

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-05-87-A
Date: 29 April 2010
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Decision: 29 April 2010

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

**DECISION ON SRETEN LUKIĆ'S SECOND MOTION TO
ADMIT ADDITIONAL EVIDENCE ON APPEAL**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Appellants:

Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 seised of “Sreten Lukic’s [*sic*] Second Motion to Present Additional Evidence Before Appeals Chamber”, filed by Counsel for Sreten Lukić (“Lukić”) on 16 February 2010 (“Motion”). The Office of the Prosecutor (“Prosecution”) responded to the Motion on 18 March 2010.¹ Lukić filed his reply on 1 April 2010.²

I. BACKGROUND

2. On 26 February 2009, Trial Chamber III (“Trial Chamber”) convicted Lukić pursuant to Article 7(1) of the Tribunal’s Statute (“Statute”) of committing, through participation in a joint criminal enterprise (“JCE”), the crimes of deportation, other inhumane acts (forcible transfer), murder and persecutions as crimes against humanity under Article 5 of the Statute, and the crime of murder as a violation of the laws or customs of war under Article 3 of the Statute.³ It sentenced him to a single term of 22 years of imprisonment.⁴ Lukić appealed his conviction on 16 grounds.⁵ The Trial Judgement has also been appealed by Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and the Prosecution.⁶

¹ Prosecution Response to Lukić’s Second Motion to Present Additional Evidence before Appeals Chamber, 18 March 2010 (“Response”).

² Sreten Lukic’s [*sic*] Reply in Support of Second Motion to Present Additional Evidence before Appeals Chamber, 1 April 2010 (“Reply”).

³ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), vol. 3, paras 1138, 1212.

⁴ Trial Judgement, vol. 3, para. 1212.

⁵ Sreten Lukic’s [*sic*] Notice of Appeal from Judgment [*sic*] and Request for Leave to Exceed the Page Limit, 27 May 2009, and Defense Appellant’s [*sic*] Brief Refiled, 7 October 2009 (public with confidential annexes) (“Lukić’s Appeal Brief”).

⁶ Defence Submission Notice of Appeal, 27 May 2009, and Defence Appeal Brief, 23 September 2009 (filed by Counsel for Nikola Šainović); General Ojdanic’s [*sic*] Second Amended Notice of Appeal, 16 October 2009 (filed as Annex C to General Ojdanic’s [*sic*] Motion to Amend his Amended Notice of Appeal of 29 July 2009, 16 October 2009), and General Ojdanic’s Amended Appeal Brief, 11 December 2009 (filed as Annex B to General Ojdanic’s [*sic*] Motion Submitting Amended Appeal Brief, 11 December 2009); Notice of Appeal from the Judgement of 26 February 2009, 29 September 2009 (filed by Counsel for Nebojša Pavković as Annex A to General Pavković Submission of his Amended Notice of Appeal, 29 September 2009), and General Pavković’s Amended Appeal Brief, 30 September 2009 (filed as Annex A to General Pavković’s Submission of his Amended Appeal Brief, 30 September 2009); Vladimir Lazarevic’s [*sic*] Defence Notice of Appeal, 27 May 2009 (confidential) and Defence Submission: Lifting Confidential Status of the Notice of Appeal, 29 May 2009; General Vladimir Lazarević’s Refiled Appeal Brief 2 October 2009 (confidential; public redacted version filed on 6 April 2010); Prosecution Notice of Appeal, 27 May 2009, and Prosecution Appeal Brief, 10 August 2009 (confidential; public redacted version filed on 21 August 2009) and Corrigenda to Prosecution Appeal Brief of 24 August 2009 and 15 January 2010.

3. On 15 December 2009 Lukić submitted a motion requesting the admission as additional evidence on appeal of 17 documents attached thereto.⁷ On 11 March 2010 the Appeals Chamber dismissed his request, finding that none of the tendered documents fully met the criteria for admission of evidence pursuant to Rule 115 of the Tribunal's Rules of Procedure and Evidence ("Rules").⁸

4. Lukić presently requests the admission of another six documents as additional evidence on appeal.⁹ The Prosecution responds that the Motion should be dismissed in its entirety as it fails to meet the requirements of Rule 115 of the Rules.¹⁰ It adds that Lukić fails to set out the specific findings of fact made by the Trial Chamber to which the additional evidence is directed, or to specify the effect that the additional evidence could or would have had upon the Trial Judgement, had it been admitted at trial.¹¹

II. APPLICABLE LAW

5. Pursuant to Rule 115 of the Rules, a party may submit a request to present additional evidence before the Appeals Chamber. This must be done no later than 30 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

6. 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 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

⁷ Sreten Lukic's [*sic*] Motion to Present Additional Evidence Before Appeals Chamber, 15 December 2009 ("First Rule 115 Motion").

⁸ Decision on Sreten Lukić's First Motion to Admit Additional Evidence on Appeal, 11 March 2010 ("*Lukić* First Rule 115 Decision").

