Proposed Site Visit by the Trial Chamber” filed on 10 December 2002 (the “Defence’s Response”).

¹⁶ Defence’s Response.

¹⁷ For instance, the Defence stated in its Defence Submission that the common law legal system does not acknowledge the principle of a silent On-site Visit, then reconsidered its position to concur with the Prosecution’s Submission that such a principle is well established in the British legal system. See also footnote 24.

3- Discussion

5. The possibility for a Trial Chamber to “exercise its functions at a place other than the seat of the Tribunal” is provided for in Rule 4 of the Rules of Procedure and Evidence (“the Rules”), which also states that the Trial Chamber must be authorized to do so by the President of the Tribunal in the interest of justice.

6. Both Parties agree that an On-site Visit should take place. The Prosecution submits, in particular, that the Rules of the Tribunal provide for the displacement of a court for a *locus in quo* and that the principle of on-site visit is well established in the British and French legal systems.¹⁸

7. Both Parties further submit that an on-site visit is part of the trial,¹⁹ and that the practicalities of an on-site-visit must be determined precisely.²⁰ For instance, the Prosecution suggests that the Registry should be required to keep a record of the site visit such as the places visited, the time of the visits, the persons present at the visit, the purpose of the visit at individual sites, the person who introduces the site, the questions posed by the judges and the answers provided, the representation of the Parties, if any, and any particular fact recorded at the request of the judges. The Defence concurs.²¹ The Defence also submits that the Trial Chamber must indicate the basis upon which it will choose its observation points during the On-site Visit,²² and expresses its doubt as to the manner in which a “silent visit” could be conducted, if certain communications are allowed during the On-site Visit.²³

8. The Trial Chamber deems that the purpose of an On-site Visit is to provide the Trial Chamber with an opportunity to observe certain landmarks and places in order to get a tri-dimensional impression of these locations and to improve its ability to understand and interpret the evidence presented in court about these locations, including evidence which seems to contain contradicting elements. The On-site Visit is therefore not intended to be a re-enactment of the incidents charged in the Indictment.²⁴

¹⁸ Prosecution’s Submissions, paras 11 *et seq.*

¹⁹ See Prosecution’s Submissions, paras 9 & 17 and Defence’s Response, para 2.

²⁰ Prosecution’s Submissions, para 20.

²¹ Defence’s Response, para 3.

²² Defence’s Response, para 3.

²³ The Defence stated that that “the almost Trappist nature of the visit would have its rules and exceptions, more specifically those of vespereal communications and interventions, but that, as regards the latter, it is again impossible to see how the interventions of this ancillary and peri-micro procedure would fit into a more macro-logical system”, Defence’s Submissions, p 3.

²⁴ The Defence had first indicated in its Defence Submissions that the on-site visit should be conducted as a re-enactment of the incidents charged in the Indictment, p 2., and then submitted in its Defence’s Response that the “it is impossible to check the facts [of the case] by reconstruction”, para 10.

9. The Trial Chamber turns now to address the question of whether an On-Site Visit could at all be held although neither the Statute nor the Rules do specifically provide for it. Rule 89 (B) provides that in cases not otherwise provided for, “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”. Views, on site visits or *locus in quo* are commonly known²⁵ in Criminal Procedure as means for a court to obtain information by observing locations. It would therefore be neither incompatible with Rule 89(B), nor with Rule 89(C), which provides that a Chamber may admit any relevant evidence which it deems to have probative value, to admit into evidence the results of an on-site visit. The Trial Chamber agrees with the parties that such an On-site Visit would be part of the Trial.

10. The right of the accused to be tried in his presence and to defend himself has led the parties to the position that a view should be held only in his presence. The Prosecution submits that because an On-site Visit is part of the trial, the presence of the Accused is necessary at a site visit.²⁶ In the Prosecution’s view, the On-site Visit should only take place in the absence of the Accused if the Defence indicates in court that the Accused consents to such a visit.²⁷ Similarly, the Defence submits that the presence of the Accused is important because he has “direct insight to the locations of the lines where the ABiH soldiers and VRS soldiers were disposed” and is able to determine the distance between these lines.²⁸

11. Before the Trial Chamber considers the merits of the arguments of the Parties in respect of the need to conduct an On-site Visit, the Trial Chamber first must address the feasibility of such a visit in the presence of the Accused. The Trial Chamber agrees that in principle an accused should be present during an On-site Visit. The Prosecution claims that security reasons oppose against the presence of the accused therein.²⁹

12. The characteristics of the case, including the charges brought against the accused, his former position in the VRS and the locations to be visited, would not only require major security measures, and the full cooperation of the local authorities and of the SFOR during the visit, but also strict

²⁵ See e.g., the French Criminal Procedural Code, article 456; the Criminal Procedural Code of Bosnia and Herzegovina, articles 233-234; the British legal system in *Richard May*, *Criminal Evidence*, 4th Ed., Sweet & Maxwell (1999), 2-06 *et seq.*

²⁶ Prosecution’s Submission, paras 7 & 9. The Trial Chamber in the *Akayesu* case stated that it was empowered under Rule 89 “to order inspections of the site where necessary”, *Prosecutor v Akayesu*, ICTR-96-4-T, “Decision on the Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis”, 7 February 1998, para 6.

