



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: 11 March 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 of: 11 March 2010

PROSECUTOR

v.

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

PUBLIC

**DECISION ON SRETEN LUKIĆ'S FIRST 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*] Motion to Present Additional Evidence Before Appeals Chamber” (“Motion”), filed by Counsel for Sreten Lukić (“Lukić”) on 15 December 2009. The Office of the Prosecutor (“Prosecution”) responded to the Motion on 14 January 2010.¹ Lukić filed his reply on 18 January 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, 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 imposed on him a single sentence 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

3. In his Motion, Lukić requests the admission as additional evidence on appeal of 17 documents attached thereto.⁷ The Prosecution responds that the Motion should be dismissed in

¹ Prosecution Response to Lukić Motion to Present Additional Evidence, 14 January 2010 (“Response”).

² Sreten Lukic’s [*sic*] Reply in Support of Rule 115 Motion, 18 January 2010 (“Reply”). On 19 February 2010, Lukić filed the Corrigendum to Sreten Lukic’s [*sic*] Reply in Support of Rule 115 Motion (“Corrigendum”).

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 Ojdanić’s [*sic*] Second Amended Notice of Appeal, 16 October 2009 (filed as Annex C to General Ojdanić’s [*sic*] Motion to Amend his Amended Notice of Appeal of 29 July 2009, 16 October 2009), and General Ojdanić’s Amended Appeal Brief, 11 December 2009 (filed as Annex B to General Ojdanić’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 Lazarević’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 20 October 2009); Prosecution Notice of Appeal, 27 May 2009, and Prosecution Appeal Brief, 10 August 2009 (confidential; the public redacted version was filed on 21 August 2009) and Corrigenda to Prosecution Appeal Brief of 24 August 2009 and 15 January 2010.

⁷ Motion, paras 14-45; see also Annexes A through H attached to the Motion.

its entirety as it fails to meet the requirements of Rule 115 of the Tribunal's Rules of Procedure and Evidence ("Rules").⁸

II. APPLICABLE LAW

4. 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.⁹

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 discoverable through the exercise of due diligence.¹⁰ 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".¹¹ Counsel is therefore expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question.¹²

6. The applicant must then show that the evidence is both relevant to a material issue and credible.¹³ 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.¹⁴ Evidence is credible if it appears to be reasonably capable of belief or reliance.¹⁵

7. The applicant must further demonstrate that the evidence *could* have had an impact on the verdict, in other words, the evidence must be such that, if considered in the context of the evidence

⁸ Response, paras 1, 3.

⁹ Rule 115(A) of the Rules; see also Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010 (public redacted version) ("*Pavković* Rule 115 Decision"), para. 5; see also 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.

¹⁰ *Pavković* Rule 115 Decision, para. 6; see also *Šainović* Rule 115 Decision, para. 5; *Lazarević* Rule 115 Decision, para. 6, and references cited therein.

¹¹ *Pavković* Rule 115 Decision, para. 6; *Šainović* Rule 115 Decision, para. 5; *Lazarević* Rule 115 Decision, para. 6, and references cited therein.

¹² *Pavković* Rule 115 Decision, para. 6; *Šainović* Rule 115 Decision, para. 5; *Lazarević* Rule 115 Decision, para. 6, and references cited therein.

¹³ *Pavković* Rule 115 Decision, para. 7; *Šainović* Rule 115 Decision, para. 6; *Lazarević* Rule 115 Decision, para. 8, and references cited therein.

¹⁴ *Pavković* Rule 115 Decision, para. 7; *Šainović* Rule 115 Decision, para. 6; *Lazarević* Rule 115 Decision, para. 8, and references cited therein.

¹⁵ *Pavković* Rule 115 Decision, para. 7; *Šainović* Rule 115 Decision, para. 6; *Lazarević* Rule 115 Decision, para. 8, and references cited therein.

given at trial, it could show that the verdict was unsafe.¹⁶ 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.¹⁷

8. 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 the 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.¹⁸

9. 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.¹⁹ A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.²⁰

10. Finally, the Appeals Chamber has repeatedly recognized that the significance and potential impact of the tendered material shall not be assessed in isolation, but in the context of the evidence given at trial.²¹

III. DISCUSSION

A. Preliminary issue

11. At the outset, the Appeals Chamber notes that Lukić misapprehends the standard for admission of additional evidence on appeal. In his submission Lukić claims that pursuant to Rule 115 of the Rules, two prerequisites must be met for additional evidence to be admitted: (i) the material must have been unavailable at trial and (ii) its consideration by the Appeals Chamber must be in the interests of justice.²² The Appeals Chamber recalls in this respect that the "interests of justice" test reflects neither the current requirements of Rule 115(B) of the Rules nor the established

¹⁶ *Pavković* Rule 115 Decision, para. 8; *Šainović* Rule 115 Decision, para. 7; *Lazarević* Rule 115 Decision, para. 9, and references cited therein.

¹⁷ *Pavković* Rule 115 Decision, para. 8; *Šainović* Rule 115 Decision, para. 7; *Lazarević* Rule 115 Decision, para. 9, and references cited therein.

¹⁸ *Pavković* Rule 115 Decision, para. 9; *Šainović* Rule 115 Decision, para. 8; *Lazarević* Rule 115 Decision, para. 10, and references cited therein.

¹⁹ *Pavković* Rule 115 Decision, para. 10; *Šainović* Rule 115 Decision, para. 9; *Lazarević* Rule 115 Decision, para. 11, and references cited therein.

²⁰ *Pavković* Rule 115 Decision, para. 10; *Šainović* Rule 115 Decision, para. 9; *Lazarević* Rule 115 Decision, para. 11, and references cited therein.

²¹ *Pavković* Rule 115 Decision, para. 11; *Šainović* Rule 115 Decision, para. 10; *Lazarević* Rule 115 Decision, para. 12, and references cited therein.

²² Motion, para. 3.

jurisprudence of the Tribunal.²³ The Appeals Chamber will therefore address Lukić's submissions in accordance with the correct standard articulated above.²⁴

B. Material tendered pursuant to Rule 115

1. Availability and due diligence

(a) Arguments of the parties

12. Lukić submits that despite his "diligent work", the documents sought to be admitted should be regarded as having been unavailable at trial.²⁵ He argues that although some of the documents were in his possession, they could not have been tendered into evidence before the Trial Chamber because they had not been translated into a working language of the Tribunal.²⁶ Lukić adds that he was not afforded adequate time and facilities for "preparing, reviewing and presenting them under the trial schedule and allotment of translation resources" to the Tribunal's Conference and Language Services Section ("CLSS").²⁷ In support of this argument, Lukić cites the submissions in his Appeal Brief in which he argues that, due to the Tribunal's insufficient translation resources, he was denied a full and fair opportunity to present evidence, with certain documents being refused admission solely due to lack of translation.²⁸

13. Lukić explains that all documents on his Rule 65 *ter* list were submitted for translation to the CLSS, which raised concerns related to its limited translation capacity.²⁹ According to Lukić, the Trial Chamber encouraged the CLSS and Lukić's Defence team to reach an agreement on the matter, which they did.³⁰ Pursuant to that agreement, Lukić was allegedly required to withdraw all documents, so that, following a review of priorities and a re-assessment of deadlines, new requests for translation could be made.³¹ However, Lukić submits, whilst the process was still underway, the Trial Chamber ordered that all un-translated documents on his Rule 65 *ter* list be submitted to the CLSS by 30 November 2007.³² Lukić argues that the Trial Chamber's Order of 14 November 2007 and two subsequent decisions were erroneous and prejudicial,³³ and resulted in lack of adequate

²³ Cf. *Pavković* Rule 115 Decision, para. 12; see also *Lazarević* Rule 115 Decision, para. 13.