⁹ Motion, paras 9-34; see also Annexes A through E attached thereto.

¹⁰ Response, paras 1-2.

¹¹ *Ibid.*, para. 2.

¹² Rule 115(A) of the Rules; see also *Lukić* First Rule 115 Decision, para. 4; Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010 (public redacted version) ("*Pavković* Rule 115 Decision"), para. 5; Decision on Nikola Šainović's Motion Requesting Admission of Additional Evidence pursuant to Rule 115 of the Rules, 28 January 2010 ("*Šainović* Rule 115 Decision"), para. 4; Decision on Vladimir Lazarević's Motion to Present Additional Evidence and on Prosecution's Motion for Order Requiring Translations of Excerpts of Annex E of Lazarević's Rule 115 Motion, 26 January 2010 ("*Lazarević* Rule 115 Decision"), para. 5.

¹³ *Lazarević* Rule 115 Decision, para. 6, and references cited therein; see also *Lukić* First Rule 115 Decision, para. 5; *Pavković* Rule 115 Decision, para. 6; *Šainović* Rule 115 Decision, para. 5.

accused before the Trial Chamber”.¹⁴ Counsel is therefore expected to apprise the Trial Chamber of all difficulties that he encounters in obtaining the evidence in question.¹⁵

7. The applicant must then show that the evidence is both relevant to a material issue and credible.¹⁶ 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.¹⁷ Evidence is credible if it appears to be reasonably capable of belief or reliance.¹⁸

8. The applicant must further demonstrate that the evidence *could* have had an impact upon the verdict, 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 verdict 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

9. If the evidence was available at trial or could have been obtained through the exercise of due diligence, it may still be admissible on appeal if the applicant shows that exclusion of the additional evidence would lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict.²¹

10. 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 pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the Trial Chamber’s verdict.²² A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.²³

¹⁴ Lazarević Rule 115 Decision, para. 6, and references cited therein; see also Lukić First Rule 115 Decision, para. 5; Pavković Rule 115 Decision, para. 6; Šainović Rule 115 Decision, para. 5.

¹⁵ Lazarević Rule 115 Decision, para. 6, and references cited therein; see also Lukić First Rule 115 Decision, para. 5; Pavković Rule 115 Decision, para. 6; Šainović Rule 115 Decision, para. 5.

¹⁶ Lazarević Rule 115 Decision, para. 8, and references cited therein; see also Lukić First Rule 115 Decision, para. 6; Pavković Rule 115 Decision, para. 7; Šainović Rule 115 Decision, para. 6.

¹⁷ Lazarević Rule 115 Decision, para. 8, and references cited therein; see also Lukić First Rule 115 Decision, para. 6; Pavković Rule 115 Decision, para. 7; Šainović Rule 115 Decision, para. 6.

¹⁸ Lazarević Rule 115 Decision, para. 8, and references cited therein; see also Lukić First Rule 115 Decision, para. 6; Pavković Rule 115 Decision, para. 7; Šainović Rule 115 Decision, para. 6.

¹⁹ Lazarević Rule 115 Decision, para. 9, and references cited therein; see also Lukić First Rule 115 Decision, para. 7; Pavković Rule 115 Decision, para. 8; Šainović Rule 115 Decision, para. 7.

²⁰ Lazarević Rule 115 Decision, para. 9, and references cited therein; see also Lukić First Rule 115 Decision, para. 7; Pavković Rule 115 Decision, para. 8; Šainović Rule 115 Decision, para. 7.

²¹ Lazarević Rule 115 Decision, para. 10, and references cited therein; see also Lukić First Rule 115 Decision, para. 8; Pavković Rule 115 Decision, para. 9; Šainović Rule 115 Decision, para. 8.

²² Lazarević Rule 115 Decision, para. 11, and references cited therein; see also Lukić First Rule 115 Decision, para. 9; Pavković Rule 115 Decision, para. 10; Šainović Rule 115 Decision, para. 9.

²³ Lazarević Rule 115 Decision, para. 11, and references cited therein; see also Lukić First Rule 115 Decision, para. 9; Pavković Rule 115 Decision, para. 10; Šainović Rule 115 Decision, para. 9.

11. Finally, the Appeals Chamber has repeatedly recognised that the significance and potential impact of the tendered material is not to be assessed in isolation, but in the context of the evidence given at trial.²⁴

III. DISCUSSION

A. Availability and due diligence

1. Arguments of the parties

12. Lukić argues that all six documents he seeks to have admitted as additional evidence through his Motion were unavailable to him at trial, and that he received them only after filing his First Rule 115 Motion.²⁵ In relation to document 6DA22, Lukić submits that it was issued after the Trial Judgement was rendered.²⁶

13. The Prosecution concurs that documents 6DA18, 6DA20, and 6DA22 were indeed unavailable at trial.²⁷ However, in relation to document 6DA19, the Prosecution responds that it was available at trial.²⁸ It asserts that the document was released by Lukić through the e-Court system on 14 September 2007 under Rule 65 *ter* number 6D1051, and that on 31 January 2008, the Trial Chamber granted Lukić's request to add the document to his Rule 65 *ter* exhibit list.²⁹ According to the Prosecution, Lukić did not, however, seek admission of the said document during the course of the trial.³⁰