²⁷ Prosecution’s Submissions, para 10.

²⁸ Defence’s Response, para 1.

²⁹ Prosecution’s Submission, para 18.

conditions of secrecy. However, it would be virtually impossible, once the visit is undertaken, to keep such major security operation secret in Sarajevo. It would thus be impossible to guarantee a sufficient level of safety to the Accused would an On-site Visit be conducted in his presence. In addition, the presence of the Accused in Sarajevo during a visit by the Trial Chamber would pose a considerable security risk for the Parties and the accompanying support staff.

13. For these reasons, the Trial Chamber finds that the presence of the Accused during the On-site Visit would pose an unacceptably high risk for the participants to the On-site Visit and therefore that it should not order that an On-site Visit be undertaken in his presence.

14. The question that remains is whether the Trial Chamber considers it appropriate to decide that an On-site Visit be conducted in the absence of the Accused. If the answer is positive, the Trial Chamber would then respect the position of the parties favouring a visit to be undertaken but ignore their views as to whether such a visit could be held in the absence of the Accused without him having consented to his absence.

15. An On-site Visit in the absence of the Accused would imply a limitation of the exercise of his right to be tried in his presence. This right, closely related to the right of an accused to defend himself in person or through legal assistance, is warranted in Article 21 of the Statute and generally accepted as a fundamental right for accused in criminal proceedings. At the same time, it is accepted that that right is not absolute. However, the existence of special circumstances would be necessary to justify whatever limitation is brought to the exercise of an accused's right to be present during his trial.

16. The Trial Chamber considers that reasons justifying such a limitation must be compelling. As the Trial Chamber has set out above, there exist compelling reasons to justify the absence of the Accused during an On site visit. But for the exception to be made out, the need to conduct a visit to ascertain the truth must be strong as well. Therefore, the Trial Chamber turns now to address the issue of what would an On-site Visit add to the evidence that has been already adduced at trial and can be still expected to be presented.

17. The Trial Chamber recalls that the purpose of an On-site Visit is for it to be better acquainted with certain locations in the city of Sarajevo and its surroundings. The Parties have implicitly emphasised in their case presentation the importance of a sufficient knowledge of the

terrain where the events described in the Indictment occurred.³⁰ Places have been described by witnesses who sometimes clarified their testimony by drawing sketches. Photographs and maps of locations were shown, videos were played. Such visualisation is of substantial assistance to the Trial Chamber in its process of adopting an image of the terrain. Indeed, by comparing and combining the information of the different categories of sources that have been admitted into evidence the trier of fact adopts in his mind an image of the relevant location. That image focuses on what is of relevance for the determinations to be made in the case. A *locus in quo* may add information to that image. But the Trial Chamber finds that that the added value of such an on site visit is not such that not having physically visited the locations would impair the Trial Chamber's ability to adopt the images of the terrain it would need to deliver a judgement in this case.

18. The Trial Chamber also notes that the relative rareness of views being held during trials illustrates that the two-dimensional presentation by photographs, videos or maps of a location usually serves as a sufficient visualisation, when needed, of the relevant terrain and that such visualisation would not be substantially modified by an On-site Visit.

19. The Trial Chamber has already made reference to the impact that desisting from an On-site Visit to Sarajevo will have on the trial. The minimal expectations of what such an On-site Visit could add to the evidence presented by both parties at trial justifies that the Trial Chamber desists from such a visit. This also implies that for the reasons given above, this stand down does not affect the right of the accused to defend himself. The absence of a strong need to visit to Sarajevo makes it redundant for the Trial Chamber to further explore how pressing such need would have had to be in order to justify the visit to be held in the absence –forced by unacceptable security risks- of the Accused.

20. For these reasons, the Trial Chamber considers that denying the Motion to Travel does not affect any of the Accused's rights nor does it affect the Trial Chamber's ability to decide upon the case against the Accused.


³⁰ By terrain, the Trial Chamber understands such places as where it is alleged that civilians died or were injured, where structures existed, where shots may have been fired from, where confrontation lines would have been, where combat activities may have taken place, where civilians lived, where military installations were established, etc.

4. Disposition

Pursuant to Rules 4, 54 and 89,

DENIES the Prosecution's Motion to Travel;

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



Alphons Orie
Presiding Judge, Trial Chamber

Dated this 4th Day of February 2003
At The Hague,
The Netherlands.

[Seal of the Tribunal]