²⁴ See *supra*, paras 4-10.

²⁵ Motion, paras 10, 12.

²⁶ *Ibid.*, para. 10.

²⁷ *Ibid.*

²⁸ *Ibid.*, para. 1, citing Lukić's Appeal Brief, para. 65.

²⁹ *Ibid.*, citing Lukić's Appeal Brief, para. 66.

³⁰ *Ibid.*, citing Lukić's Appeal Brief, para. 66.

³¹ *Ibid.*, citing Lukić's Appeal Brief, para. 66.

³² *Ibid.*, citing Lukić's Appeal Brief, para. 66; see also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Order on Timing of Motions Prior to Winter Recess and Presentation of Lukić Defence Case, 14 November 2007 ("Order of 14 November 2007").

³³ *Ibid.*, citing Lukić's Appeal Brief, para. 66, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Defence (1) First, Second, Third, and Fourth Motions for Further Enlargement of Time in Relation

time and facilities for the translation of the evidence.³⁴ Lukić submits, moreover, that documents 6DA1 through 6DA3 were relied upon by expert witness Simonović in his expert report but that Lukić was unable to fully translate these materials due to the constraints allegedly imposed upon him by the CLSS and the Trial Chamber.³⁵

14. The Prosecution responds that with the exception of document 6DA17, for which Lukić fails to show that it was not discoverable despite the exercise of due diligence, all of the tendered documents were available to him at trial.³⁶ Regarding documents 6DA1, 6DA3, and 6DA5 through 6DA16, the Prosecution claims that Lukić failed to obtain their appropriate and timely translation despite the Trial Chamber's instructions and efforts to facilitate the translation process, and despite its decisions granting Lukić several extensions of time.³⁷ As a result, the Prosecution asserts, the documents were denied admission by the Trial Chamber,³⁸ which, in addition, found documents 6DA12 through 6DA16 to be "inappropriate for admission".³⁹ The Prosecution further contends that Lukić's position as the last accused to present his case afforded him the maximum time to obtain translations of the evidence, and that seeking the revision on appeal of the "tactical choices" he made at trial is impermissible.⁴⁰

15. With regard to Lukić's assertion that document 6DA2 was relied upon at trial by expert witness Simonović, the Prosecution contends that the document in question must have been in Lukić's possession and thus available to him at trial.⁴¹ The Prosecution asserts that pursuant to the Trial Chamber's oral decision of 20 March 2007, a partial translation of document 6DA4 was admitted into evidence as Exhibit 1D334.⁴² In light of Lukić's failure to explain the reasons for not tendering a full translation of this document at any time prior to the close of the case, the Prosecution submits that document 6DA4 must also be regarded as having been available at trial.⁴³

to Motions for Admission of Documents from Bar Table and (2) Motion for Leave to File Replies, 2 June 2008 ("Decision of 2 June 2008"); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Defence Motion for Reconsideration of Denial of Extension of Time and Leave to File Replies, 10 June 2008 ("Decision of 10 June 2008").

³⁴ *Ibid.*, citing Lukić's Appeal Brief, para. 67.

³⁵ See *Ibid.*, paras 16, 22.

³⁶ Response, paras 1-2, 6-7, 52.

³⁷ *Ibid.*, paras 8-9, referring to Order of 14 November 2007, paras 3-4; Decision of 2 June 2008, para. 6; Decision of 10 June 2008, paras 4-8.

³⁸ *Ibid.*, para. 1, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Sreten Lukic's [*sic*] Motion for Admission of Documents from the Bar Table and Motion to Exceed Word Limit for Filing with Confidential Annex A (partly confidential), 7 May 2008 ("Motion of 7 May 2008"); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Defence Motions for Admission of Documents from Bar Table, 11 June 2008 ("Decision of 11 June 2008"), paras 16, 65, 97, 125(n).

³⁹ *Ibid.*, paras 1, 10, citing Decision of 11 June 2008, para. 94.

⁴⁰ *Ibid.*, para. 9.

⁴¹ *Ibid.*, paras 1, 14, referring to Motion, para. 22.

⁴² *Ibid.*, para. 1. The Appeals Chamber considers that despite referring to document 6DA5, the Prosecution's argument in fact concerns document 6DA4 (see also *ibid.*, para. 13).

⁴³ *Ibid.*, para. 13.

Finally, concerning document 6DA17, the Prosecution argues that Lukić fails to explain why the document could not have been obtained through the exercise of due diligence and thus has not demonstrated its unavailability at trial.⁴⁴

16. In reply, Lukić refers to grounds A and Q of his appeal, reiterating the “extreme hardships” caused to him at trial by the lack of sufficient translation resources.⁴⁵

(b) Analysis

(i) Documents 6DA1, 6DA3, and 6DA5 through 6DA16

17. The Appeals Chamber recalls that, for the purposes of Rule 115 of the Rules, whether the proffered evidence was available at trial is not merely a question of whether the evidence was “available” in a literal sense.⁴⁶ The applicant bears the burden of demonstrating that he acted with due diligence in obtaining the evidence and bringing it before the Trial Chamber.⁴⁷

18. It is apparent in the present case that documents 6DA1, 6DA3, and 6DA5 through 6DA16 were physically available to Lukić at trial, as he sought their admission in his Motion of 7 May 2008.⁴⁸ The Trial Chamber, however, denied the admission of the documents holding that it was unable to assess their admissibility in the absence of translation.⁴⁹ In order to establish whether, in seeking the admission of the untranslated documents Lukić acted with due diligence, the Appeals Chamber will need to address Lukić’s submission that the Trial Chamber obstructed his efforts to obtain appropriate translations. However, given that the latter issue bears on the merits of Lukić’s appeal, the Appeals Chamber will refrain from making such a determination at this juncture. That said, the Appeals Chamber notes that if, at the stage of rendering its judgement in this case, it were to grant the relevant grounds of Lukić’s appeal but refuse, at present, to consider the tendered material as unavailable at trial, hence applying a much stricter standard for its admission, it would

⁴⁴ *Ibid.*, paras 1, 51-52.

⁴⁵ Reply, para. 7, referring to submissions under grounds A(3)(b)/(g) and Q(1) of Lukić’s Appeal Brief.

⁴⁶ *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, para. 6, referring to *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj’s Request to Present Additional Evidence under Rule 115, 3 March 2006 (“*Haradinaj et al.* Rule 115 Decision”), para. 16.

⁴⁷ See *supra*, para. 5.