14. Concerning document 6DA21, which is a dispatch from the Serbian Minister of the Interior, the Prosecution argues that it could have been obtained at trial through the exercise of due diligence.³¹ In the Prosecution's submission, the exercise of due diligence would have included anticipation of the need for documents issued by the Ministry of the Interior ("MUP") relevant to the Indictment period.³² It adds that Lukić could have sent the Serbian National Council for Cooperation with the International Criminal Tribunal for the Former Yugoslavia ("Council for

²⁴ *Lazarević* Rule 115 Decision, para. 12, and references cited therein; see also *Lukić* First Rule 115 Decision, para. 10; *Pavković* Rule 115 Decision, para. 11; *Šainović* Rule 115 Decision, para. 10.

²⁵ Motion, paras 3, 6; see also Motion, Annexes A-E; see further Reply, para. 10.

²⁶ Motion, para. 26.

²⁷ Response, para. 1(b).

²⁸ *Ibid.*, paras, 1(a), 7, 9.

²⁹ *Ibid.*, para. 1(a), referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić First Motion to Amend Rule 65 *ter* Exhibit List, 31 January 2008 ("Decision of 31 January 2008").

³⁰ *Ibid.*, para. 9.

³¹ *Ibid.*, paras 1(a), 11.

³² *Ibid.*, para. 11. See *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Third Amended Joinder Indictment, 21 June 2006 ("Indictment").

Cooperation”) a request for access to this document long before 18 January 2010.³³ Lukić’s failure to do so, according to the Prosecution, shows lack of due diligence.³⁴

15. As to document 6DA23, the Prosecution responds that it was publicly available as it is a “website summary of a report issued in September 2006”, which was published two months after commencement of the trial and that it could have been obtained through the exercise of due diligence.³⁵ The Prosecution further argues that Lukić did not adequately set out, in his Motion, the reasons for the lack of availability of the document to him, or the steps that he took to obtain it.³⁶

16. In reply, Lukić admits that document 6DA19 was indeed available to him at trial.³⁷ In relation to document 6DA21, however, Lukić explains that “in January 2010 the MUP official in charge of maintaining the MUP KiM Dossier records” informed him that “a previously unavailable document had been located, identified, authenticated, and categorized and was being added to the ‘G’ dossier section in the MUP Records”.³⁸ At that time, Lukić submits, a request concerning the production of this document was sent to the relevant authorities.³⁹ Lukić argues that document 6DA21 could thus not have been obtained during trial despite the exercise of due diligence consisting of numerous requests sent to the MUP for the production of “any and all documents” relevant to the Indictment period and to “the relations between the various organizational units within the [MUP]”.⁴⁰

17. With regard to document 6DA23, Lukić replies that, although the document is dated 2006, it was discovered by the Defence only after the Trial Judgement was rendered, and that its current availability on the internet does not mean that it was available in that form in 2006.⁴¹

2. Analysis

18. As regards documents 6DA18, 6DA20, and 6DA22, dated 12 January 2010, 28 January 2010, and 23 April 2009 respectively,⁴² the Appeals Chamber is satisfied that they were unavailable at trial as they were issued after the Trial Judgement was rendered.

³³ Response, para. 12.

³⁴ *Ibid.*, paras 7, 12.

³⁵ *Ibid.*, paras 1(a), 13. Although the Prosecution refers to document 6DA22, the Appeals Chamber understands the reference to be to document 6DA23.

³⁶ *Ibid.*, paras 7, 10.

³⁷ Reply, para. 10.

³⁸ *Ibid.*, para. 23. KiM stands for Kosovo and Metohija.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, p. 5, para. 25.

⁴¹ *Ibid.*, para. 31.

⁴² Motion, Annexes B, C, D.

19. Likewise, in light of Lukić's detailed explanations as to the recent discovery of document 6DA21 by the MUP authorities and the immediate steps that he took to solicit the provision of that document as additional evidence on appeal, the Appeals Chamber finds that for the purposes of Rule 115 of the Rules, document 6DA21 was not available to Lukić at trial, despite the exercise of due diligence.

20. Concerning document 6DA19 the Appeals Chamber notes that the parties are in agreement that the document was available to Lukić at trial.⁴³ As to document 6DA23, Lukić makes no submissions to indicate either the reasons why the document was unavailable, or his due diligence in attempting to obtain it. The mere assertion that the document was found by the Defence only after the rendering of the Trial Judgement is not sufficient for demonstrating that due diligence had been exercised. The online summary that constitutes document 6DA23 is based on a report that was undisputedly published in September 2006. The information underlying the summary was therefore available during trial. There is no reason to suggest that, in September 2006, Lukić was not notified of the aspects of the Prosecution's case that rendered the information relevant in the sense upon which Lukić now relies. Accordingly, the Appeals Chamber finds that the information contained in document 6DA23 was available to Lukić at the time of the trial.