⁴⁸ See Annex A to the Motion and Motion of 7 May 2008, para. 8 concerning document 6DA3 (formerly document Marked Not Admitted (“MNA”) 6D1322); paras 68-71 concerning documents 6DA5 (formerly document MNA 6D1262), 6DA6 (formerly document MNA 6D1263), 6DA7 (formerly document MNA 6D1264), 6DA8 (formerly document MNA 6D1265) and 6DA9 (formerly document MNA 6D1266); paras 84-85 concerning documents 6DA12 (formerly document MNA 6D1109), 6DA13 (formerly document MNA 6D1111), 6DA14 (formerly document MNA 6D1115), 6DA15 (formerly document MNA 6D1116), 6DA16 (formerly document MNA 6D1117), and 6DA1 (formerly document MNA 6D1323); and para. 90 concerning documents 6DA10 (formerly document MNA 6D1648) and 6DA11 (formerly document MNA 6D1649).

⁴⁹ Decision of 11 June 2008, paras 16, 65, 94, 97, 125 (n).

be difficult to remedy the potential prejudice to Lukić.⁵⁰ Therefore, in light of the particular circumstances of this case, the pending resolution of Lukić's appeal on the merits, and the interests of fairness, the Appeals Chamber finds that documents 6DA1, 6DA3, and 6DA5 through 6DA16 should be regarded as having been unavailable to Lukić for the purposes of Rule 115 of the Rules. The Appeals Chamber emphasizes, however, that this finding pertains strictly to one of the criteria of admissibility of additional evidence on appeal and must not be interpreted as expressing any views on the merits of Lukić's appeal.

(ii) Documents 6DA2, 6DA4, and 6DA17

19. According to Lukić, document 6DA2 was relied upon by witness Simonović in his expert report.⁵¹ Lukić generally submits that he was unable to provide for the translation of the document "due to the constraints of the CLSS system and the time constraints imposed by the [Trial] Chamber".⁵² Accordingly, Lukić does not contest that the document was physically available to him at trial. However, unlike the documents discussed in paragraph 18 above, Lukić did not seek the admission of document 6DA2 in his Motion of 7 May 2008. Furthermore, he does not demonstrate what steps he took, if any, during the trial to tender document 6DA2 into evidence. The Appeals Chamber considers Lukić's general assertion in relation to this document to be insufficient to demonstrate that he exercised due diligence. The Appeals Chamber thus finds that, for the purposes of Rule 115 of the Rules, the tendered evidence must be regarded as having been available at trial or discoverable through the exercise of due diligence.

20. Concerning document 6DA4, Lukić admits that a partial translation thereof was admitted at trial as Exhibit 1D334.⁵³ The Appeals Chamber notes, however, that apart from claiming that he "had no way of anticipating that the [Trial] Chamber would misread or misapprehend the legal requirements",⁵⁴ Lukić fails to provide any explanation as to the reasons for not having sought the admission at trial of the full translation of the document. Considering that the duty to act with due diligence requires the parties "to make the best case in the first instance",⁵⁵ the Appeals Chamber finds Lukić's argument that he could not have anticipated the Trial Chamber's interpretation of the evidence unpersuasive. Moreover, the Appeals Chamber recalls that it is the settled jurisprudence of

⁵⁰ Cf. *Pavković* Rule 115 Decision, para. 23.

⁵¹ Motion, para. 22.

⁵² *Ibid.*

⁵³ *Ibid.*, para. 23; see also Response, para. 1, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Further Submission to Joint Prosecution and Defence Submission of Annex C (Documents Agreed by the Parties), Filed 9 March 2007, 19 March 2007; Ruling, 20 Mar 2007, T. 12024.

⁵⁴ Motion, para. 23.

⁵⁵ *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Naletilić's Consolidated Motion to Present Additional Evidence, 20 October 2004 ("*Naletilić* Rule 115 Decision"), para. 30, citing *Prosecutor v.*

this Tribunal that the appeal process is not designed for the purpose of allowing the parties to remedy their own failings or oversights during trial.⁵⁶

21. Finally, Lukić does not adduce arguments detailing the efforts he made, if any, to obtain and present document 6DA17, or the information contained therein, before the Trial Chamber. His bare assertion that document 6DA17 was unavailable to him⁵⁷ falls short of demonstrating that he exercised the required due diligence to obtain it and have it admitted as part of the trial record.⁵⁸ Accordingly, the Appeals Chamber finds, for the purposes of Rule 115 of the Rules, that documents 6DA4 and 6DA17 were available at trial or discoverable through the exercise of due diligence.

22. Consequently, documents 6DA2, 6DA4, and 6DA17 can only be admitted as additional evidence if the Appeals Chamber finds that they are credible, relevant and *would* have affected the verdict had they been before the Trial Chamber.⁵⁹

2. Credibility, relevance and impact upon verdict

(a) Document 6DA1

(i) Arguments of the parties

23. Document 6DA1 is a Serbian Ministry of the Interior (“MUP”) “Instruction on Information and Reporting” dated 23 December 1994.⁶⁰ Lukić submits that it shows the chain of reporting that existed within the MUP during the time relevant to the Indictment.⁶¹ He further argues that the document is important because it corroborates the credibility of the numerous defence witnesses who testified on this matter, and because it affects the weight attributed to their testimony.⁶² In Lukić’s view, had the document been admitted, the Trial Chamber’s conclusion on his “role and position” within the MUP would have been different.⁶³ He contends that the Trial Chamber “failed

Zoran Kupreškić et al., Case No. IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, 11 April 2001 (confidential), para. 12.

⁵⁶ *Naletilić* Rule 115 Decision, para. 30, referring to *Prosecutor v. Hazim Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, para. 15.

⁵⁷ Motion, para. 44.

⁵⁸ See *supra*, para. 5.

⁵⁹ See *supra*, para. 8.

⁶⁰ Motion, Annex B.

⁶¹ *Ibid.*, para. 16; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Third Amended Joinder Indictment, 21 June 2006 (“Indictment”).

⁶² *Ibid.*, para. 16, referring to Dragan Paunović, 8 Feb 2008, T. 21904; Miroslav Mijatović, 12 Feb 2008, T. 22111, 22199 and 13 Feb 2008, T. 22222-22228; Dušan Gavranović, 19 Feb 2008, T. 22636-22642, T. 22644-22645; Nebojša Ognjenović, 21 Feb 2008, T. 22902; Radovan Vučurević, 22 Feb 2008, T. 23046, T. 23052; Božidar Filić, 12 Mar 2008, T. 24011, T. 23945-23946; Miloš Vojnović, 12 Mar 2008, T. 24174; Gvozden Gagić, 19 Mar 2008, T. 24438; Duško Adamović, 9 Apr 2008, T. 24994-24995.

⁶³ Motion, para. 16.

to acknowledge and understand that the MUP Staff was only reported to parallelly [*sic*].⁶⁴ Finally, Lukić claims that the untranslated version of document 6DA1 was relied upon by witness Simonović in his expert report.⁶⁵

24. The Prosecution responds that Lukić's request for admission of this document should be summarily dismissed because Lukić has failed to identify the specific findings in the Trial Judgement which are allegedly impacted upon by document 6DA1.⁶⁶ The Prosecution also argues that Lukić has not shown how the document would have enhanced the credibility of the witnesses to whom he refers.⁶⁷ In this regard, the Prosecution submits that the untranslated version of the document was presented to the Trial Chamber through witness Mijatović, but the Trial Chamber instructed Lukić to discuss it with his expert witness once the translation was complete.⁶⁸ It goes on to submit that the untranslated document was also relied upon both by witness Vučurević⁶⁹ and witness Filić⁷⁰ in their testimonies. The Prosecution also asserts that the concept of parallel reporting was mentioned by all of the witnesses referred to by Lukić, as well as in his final trial brief.⁷¹

25. In addition, the Prosecution argues that Lukić fails to demonstrate how the document would have affected the Trial Chamber's finding that "various reporting alternatives were available to the MUP staff and Lukić as its Head".⁷² In particular, the Prosecution disputes Lukić's contention that the Trial Chamber misunderstood the parallel reporting issue, submitting that the Trial Chamber specifically took into account that the Kosovo Secretariats of the Interior ("SUPs") were reporting to both MUP in Belgrade and the MUP Staff in Kosovo.⁷³ The Prosecution claims, further, that the Trial Chamber had sufficient evidence before it regarding the reporting procedures in 1998 and 1999 to enable it to reject Lukić's argument that he only had access to a limited amount of information pertaining to MUP activities in Kosovo at the relevant time, including the commission of crimes.⁷⁴

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, referring to Exhibit 6D668; See also Reply, para. 4, and Corrigendum, para. 3.

⁶⁶ Response, para. 15.

⁶⁷ *Ibid.*, para. 16.

⁶⁸ *Ibid.*, referring to Miroslav Mijatović, 12 Feb 2008, T. 22223-22224.

⁶⁹ *Ibid.*, referring to Radovan Vučurević, 22 Feb 2008, T. 23052.

⁷⁰ *Ibid.*, referring to Božidar Filić, 10 Mar 2008, T. 23945-23946.

⁷¹ *Ibid.*, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Motion to Replace Public Redacted Version of Final Trial Brief, Exhibit A, Corrigendum to Sreten Lukic's [*sic*] Final Defense Trial Brief, 7 August 2008, paras 539-596.

⁷² *Ibid.*, para. 17, citing Trial Judgement, vol. 3, para. 1090.

⁷³ *Ibid.*, citing Trial Judgement, vol. 3, para. 1090.

⁷⁴ *Ibid.*, para. 18, referring to Trial Judgement, vol. 3, paras 1090, 1096-1097.

(ii) Analysis

26. Considering that document 6DA1 bears sufficient indicia of credibility, such as the signature of the Minister who issued it at the time, and that its credibility is not disputed by the Prosecution, the Appeals Chamber finds it to be *prima facie* credible. As to the relevance of the document, the Appeals Chamber finds that it is relevant to the Trial Chamber's finding that Lukić received "detailed information about the activities of the MUP in Kosovo during the Indictment period, including the commission of crimes".⁷⁵

27. However, Lukić does not explain how document 6DA1 could have had an impact upon the verdict. Lukić claims that document 6DA1 would have led to "the only available reasonable conclusion with respect to the MUP Staff and Appellant's role and position" but does not identify which conclusion he is referring to or how this document could have affected it.⁷⁶ The Appeals Chamber understands Lukić to broadly argue that this document demonstrates that the Trial Chamber misunderstood the concept of parallel reporting, but he neither explains the nature of the Trial Chamber's alleged misunderstanding, nor how this document could have corrected any such purported error. Consequently, the Appeals Chamber finds that Lukić has not met the requirements of Rule 115 of the Rules. His request for the admission of document 6DA1 is therefore dismissed.

(b) Documents 6DA2 and 6DA3

(i) Arguments of the parties

28. Documents 6DA2 and 6DA3 bear the titles "Rules on the Classification of Posts in the Ministry of the Interior", and "Classification of Posts with Salary Grades", and are dated 5 April 1996 and 21 March 1997, respectively.⁷⁷ Lukić argues that these documents demonstrate that he was demoted after his stay in Kosovo by Slobodan Milošević.⁷⁸ He submits that these documents contradict the Trial Chamber's finding that Lukić played a "'central role' in Kosovo, since after [*sic*] Kosovo conflict".⁷⁹ In Lukić's submission, these documents show that although he held the rank of a major-general, Lukić was appointed as "Chief of the Administration for Border

⁷⁵ Trial Judgement, vol. 3, para. 1097.

⁷⁶ Motion, para. 16.

⁷⁷ *Ibid.*, Annex C.

⁷⁸ *Ibid.*, para. 19.

⁷⁹ *Ibid.*, para. 20.

Police Administration”, a post which should allegedly have been filled by someone of the lower rank of lieutenant-colonel or colonel.⁸⁰

29. The Prosecution responds that Lukić has failed to show how a consideration of his role following the Kosovo conflict would contradict the Trial Chamber’s findings on his role and responsibility throughout the Indictment period.⁸¹ In addition, as regards document 6DA2, the Prosecution argues that Lukić does not show how it would have impacted upon the verdict.⁸² As regards document 6DA3, the Prosecution submits that Lukić fails to provide sufficient basis for his claim that the post of “lieutenantcolonel/colonel [*sic*]” should have been filled by someone of a lower rank.⁸³ The Prosecution also argues that Lukić fails to identify the specific finding of fact to which the evidence is directed, and has failed to demonstrate how the admission of this document would have impacted upon the verdict.⁸⁴ In this regard, the Prosecution claims that the Trial Chamber considered a multitude of evidence⁸⁵ regarding Lukić’s rank and position which led it to reasonably conclude that he was a “*de facto* commander over MUP forces deployed in Kosovo from mid-1998 to mid-1999”.⁸⁶ In the Prosecution’s view, Lukić has not shown how document 6DA3 contradicts these findings.⁸⁷ Finally, the Prosecution submits that Lukić has provided only a partial translation of document 6DA3.⁸⁸

(ii) Analysis

30. The Appeals Chamber notes that documents 6DA2 and 6DA3 both bear a stamp and a signature, thus displaying *prima facie* indicia of credibility.

31. The Appeals Chamber recalls that it found document 6DA2 to have been available at trial.⁸⁹ Consequently, the document will only be admitted if Lukić demonstrates that its exclusion would lead to a miscarriage of justice, in that if admitted at trial, it would have affected the verdict.⁹⁰ Lukić fails to specify, however, a finding of fact made by the Trial Chamber to which this document pertains. The Appeals Chamber further finds that Lukić has not demonstrated how a consideration of his role and position “since after [*sic*] Kosovo conflict” is relevant to the Trial Chamber’s findings as to his responsibility during the Indictment period. In these circumstances, the Appeals

⁸⁰ *Ibid.*, para. 21.

⁸¹ Response, paras 23 (in relation to document 6DA3), 48 (in relation to document 6DA2).

⁸² *Ibid.*, para. 49.

⁸³ *Ibid.*, para. 21.

⁸⁴ *Ibid.*, para. 22.

⁸⁵ *Ibid.*, referring to Trial Judgement, vol. 3, paras 941-1051.

⁸⁶ *Ibid.*, citing Trial Judgement, vol. 3, para. 1051.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, para. 21.