21. In light of the above, the Appeals Chamber will proceed to consider whether documents 6DA18, 6DA20, 6DA21, and 6DA22 satisfy the remainder of the criteria provided for in Rule 115 of the Rules, notably whether they are credible, relevant, and *could* have affected the verdict. As for documents 6DA19 and 6DA23, the Appeals Chamber recalls that they cannot be admitted as additional evidence on appeal unless it has been demonstrated that in addition to being credible and relevant, the documents *would* have affected the verdict had they been admitted at trial.⁴⁴

B. Credibility, relevance, and impact on the verdict

1. Documents 6DA18 and 6DA19

(a) Arguments of the parties

22. Lukić submits that document 6DA18 is the "cover letter" of document 6DA19.⁴⁵ As regards document 6DA19, Lukić submits that it is directly relevant to his submission at trial that the "Decision to Establish a Ministerial Staff for the Suppression of Terrorism" ("Decision Establishing the MUP Staff"), also known as the MUP Staff for Kosovo, was never enacted "in either personnel

⁴³ Response, para. 9; Reply, para. 10.

⁴⁴ See *supra* paras 7, 9.

⁴⁵ Motion, para. 11.

sense nor in the functional sense”.⁴⁶ Lukić asserts that the document could have had an impact upon the verdict as it corroborates the testimony of witnesses who stated that Živko Trajković (“Trajković”) was not a member of the MUP Staff.⁴⁷

23. Lukić refers to a purported finding of the Trial Chamber that although David Gajić and Milorad Ulemek Luković (a.k.a. Legija) were listed in the Decision Establishing the MUP Staff, they were not members of the MUP Staff.⁴⁸ Accordingly, in Lukić’s view, a finding that Trajković was not a member of the MUP Staff either, would show that “the three most important men from the list” were not members of the MUP Staff.⁴⁹ That in turn could show, Lukić asserts, that his conviction is unsafe.⁵⁰

24. The Prosecution responds that document 6DA18 is irrelevant and, as such, could not have had an impact upon the verdict.⁵¹ Concerning document 6DA19, the Prosecution submits that Lukić’s request for its admission as additional evidence on appeal should be dismissed for several reasons.⁵² First, according to the Prosecution, Lukić fails to show the relevance and the impact that document 6DA19 would have had upon the verdict had it been admitted at trial.⁵³ Second, in the Prosecution’s view, Lukić incorrectly argues that the Trial Chamber found that Gajić and Luković were not members of the MUP Staff, and fails to address the Trial Chamber’s detailed conclusions on the reliability of the witnesses who testified on this matter.⁵⁴ Third, the Prosecution submits that Lukić “mischaracterises or at the very least exaggerates” the content of document 6DA19.⁵⁵ According to the Prosecution, contrary to Lukić’s assertion, document 6DA19 does not show that Trajković was not a member of the MUP Staff pursuant to the Decision Establishing the MUP Staff.⁵⁶ Fourth, the Prosecution argues that Lukić merely repeats arguments that were already submitted and considered at trial.⁵⁷ It asserts that document 6DA19 belongs to a series of documents introduced by Lukić at trial, which deal with the “completion of deployment” of persons listed in the Decision Establishing the MUP Staff.⁵⁸ The Prosecution further contends that the Trial Chamber’s finding concerning Trajković’s membership in the MUP Staff is immaterial to Lukić’s

⁴⁶ *Ibid.*, paras 14, 17, referring to Exhibit P1505; see also Trial Judgement, vol. 3, para. 964, citing *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Sreten Lukic’s [sic] Final Defense Trial Brief, 7 August 2008, para. 755; Reply, para. 13.

⁴⁷ Motion, paras 11-12.

⁴⁸ *Ibid.*, para. 15, citing Trial Judgement, vol. 3, para. 965; see also Motion, para. 16, referring to Trial Judgement, vol. 3, paras 966-969.

⁴⁹ *Ibid.*, para. 17.

⁵⁰ *Ibid.*

⁵¹ Response, paras 1(b), 37-39.

⁵² *Ibid.*, para. 15.

⁵³ *Ibid.*, paras 8, 15-17.

⁵⁴ *Ibid.*, paras 19-20, citing Trial Judgement, vol. 3, para. 960.

⁵⁵ *Ibid.*, para. 21; see also *ibid.*, para. 15.

⁵⁶ *Ibid.*, para. 21.

⁵⁷ *Ibid.*, paras 15, 23.

conviction.⁵⁹ Even if it were, the Prosecution argues, the Trial Chamber cited one of the abovementioned “completion of deployment” documents solely in the context of witness testimonies concerning Goran Radosavljević’s membership in the MUP Staff.⁶⁰

25. In reply, Lukić argues that document 6DA19 would have affected the verdict as it shows that Trajković’s deployment to Kosovo was not related to the MUP Staff.⁶¹ He asserts that the decisions on deployment and end of assignment of individuals who were members of the MUP Staff contained an explicit reference in this regard, and that this was not the case with document 6DA19 and Trajković.⁶² In addition, Lukić submits that contrary to the Prosecution’s submission, the Trial Chamber excluded members of the State Security Department of the MUP (“RDB”) from the MUP Staff, by finding that in practice Lukić did not have authority over RDB personnel and units in Kosovo.⁶³

(b) Analysis

26. Document 6DA18 is a “Notice of response” sent by the Council for Cooperation on 12 January 2010.⁶⁴ Although Lukić submits that the “Notice of response” is the “cover letter” of document 6DA19, the Appeals Chamber notes that document 6DA19 does not contain any of the material mentioned in the “Notice of response”.⁶⁵ Being unable to establish the relevance of document 6DA18, the Appeals Chamber dismisses Lukić’s request for its admission into evidence.

27. Document 6DA19 is a MUP decision terminating as of 10 June 1999 the “special-security related tasks” performed by Trajković in Kosovo.⁶⁶ The Appeals Chamber notes that document 6DA19 contains sufficient indicia of credibility, such as a date, reference number, and the signature of Vlastimir Đorđević.⁶⁷ Accordingly, the Appeals Chamber finds document 6DA19 to be *prima facie* credible.⁶⁸ It also finds it to be relevant as it bears upon the Trial Chamber’s findings concerning the structure and function of the MUP Staff, which are central to Lukić’s conviction.⁶⁹

⁵⁸ *Ibid.*, para. 22.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, referring to Trial Judgement, vol. 3, para. 958, fn. 2387.

⁶¹ Reply, paras 11-12.

⁶² *Ibid.*, para. 12.

⁶³ *Ibid.*, para. 14, referring to Response, para. 19; Trial Judgement, vol. 3, para. 1015.

⁶⁴ Motion, Annex B, first part.

⁶⁵ The Notice of response was allegedly sent following a request for the provision of MUP decision number 112-45/99. It refers to enclosed “Conclusion” and “communication” by the Council for Cooperation, both dated 12 January 2010 and bearing numbers 4/0-1/6-10 and 1/0-29/1-10 respectively. As noted above, none of this appears to be related to document 6DA19 (see Motion, Annex B).

⁶⁶ Motion, Annex B, second part.

⁶⁷ *Ibid.*

⁶⁸ The Appeals Chamber notes that the Prosecution does not challenge the credibility of any of the proposed documents (see Response, fn. 20).

⁶⁹ See e.g. Trial Judgement, vol. 3, paras 946, 1012-1015, 1050-1051.

28. As to the alleged impact upon the verdict, the Appeals Chamber notes that at best, document 6DA19 shows that Trajković was sent to Kosovo to perform “special security-related tasks” on 23 March 1999 and that his assignment terminated on 10 June 1999.⁷⁰ It contains no further details as to the nature of the tasks performed by Trajković during this time, or with regard to Trajković’s assignments in the period between 16 June 1998, when according to Exhibit P1505 the MUP Staff commenced its work, and 23 March 1999, when Trajković’s “special security-related tasks” allegedly began. Moreover, whereas document 6DA19 does not contain an explicit reference to the MUP Staff for Kosovo, it does not show either what effect, if any, Trajković’s “special security-related tasks” had on his membership of the MUP Staff as envisaged under the Decision Establishing the MUP Staff and as established by the Trial Chamber. Consequently, it remains uncertain how the proffered evidence would have corroborated the testimony of witnesses Vučurević and Vojnović that Trajković was not a member of the MUP Staff, despite being listed as such in the Decision Establishing the MUP Staff.⁷¹ More importantly, Lukić does not show how the document would have undermined the evidence that the Trial Chamber decided to rely on when it made its findings regarding the MUP Staff. In light of these considerations, the Appeals Chamber finds that Lukić fails to meet his burden of demonstrating that had document 6DA19 been admitted at trial, it would have affected the verdict. The request for admission of this document into evidence is therefore dismissed.

2. Documents 6DA20 and 6DA21

(a) Arguments of the parties

29. Lukić submits that document 6DA20 is the “cover page” of document 6DA21.⁷² As regards document 6DA21, according to Lukić, it shows that the Heads of the Kosovo Secretariats of the Interior (“SUPs”) received “all orders” directly from the Minister of the Interior and were directly responsible to him.⁷³ Lukić argues that the document supports claims that he made at trial,⁷⁴ and that it contradicts the Trial Chamber’s finding that the MUP Staff and Lukić as its Head, were “in charge of MUP organizational units, meaning SUPs, and its smaller organizational units”.⁷⁵ Lukić further asserts that the document corroborates the testimony of witnesses Mijatović, Adamović, and Cvetić, and that had it been available at trial, it would have enhanced the credibility of the former

⁷⁰ Motion, Annex B, second part.