⁸⁹ See *supra*, paras 19, 22.

⁹⁰ See *supra*, para. 8.

Chamber is unable to discern how document 6DA2 would have affected the verdict. Accordingly, Lukić's request for its admission as additional evidence on appeal is dismissed.

32. Since the Appeals Chamber found document 6DA3 to have been unavailable at trial,⁹¹ in order for the document to be admissible as additional evidence on appeal, the Appeals Chamber must be satisfied that had it been admitted at trial, this document *could* have affected the verdict.⁹² However, Lukić fails to specify a finding of fact made by the Trial Chamber to which this document pertains. As noted above in relation to document 6DA2, the Appeals Chamber finds that Lukić has not shown how a consideration of his role and position "since after [*sic*] Kosovo conflict" is relevant to the Trial Chamber's findings as to his responsibility during the Indictment period. Furthermore, Lukić has submitted only a partial translation of this document and the Appeals Chamber is therefore not in a position to fully assess its relevance and possible impact on the verdict. For these reasons, the Appeals Chamber dismisses the request for the admission of this document into evidence.

(c) Document 6DA4

(i) Arguments of the parties

33. Lukić argues that document 6DA4, a Law on Weapons and Ammunition ("Law") demonstrates "the lack of a criminal intent" and presents a legal justification for the attempts made to disarm the population in Kosovo.⁹³ He claims that Articles 5, 7, and 33 of the Law clearly contradict the Trial Chamber's conclusions on "disarming of civilians in possession of illegal weapons who happened to be Albanian" since the police was obliged to disarm members of the civilian population bearing illegal weapons.⁹⁴ Lukić argues that, had the Trial Chamber taken the Law into account, it would not have concluded that the disarming of the civilian population was illegal⁹⁵ and that Lukić "acted in concert with the members of the joint criminal enterprise to further the common purpose of maintaining control over Kosovo through various criminal means".⁹⁶ In addition, Lukić claims that the Law is an important part of witness Simonović's expert report and should be considered "for the sake of completeness and accuracy".⁹⁷

34. In response, the Prosecution argues that Article 7 of the Law was before the Trial Chamber, and that Lukić fails to show how the admission of either Article 5 or 33 of the Law would impact

⁹¹ See *supra*, para. 18.

⁹² See *supra*, para. 7.

⁹³ Motion, para. 24.

⁹⁴ *Ibid.*, para. 23.

⁹⁵ *Ibid.*, referring to Trial Judgement, vol. 1, paras 57-72.

⁹⁶ *Ibid.*, citing Trial Judgement, vol. 3, para. 1121.

on the verdict.⁹⁸ The Prosecution claims that the Trial Chamber examined, *inter alia*, the Federal Republic of Yugoslavia (“FRY”) Law on Defence and the FRY Constitution,⁹⁹ and considered that the primary issue was not whether the arming was in and of itself illegal, but whether the process of arming and disarming of the population was based upon ethnicity.¹⁰⁰ In the Prosecution’s view, the Trial Chamber reasonably concluded that the process was indeed carried out in a discriminatory manner.¹⁰¹

(ii) Analysis

35. At the outset, the Appeals Chamber notes that translated portions of the Law were admitted at trial as Exhibit 1D334. Accordingly, those portions cannot constitute “additional evidence” pursuant to Rule 115 of the Rules. Lukić’s request for their admission is consequently moot.¹⁰² The Appeals Chamber will therefore entertain Lukić’s request only in relation to the excerpts of the Law not contained in Exhibit 1D334.

36. Concerning the credibility requirement, the Appeals Chamber notes that the source of document 6DA4 is the Official Gazette of the Republic of Serbia. Accordingly, it finds the proposed evidence to be *prima facie* credible. It also considers this document to be relevant to the issue of the arming and disarming of the civilian population in Kosovo, which is material to Lukić’s conviction. The question that remains, therefore, is whether the Appeals Chamber is satisfied that exclusion of document 6DA4 would lead to a miscarriage of justice, in the sense that if it had been admitted at trial, it would have affected the verdict.¹⁰³ The Appeals Chamber will not examine the proffered evidence in isolation but rather in the context of the evidence that was presented at trial, and in particular in light of the excerpts of the Law admitted already as Exhibit 1D334.¹⁰⁴

37. The Appeals Chamber notes that in finding the existence of a common criminal purpose, the Trial Chamber considered, *inter alia*, the process of arming and disarming of the civilian population in Kosovo.¹⁰⁵ It explicitly noted that “the primary issue in relation to [the] process of arming and disarming is whether it was done upon ethnic lines”.¹⁰⁶ The Trial Chamber was aware that according to the Law, obtaining firearms and ammunition required a permit issued by MUP.¹⁰⁷ It

⁹⁷ *Ibid.*, paras 25-26, referring to Exhibit 6D668, fns 270-271; see also Reply, para. 4.

⁹⁸ Response, paras 27, 30.

⁹⁹ *Ibid.*, para. 28, referring to Exhibits P958, articles 61-63; 1D139.

¹⁰⁰ *Ibid.*, referring to Trial Judgement, vol. 3, para. 56.

¹⁰¹ *Ibid.*, paras 28-29, citing Trial Judgement, vol. 3, para. 72.

¹⁰² See *Pavković* Rule 115 Decision, para. 20; *Lazarević* Rule 115 Decision, para. 20 and the references cited therein.

¹⁰³ See *supra*, paras 8, 22.

¹⁰⁴ See *supra*, para. 10.

¹⁰⁵ Trial Judgement, vol. 3, paras 49-72.

¹⁰⁶ *Ibid.*, para. 56.

¹⁰⁷ Exhibit 1D334, Article 7.

was also presented with the testimony of witness Odalović asserting that in the autumn of 1998, there occurred a public campaign calling upon Kosovo Albanians to hand in their illegally-obtained weapons.¹⁰⁸ However, the Trial Chamber was not convinced that the weapons of the Kosovo Albanian population were being collected because they were illegally obtained.¹⁰⁹ Following consideration of the relevant evidence, the Trial Chamber opined that

the approach of disarming Kosovo Albanians in their villages, while at the same time arming the large majority of Serbs and Montenegrins in Kosovo, in the context of an acknowledged ethnic dispute, was carried out on a discriminatory basis and was designed to render the Kosovo Albanian population vulnerable to the forces of the FRY and Serbia, while at the same time empowering the non-Albanian population.¹¹⁰

38. Lukić argues that had the Trial Chamber considered Articles 5 and 33 of the Law, it would have reached a different conclusion.¹¹¹ Article 5 of the Law prohibits, *inter alia*, the possession and bearing of certain weapons, conduct which is further declared criminal under Article 33 of the Law.¹¹² The Appeals Chamber finds that the two provisions add little to what was presented at trial. Moreover, considering that it was not the legality of the collection of the firearms that was at issue, but the discriminatory manner in which the disarming was carried out, the Appeals Chamber is not convinced that the admission of the full translation of the Law would have had an impact on the Trial Chamber's findings. Accordingly, Lukić's request for admission of document 6DA4 as additional evidence on appeal is dismissed.