⁷¹ Trial Judgement, vol. 3, para. 960, referring to Radovan Vučurević, 22 Feb 2008, T. 23056; Miloš Vojnović, 12 Mar 2008, T. 24148.

⁷² Motion, para. 21; Reply, para. 21.

⁷³ Motion, para. 22.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, para. 23, referring to Trial Judgement, vol. 3, para. 1012.

two.⁷⁶ At the same time, the Appeals Chamber understands Lukić to argue that document 6DA21 would have been used to undermine the credibility of other aspects of witness Cvetic's testimony.⁷⁷

30. The Prosecution responds that, in a manner similar to document 6DA18, document 6DA20 is irrelevant and, as such, could not have had an impact upon the verdict.⁷⁸ As to document 6DA21, the Prosecution submits that Lukić's request for its admission as additional evidence on appeal should be dismissed.⁷⁹ According to the Prosecution, Lukić neither shows that the proffered evidence is relevant to a material issue, nor specifies with sufficient clarity the impact that it would have had upon the Trial Chamber's verdict.⁸⁰ The Prosecution further submits that Lukić fails to show how document 6DA21 contradicts the Trial Chamber's findings and that despite Lukić's assertion that the proffered evidence supports claims he made at trial, Lukić fails to identify the claims to which he refers.⁸¹

31. According to the Prosecution, the Trial Chamber concluded that the "MUP Staff did not replace the day-to-day command structures within the MUP" and that the MUP, although extensively relying upon the information provided by the MUP Staff, remained in control of its units.⁸² In light of these findings, the Prosecution contends that the information contained in document 6DA21 does not undermine the role and functions of the MUP Staff as established by the Trial Chamber.⁸³ Finally, the Prosecution submits that Lukić merely repeats arguments he already presented at trial which, presumably, were taken into consideration by the Trial Chamber.⁸⁴

32. In reply, Lukić submits that document 6DA21 shows that all SUPs "remained directly subordinated to and answerable to the Minister of Interior [...] and not to the MUP Staff", which in Lukić's view, contradicts the Trial Chamber's conclusion that "Lukic [*sic*] [was the] Commander of all MUP forces in Kosovo".⁸⁵

(b) Analysis

33. Document 6DA21 is a dispatch dated 25 March 1999 sent by the Serbian Minister of the Interior at the time, Vljeko Stojiljković, to all SUPs, ordering the submission of reports on "speculations, crimes and prohibited conduct" in production and trade which have resulted in

⁷⁶ *Ibid.*, paras 22, 23.

⁷⁷ *Ibid.*, para. 23.

⁷⁸ Response, paras 1(b), 38-39.

⁷⁹ *Ibid.*, para. 25.

⁸⁰ *Ibid.*, paras 25, 27-28, 32.

⁸¹ *Ibid.*, para. 29.

⁸² *Ibid.*, para. 30, citing Trial Judgement, vol. 3, para. 1012.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, para. 31.

⁸⁵ Reply, p. 6, para. 28.

“unjustifiable increases in the price of foodstuffs”.⁸⁶ Given that the document bears sufficient indicia of credibility, such as a date, reference number, and a handwritten confirmation of receipt, the Appeals Chamber finds it to be *prima facie* credible.⁸⁷ As to whether it relates to a finding material to Lukić’s conviction, the Appeals Chamber understands Lukić to argue that the document relates to the Trial Chamber’s conclusions concerning the powers that the MUP Staff and Lukić as its Head possessed over the SUPs.⁸⁸ The Appeals Chamber considers that these findings are instrumental to Lukić’s conviction and that document 6DA21 is indeed relevant thereto.⁸⁹

34. Turning to the alleged impact, the Appeals Chamber notes the Trial Chamber’s finding that Lukić was “in charge of the MUP Staff from June 1998 to July 1999” and that on behalf of the MUP Staff he had issued numerous dispatches containing tasks and instructions to, amongst others, the SUPs.⁹⁰ For example, the Trial Chamber considered that in early April 1999, Lukić instructed the Kosovo SUPs to report to the MUP Staff.⁹¹ Similarly, the Trial Chamber found that as Head of the MUP Staff

Lukić did not replace Stevanović, Đorđević, or Ilić, the heads of the SUPs, or the commanders of PJP or SAJ units, but rather was the bridge between those commanders and the policy and plans set in Belgrade, as well as being directly involved in the planning process and in ensuring that day-to-day operations were conducted by the various MUP forces in accordance with those plans.⁹²

The Trial Chamber also found that the “MUP Staff played a central role in planning, organising, controlling, and directing the work of the various MUP units active in Kosovo” and concluded that “[t]he MUP Staff did not replace the day-to-day command structures within the MUP”.⁹³

35. Document 6DA21 appears to be an effort by the above mentioned Serbian Minister of the Interior to fight the illegal increase of food prices in Serbia at the start of the conflict with NATO. The content as such is thus not relevant to Lukić’s conviction. Lukić’s argument, however, is based on the fact that the document was sent by the Minister of the Interior to all SUPs, and that this fact undermines the Trial Chamber’s finding that Lukić was in charge of the SUPs in Kosovo. As noted above, the Trial Chamber found that the MUP Staff did not replace the day-to-day command structures within the MUP. Furthermore, the Trial Chamber noted that “the Minister of Interior instructed all organisational units of the MUP in Kosovo to report any security incidents to the

⁸⁶ Motion, Annex C, second part.