(d) Documents 6DA5 through 6DA9

(i) Arguments of the parties

39. Documents 6DA5 through 6DA9 are MUP staff reports on security-related events, incidents and intelligence for the period 26 through 30 April ("MUP staff reports").¹¹³ Lukić argues that these documents show that the MUP staff did not have information concerning the operation conducted in the Reka/Caragoj valley at the end of April 1999.¹¹⁴ He further submits that the proffered evidence is relevant to his *mens rea* and demonstrates his lack of knowledge that any crimes have been "committed/reported through the MUP structure" at the time when the events in Đakovica/Gjakova took place.¹¹⁵

¹⁰⁸ Trial Judgement, vol. 3, para. 70, referring to Veljko Odalović, 27 Aug 2007, T. 14459-14460.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, para. 72.

¹¹¹ Motion, para. 23.

¹¹² *Ibid.*, Annex D.

¹¹³ *Ibid.*, Annex E.

¹¹⁴ *Ibid.*, para. 28.

¹¹⁵ *Ibid.*, para. 29.

40. The Prosecution responds that the Trial Chamber considered ample evidence in relation to Lukić's knowledge of the Reka/Caragoj operation.¹¹⁶ In the Prosecution's view, the mere fact that information concerning this operation was absent from the MUP staff reports does not prove that the MUP staff, and Lukić in particular, were unaware of the commission of "crimes in general".¹¹⁷ In this respect, the Prosecution suggests that the MUP staff reports were demonstrably more concerned with recording minor crimes, rather than reporting on more serious crimes committed against the civilian population.¹¹⁸ Finally, the Prosecution argues that the proffered evidence is repetitive of evidence that was considered by the Trial Chamber and therefore, even if it had been admitted at trial, it would not have affected the verdict.¹¹⁹

(ii) Analysis

41. Documents 6DA5 through 6DA9 bear some indicia of credibility, such as dates, recipients, and Lukić's typed name as Head of Staff.¹²⁰ The Prosecution does not contest their credibility. Accordingly, the Appeals Chamber finds the documents to be *prima facie* credible. The Appeals Chamber further finds the proposed evidence to be relevant to Lukić's conviction as it bears upon the finding that he had knowledge of the commission of crimes by MUP and Army of Yugoslavia ("VJ") staff in Kosovo in April 1999.¹²¹

42. As to the alleged impact of the documents on the verdict, the Appeals Chamber notes that the Trial Chamber was mindful that evidence of the information received by Lukić was crucial for determining whether he possessed knowledge of the crimes committed by MUP and VJ personnel in Kosovo.¹²² It examined a vast number of reports sent by Lukić to the MUP in Belgrade during the period of 1 January to 1 May 1999,¹²³ and explicitly noted that apart from containing information concerning MUP or VJ members retaliating against Kosovo Liberation Army ("KLA")

¹¹⁶ Response, para. 34, referring to Trial Judgement, vol. 2, paras 165-240.

¹¹⁷ *Ibid.*, para. 35, referring to Trial Judgement, vol. 3, paras 1076-1097.

¹¹⁸ *Ibid.*, para. 36, referring to Trial Judgment, vol. 3, paras 1055-1056, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Public Redacted Final Trial Brief and Corrigendum, 29 July 2008, para. 1091.

¹¹⁹ *Ibid.*, para. 37.

¹²⁰ The Appeals Chamber observes that the copies of documents 6DA5 through 6DA9 contained in Annex E of the Motion are of very poor quality. In this particular instance, the Appeals Chamber was able to compare the currently submitted versions of the documents with those tendered at trial in relation to Lukić's Motion of 7 May 2008 (documents MNA 6D1262, MNA 6D1263, MNA 6D1264, MNA 6D1265, MNA 6D1266) and is satisfied that the documents are indeed the same. Therefore, the fact that in this case the submitted copies of the documents were of poor quality does not affect the Appeals Chamber's finding in relation to the credibility of the documents. The Appeals Chamber however notes that it is Counsel's duty to ensure that the documentary evidence sought to be admitted is of good quality.

¹²¹ See Trial Judgement, vol. 3, paras 1097, 1128.

¹²² Trial Judgement, vol. 3, para. 1119.

¹²³ See *Ibid.*, para. 1053, fns 2639-2641, referring to Exhibits 6D1151, 6D1156, 6D1157, 6D1158 (also admitted as P1228), 6D1207, 6D1208, 6D1152, 6D1153, 6D1155, 6D1221, 6D1222, 6D1223, 6D1224, 6D1225, 6D1226, 6D1227, 6D1228, 6D1229, 6D1230, 6D1231, 6D1232, 6D1233, 6D1234, 6D1235 (also admitted as P1100), 6D1236, 6D1237, 6D1238, 6D1239, 6D1240, 6D1241, 6D1242, 6D1243, 6D1244, 6D1245, 6D1246, 6D1248, 6D1249, 6D1250, 6D1251, 6D1252, 6D1254, 6D1255, 6D1256, 6D1257, 6D1259, 6D1260, 6D1261, P1693.

attacks, none of the reports related to operations initiated by the MUP units.¹²⁴ The Trial Chamber found that the reports also addressed opportunistic crimes, deaths and injuries inflicted upon VJ and MUP personnel, as well as discovery of unidentified bodies of civilians.¹²⁵ Notwithstanding this evidence, the Trial Chamber concluded as follows

Given the number of different units involved and the level of co-ordination required to carry out the sweep through the Reka/Caragoj valley, the Chamber is convinced that this was an organised joint operation of the VJ and MUP, carried out with the awareness and approval of the superior MUP and VJ chains of command, in which members of paramilitary groups also participated.¹²⁶

43. The Trial Chamber further found that information was transmitted to Lukić through various reporting mechanisms, including through daily reports produced by the Kosovo SUPs containing information about “terrorist actions”, police operations and movement of police units.¹²⁷ The Trial Chamber concluded that Lukić was updated on a daily basis about the events throughout Kosovo,¹²⁸ and that he himself issued instructions, dispatches and reports showing his detailed knowledge of the situation on the ground.¹²⁹ The Trial Chamber specifically considered the fact that in the beginning of April 1999 Lukić instructed the heads of Kosovo SUPs to report on “terrorist attacks”, serious crimes, including murder, looting, and rape, and on the number of Kosovo Albanians fleeing from the area.¹³⁰ In addition, the Trial Chamber took into account that despite Lukić’s dispatches instructing the heads of Kosovo SUPs and the commanders of the Special Police Units detachments to prevent any forcible eviction of the Kosovo Albanian population, the mass departure of civilians continued throughout April 1999.¹³¹

44. Accordingly, in reaching its findings on Lukić’s *mens rea*, the Trial Chamber was well aware of over 40 MUP staff reports which did not convey information about the commission of serious crimes against the Kosovo Albanian civilian population but rather dealt with MUP and VJ retaliations to KLA attacks, minor offences, VJ and MUP casualties, and the discovery of unidentified civilian bodies. However, the Trial Chamber was satisfied that there was ample evidence on the record showing that Lukić had detailed knowledge of the events on the ground. Lukić fails to explain how admission into evidence of five more MUP staff reports containing similar information could have affected the Trial Chamber’s conclusion. His request for admission of documents 6DA5 through 6DA9 as additional evidence on appeal is therefore dismissed.

¹²⁴ *Ibid.*, para. 1055.

¹²⁵ *Ibid.*, paras 1055-1056.

¹²⁶ *Ibid.*, vol. 2, para. 228.

¹²⁷ *Ibid.*, vol. 3, paras 1057, 1090; see also Exhibit P2528.

¹²⁸ *Ibid.*, para. 1090.

¹²⁹ *Ibid.*, paras 1090-1094, 1123.

(e) Documents 6DA10 and 6DA11(i) Arguments of the parties

45. Lukić submits that documents 6DA10 and 6DA11¹³² provide information on the security situation in Kosovo during the Indictment period and demonstrate the legitimacy of the Serbian anti-terrorist activities.¹³³ In his view, the documents show that it was the KLA rather than the FRY and Serbian forces that relocated civilians.¹³⁴ He further argues that the proffered evidence refutes the Trial Chamber's considerations which "focused on the lack of KLA presence and activity as a basis to exclude the reasonable conclusion that flight of civilians was caused due to KLA actions".¹³⁵ In addition, Lukić submits that the proposed evidence affects the assessment of his *mens rea*.¹³⁶

46. In response, the Prosecution argues that Lukić neither explains the origin of the two documents nor identifies the specific factual findings to which they are directed.¹³⁷ According to the Prosecution, Lukić also fails to demonstrate how the information contained therein would have impacted upon the Trial Chamber's finding as to why the Kosovo Albanian civilians left the region.¹³⁸ In the Prosecution's view, the Trial Chamber gave detailed consideration to the argument that the KLA was responsible for the forcible displacement of Kosovo Albanians, and on the basis of the evidence it ultimately concluded that it was the forces of FRY and Serbia that deliberately expelled the Kosovo Albanians from the area.¹³⁹ Finally, the Prosecution submits that Lukić fails to show that, if the two documents had been admitted at trial, they would have affected the Trial Chamber's finding that he possessed the requisite *mens rea*.¹⁴⁰

47. In reply, Lukić submits that "the documents on their face demonstrate the source to be the State Security Service (RDB) of the Serbian MUP", and that they "were officially received from the relevant authorities".¹⁴¹

¹³⁰ *Ibid.*, para. 1093, referring to Exhibits 6D808 and P1989.

¹³¹ *Ibid.*, para. 1094, referring to Exhibits 6D666 and 6D778.

¹³² The documents bear the titles "Activities of Terrorists from the So-called KLA in KiM /Kosovo and Metohija" and "Activities of Members of the So-called KLA in the General Area of Budakovo Village, Suva Reka Municipality" (see Motion, Annex F).

¹³³ Motion, para. 33.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Response, para. 39.

¹³⁸ *Ibid.*, para. 40.

¹³⁹ *Ibid.*, paras 41-42, referring to Trial Judgement, vol. 1, para. 1214; vol. 2, paras 1175-1178; vol. 3, paras 16-96.

¹⁴⁰ Response, para. 43, referring to Trial Judgement, vol. 3, paras 1089, 1097, 1119, 1130.

¹⁴¹ Reply, para. 6.

(ii) Analysis

48. The Appeals Chamber recalls that when assessing the credibility of a piece of evidence it will consider whether it appears to be reasonably capable of belief or reliance.¹⁴² Identification of the provenance of the evidence is important in this respect. In the present circumstances, the Appeals Chamber does not agree with Lukić's submission that "on their face" documents 6DA10 and 6DA11 demonstrate their source to be the RDB of the MUP.¹⁴³ It notes that the documents in question are not signed and do not bare any proof of their origin, such as MUP insignia, contemporary stamps, or stamps from an archive. Also, no source for the facts contained in the documents is mentioned, and there is no indication of who authored the documents. Furthermore, the Appeals Chamber finds Lukić's assertion that the documents "were officially received from the relevant authorities"¹⁴⁴ to be impermissibly vague. The Appeals Chamber therefore finds that documents 6DA10 and 6DA11 do not bear sufficient indicia of credibility and therefore do not appear to be reasonably capable of belief or reliance. However, the Appeals Chamber considers that, for reasons explained below, even if the same material were to be presented before it in the form of documents bearing the necessary indicia of credibility, it would still be inadmissible as additional evidence on appeal.

49. Document 6DA10 is dated 14 April 1999 and it contains information concerning the KLA presence and military activities in a number of municipalities in Kosovo. The Appeals Chamber notes that, contrary to Lukić's argument that the Trial Chamber "focused on the lack of KLA presence and activity as a basis to exclude the reasonable conclusion that flight of civilians was caused due to KLA actions",¹⁴⁵ the Trial Chamber examined extensive evidence regarding KLA presence and military activities in all 13 municipalities of Kosovo concerned by the Indictment.¹⁴⁶ The Trial Chamber was furthermore aware of evidence showing that in certain areas KLA members

¹⁴² See *supra*, para. 6.

¹⁴³ Reply, para. 6. The Appeals Chamber notes that similarly to documents 6DA5 through 6DA9, the copies of documents 6DA10 and 6DA11 contained in Annex F of the Motion are of very poor quality. The Appeals Chamber was again able to compare the currently submitted versions of the documents with those tendered at trial in relation to Lukić's Motion of 7 May 2008 (documents MNA 6D1648, MNA 6D1649) and is satisfied that the documents are indeed the same. Therefore, the fact that in this case the submitted copies of the documents were of poor quality does not affect the Appeals Chamber's finding in relation to the credibility of the documents. The Appeals Chamber however reiterates that it is Counsel's duty to ensure that the documentary evidence sought to be admitted is of good quality.

¹⁴⁴ *Ibid.*

¹⁴⁵ Motion, para. 33.

¹⁴⁶ See e.g. Trial Judgement, vol. 2, paras 7 (concerning Peć/Peja municipality), 51 (concerning Dečani/Deçan municipality), 109-115 (concerning Đakovica/Gjakova municipality), 245 (concerning Prizren municipality), 293-302 (concerning Orahovac/Rahovec municipality), 477 (concerning Suva Reka/Suhareka municipality), paras 567, 665-666 (concerning Srbica/Skenderaj municipality), 726, 728 (concerning Kosovska Mitrovica/Mitrovica), 796-797 (concerning Vučitrn/Vushtrria municipality), 814-815 (concerning Priština/Prishtina municipality), 896-898

were forcibly mobilising civilians¹⁴⁷ Upon considering the evidence on the record, the Trial Chamber concluded that

in some parts of Kosovo, both within the 13 municipalities discussed in [the Trial] Judgement and elsewhere, people may have left their homes for different reasons, such as instructions from the KLA, the desire to avoid being present while combat between the KLA and forces of the FRY and Serbia was taking place, or indeed the fact that NATO was bombing targets close to where they lived. However, despite the arguments by the Defence that these were the primary reasons for the massive movement of people within Kosovo and across the borders with Albania and Macedonia, none of the Kosovo Albanians who testified cited the NATO bombing as among the reasons for their departure, and in only one area of Vučitrn/Vushtrria municipality and another area of Suva Reka/Suhareka municipality discussed above has the Chamber found that people were moving as a consequence of the actions of the KLA.¹⁴⁸

50. Bearing in mind the extensive evidence examined by the Trial Chamber, Lukić has not substantiated with sufficient clarity the impact that document 6DA10 could have had on the Trial Chamber's verdict. Furthermore, Lukić has failed to direct the Appeals Chamber to a specific finding of fact made by the Trial Chamber to which this document pertains. The request for admission of document 6DA10 as additional evidence on appeal is therefore dismissed.