⁸⁷ *Ibid.*

⁸⁸ See Motion, para. 23, referring to Trial Judgement, vol. 3, para. 1012; Reply, p. 6, para. 28; see also *supra* paras 29, 32.

⁸⁹ See Trial Judgement, vol. 3, paras 1012, 1050-1051.

⁹⁰ *Ibid.*, paras 1050-1051.

⁹¹ *Ibid.*, para. 1093; see also para. 1090.

⁹² *Ibid.*, para. 1051.

⁹³ *Ibid.*, para. 1012.

MUP Staff in Kosovo, as well to the MUP in Belgrade”.⁹⁴ The Trial Chamber was therefore aware of the evidence of direct communication between the Minister of the Interior and the SUPs in Kosovo when it considered Lukić’s responsibility and when it found that he was in charge of the MUP Staff and that he had issued numerous tasks and instructions to the SUPs.⁹⁵ Moreover, contrary to Lukić’s assertion, the content of document 6DA21 does not suggest that the SUPs received “all orders directly from the Minsiter [*sic*]”.⁹⁶ The Appeals Chamber does not see how an instruction from the Minister of the Interior to act against war profiteering sent to all SUPs in Serbia could have affected any of the findings material to Lukić’s conviction.⁹⁷ Lukić has therefore failed to show how document 6DA21 could have affected the verdict and dismisses his request to admit the document as additional evidence on appeal.

36. As to document 6DA20, the Appeals Chamber understands it to suggest that document 6DA21 was sent by the MUP to the Council for Cooperation which in turn forwarded it to Lukić.⁹⁸ Whereas the Appeals Chamber appreciates the significance of document 6DA20 in showing the provenance of document 6DA21 and therefore the credibility of the latter, it finds that in light of its findings concerning the admissibility of document 6DA21, Lukić’s request for admission of document 6DA20 as additional evidence on appeal should also be dismissed.

3. Document 6DA22

(a) Arguments of the parties

37. Document 6DA22 is a judgement by the War Crimes Chamber of the District Court of Belgrade of 23 April 2009 (“*Suva Reka/Suhareka* Judgement”).⁹⁹ Lukić argues that it contradicts the finding of the Trial Chamber that he was responsible for committing the crimes in Suva Reka/Suhareka, by participating in a joint criminal enterprise, where that participation is evinced by his “command role over the PJP [“Special Police Unit”] units in Kosovo, including the 37th Detachment”.¹⁰⁰

38. The Prosecution responds that document 6DA22 should be rejected because (i) Lukić does not set out the evidentiary value of a judgement by a national court, and (ii) “a judgement by another court cannot be substituted for the evidence underlying it”.¹⁰¹ The Prosecution contends,

⁹⁴ *Ibid.*, para. 1090.

⁹⁵ *Ibid.*, paras 1050-1051.

⁹⁶ Motion, para. 22.

⁹⁷ See *supra* para. 34.

⁹⁸ Motion, Annex C, first part; see also Reply, para. 21.

⁹⁹ Motion, Annex D.

¹⁰⁰ *Ibid.*, para. 27, referring to Trial Judgement, vol. 3, para. 1138. PJP stands for Special Police Unit of the MUP.

¹⁰¹ Response, paras 40, 43.

further, that Lukić provides no indication of how the *Suva Reka/Suhareka* Judgement could have been a decisive factor in reaching the verdict,¹⁰² and that the only possible effect of such a judgement “may be in relation to the credibility of certain witnesses, should they be common to both trials and the court has made adverse credibility findings”.¹⁰³

39. Lukić replies that the acquittal of Mitrović in the *Suva Reka/Suhareka* case would have affected the verdict because it calls into question the credibility of witness K83, upon whom the Trial Chamber relied.¹⁰⁴ Lukić submits that the Trial Chamber’s reliance upon this witness is evident from its findings as to the role of the 37th Detachment of the PJP in killings in Suva Reka/Suhareka town on 26 March 1999.¹⁰⁵

(b) Analysis

40. The Appeals Chamber notes that although the original, untranslated version of document 6DA22 in Annex D of the Motion does not include the page containing the relevant stamps and signatures, the Appeals Chamber is apprised of the name of the court and the date on which the judgement was rendered. The Appeals Chamber further notes that the Prosecution does not contest its credibility. Accordingly, the Appeals Chamber finds document 6DA22 to be *prima facie* credible. As to whether it relates to a finding material to Lukić’s conviction, the Appeals Chamber understands Lukić to argue that the document bears upon the Trial Chamber’s conclusions concerning the role of the 37th Detachment of the PJP in killings in Suva Reka/Suhareka town on 26 March 1999.¹⁰⁶ The Appeals Chamber concurs that these findings are instrumental to Lukić’s conviction and that document 6DA22 is indeed relevant thereto.

41. With regard to the issue of whether document 6DA22 could have affected the verdict, the Appeals Chamber recalls that Lukić bears the burden of not only identifying with precision specific finding(s) of fact made by the Trial Chamber to which the additional evidence pertains, but also of specifying with sufficient clarity the impact the additional evidence could or would have had upon the Trial Chamber’s verdict.¹⁰⁷ While the Appeals Chamber is satisfied that Lukić has identified the findings of fact to which the additional evidence pertains,¹⁰⁸ he fails to elaborate with sufficient clarity on the impact the proffered material could have had on the verdict had it been admitted at trial. He does not show how the *Suva Reka/Suhareka* Judgement could affect the verdict. Also, he

¹⁰² *Ibid.*, para. 42.

¹⁰³ *Ibid.*, para. 43.

¹⁰⁴ Reply, p. 7, para. 28.

¹⁰⁵ *Ibid.*, p. 7, paras 26-28, referring to Trial Judgement, vol. 2, paras 499-500, 535.

¹⁰⁶ *Ibid.*

¹⁰⁷ See *supra* para. 10.

¹⁰⁸ See Motion, para. 27 referring to Trial Judgement, vol. 3, para. 1138 and Reply, p. 7, paras 26-28, referring to Trial Judgement vol. 2, paras 499-500, 535.

fails to demonstrate with sufficient clarity and specificity how the acquittal of Mitrović affects the credibility of witness K83. In light of Lukić's vague and unsubstantiated allegations, the Appeals Chamber dismisses the request for admission of document 6DA22 as additional evidence on appeal.

4. Document 6DA23

(a) Arguments of the parties

42. Lukić argues that document 6DA23 is a "small arms and light weapons survey of Kosovo", prepared by the organization called "Saferworld".¹⁰⁹ He argues that it could have had an impact upon the verdict as it shows that even after the NATO bombing there remained large quantities of weapons in Kosovo and that "[k]nowing that [the] international community seized [a] large number of weapons in Kosovo after the conflict", it can be inferred that there had been even more weapons there during the conflict.¹¹⁰ Lukić submits that lack of consideration of evidence such as document 6DA23 led the Trial Chamber to find, erroneously, that "disarming was illegal and that Lukić acted in concert with the members of the joint criminal enterprise" to further the common purpose of the JCE.¹¹¹

43. The Prosecution responds that the document is essentially an "estimate of small arms and light weapons proliferation as of June 2006", and that, in light of the fact that the relevant time period in this case is 1998-1999, it is irrelevant.¹¹² The Prosecution also refers to the Appeals Chamber's finding in relation to document 6DA4 in *Lukić* First Rule 115 Decision, and argues that document 6DA23 should be rejected for the same reasons, namely that the legality of the disarming of Kosovo Albanians and the arming of non-Albanians is irrelevant, and that the key issue is whether these were done on the basis of ethnic discrimination.¹¹³

(b) Analysis

44. Document 6DA23 is a page from the website of an organisation called "Saferworld". The information contained in the document concerns estimates on the quantities of small arms and light weapons in Kosovo as of June 2006. The relevant Indictment period in this case concerns events which took place in 1998 and 1999. The Appeals Chamber finds Lukić's argument that the quantity of those weapons in Kosovo during the conflict there was even higher than in June 2006 to be speculative and unsupported by the tendered document. Lukić has failed to establish how the

¹⁰⁹ Motion, paras 29-30.

¹¹⁰ *Ibid.*, para. 33; see also *ibid.*, para. 30; see further Reply, para. 30.

¹¹¹ Motion, para. 32, citing Trial Judgement, vol. 3, para. 1121, and also referring to Trial Judgement, vol. 1, paras 57, 72.

¹¹² Response, paras 33-34.

document is relevant to the Indictment period. The Appeals Chamber therefore finds that document 6DA23 is not relevant for the purposes of Rule 115 of the Rules. Considering that the requirements of Rule 115 of the Rules are cumulative, the Appeals Chamber will not consider the other requirements of that Rule. The Appeals Chamber dismisses Lukić's request for the admission of document 6DA23 as additional evidence on appeal.

IV. DISPOSITION

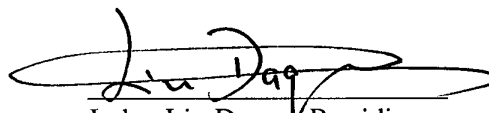
45. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion in its entirety.

46. The Appeals Chamber emphasizes that its findings in this Decision pertain strictly to the admissibility of the proposed 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 29th day of April 2010,

At The Hague,
The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]

¹¹³ *Ibid.*, para. 36, referring to *Lukić* First Rule 115 Decision, paras 35-38.