51. As for document 6DA11, dated 17 April 1999, which reports on KLA activities "in the general area of Budakovo village", Suva Reka/Suhareka municipality, the Appeals Chamber notes that the Trial Chamber referred to the evidence of witness K83 that members of the KLA were stationed towards the village of Budakovo/Budakova.¹⁴⁹ It further referred to witness Delić's evidence that as of June 1998, the KLA was in control of the village and expanded its authority over the area in 1999.¹⁵⁰ This information was corroborated by the testimony of witness Crosland, according to whom in the first few months of 1999, one of the 24 KLA headquarters was situated in Budakovo/Budakova.¹⁵¹ Accordingly, the Trial Chamber was aware of the evidence showing the KLA presence and activities in the Budakovo/Budakova area during the Indictment period. Lukić has failed to direct the Appeals Chamber to a specific finding of fact made by the Trial Chamber to which document 6DA11 pertains, and to show how this document could invalidate any such finding and, eventually, the Trial Chamber's verdict. The request for admission of document 6DA11 as additional evidence on appeal is therefore dismissed.

(concerning Gnjilane/Gjilan municipality), 958-959 (concerning Uroševac/Ferizaj municipality), 1009-1019 (concerning Kačanik/Kaçanik municipality).

¹⁴⁷ Trial Judgement, vol. 1, para. 819, referring to Exhibits 3D1050; 3D1052; 3D1053; 3D1048; para. 823, referring to Bislim Zyrapi, 7 Nov 2006, T. 6031 and 10 Nov 2006, 6260-6261; vol. 2, para. 1153, referring to Exhibits 5D885, pp. 1-2; 3D1052, para. 2.2; para 1013, referring to Krsman Jelić, 22 Nov 2007, T. 18840; para. 1015, referring to Krsman Jelić, 23 Nov 2007, T. 18934-18935.

¹⁴⁸ *Ibid.*, vol. 2, para. 1175.

¹⁴⁹ *Ibid.*, para. 473, referring to K83, 26 Sep 2006, T. 3978-3979.

¹⁵⁰ *Ibid.*, para. 475, referring to Božidar Delić, 28 Nov 2007, T. 19275-19277.

¹⁵¹ *Ibid.*, vol. 1, para. 817, referring to John Crosland, 8 Feb 2007, T. 9898-9899; Exhibit P2645, para. 26.

(f) Documents 6DA12 through 6DA16

(i) Arguments of the parties

52. Lukić requests the admission into evidence of lists of policemen (documents 6DA12 and 6DA13), civilians (documents 6DA14 and 6DA15), and “members of the public” (document 6DA16), allegedly killed, injured, or abducted by “terrorists” in Kosovo in 1998 and 1999.¹⁵²

53. Lukić submits that the proffered documents “show methods and widespread attacks by the KLA” in 1998 and 1999.¹⁵³ In his view, the documents contradict the Trial Chamber’s finding about the existence of a common criminal plan to expel the Kosovo Albanians from the area, and its conclusion that such a plan was formed no later than October 1998.¹⁵⁴ Lukić claims that the documents are relevant to his conviction because they demonstrate the nature and location of “terrorist attacks and other crimes” and show that ethnic Serb and Albanian civilians were targeted by the KLA.¹⁵⁵ Lukić further argues that the proposed evidence contradicts the testimony of witnesses who denied or diminished KLA’s presence and activities, and rebuts the Trial Chamber’s finding that forces of the FRY and Serbia acted in a “deliberate and widespread or systematic manner” to commit or conceal the crimes committed against Kosovo Albanians.¹⁵⁶ According to Lukić, the proposed evidence further shows the fear that KLA activities instilled in the civilian population and the lawfulness of the measures undertaken by the MUP.¹⁵⁷

54. In response, the Prosecution submits that the information contained in documents 6DA12 through 6DA16 originates from the MUP website, and that this website does not provide any reference to the material underlying the postings.¹⁵⁸ The Prosecution further argues that the admission of documents 6DA12 through 6DA16 was already denied by the Trial Chamber on the merits,¹⁵⁹ and that in light of the evidence considered at trial, Lukić fails to show how the proffered material would have impacted upon the verdict.¹⁶⁰ Moreover, the Prosecution contends, the evidence does not support the conclusions that Lukić seeks to draw from it.¹⁶¹

¹⁵² Motion, Annex G.

¹⁵³ *Ibid.*, para. 41.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*, para. 42.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ Response, para. 46.

¹⁵⁹ *Ibid.*, para. 45, citing Decision of 11 June 2008, para. 94.

(ii) Analysis

55. The Appeals Chamber notes that these documents originate from the website of the Serbian MUP.¹⁶² As for their content, the Appeals Chamber observes that they include identification information of individuals allegedly killed or injured by “terrorists”, as well as a description of the circumstances in which the events occurred. Regarding the Prosecution’s argument that there is no reference to the materials relied upon by the MUP in compiling the postings, the Appeals Chamber recalls that hearsay evidence is not inadmissible as such and that, in any case, it need not at this stage evaluate the weight to be accorded to the proffered evidence.¹⁶³ Accordingly, the Appeals Chamber is satisfied that the *prima facie* credibility requirement for admissibility of evidence under Rule 115 of the Rules has been met. The Appeals Chamber further finds the proffered evidence relevant to Lukić’s conviction, in that it purportedly demonstrates the intensity of KLA actions, a factor that was taken into consideration by the Trial Chamber in establishing the cause for the flight of the Kosovo Albanians from the region.¹⁶⁴

56. Regarding the alleged impact, the Appeals Chamber first notes the Trial Chamber’s finding that the protracted armed violence occurring from mid-1998 in Kosovo and continuing through to the commencement of the NATO air campaign on 24 March 1999, reached the level of an internal armed conflict involving VJ and MUP forces fighting the KLA.¹⁶⁵ Particularly relevant is the Trial Chamber’s consideration of several MUP documents from July 1998, asserting that civilians of different ethnicity, as well as MUP members, allegedly became victims of killings and abductions by “Albanian terrorists”.¹⁶⁶ Moreover, the Trial Chamber examined extensive evidence regarding KLA actions in all 13 municipalities of Kosovo mentioned in the Indictment,¹⁶⁷ and was mindful of the reluctance of some witnesses to recognize that there was KLA presence and activity in certain areas.¹⁶⁸ The Trial Chamber further noted the fact that, in some parts of Kosovo, the causes of departure of civilians may have included instructions from the KLA as well as the ongoing combat between the latter and the forces of FRY and Serbia.¹⁶⁹ However, it found that apart from some areas in Vučitrn/Vushtrria and Suva Reka/Suhareka municipalities, the conflict between the KLA

¹⁶⁰ *Ibid.*, para. 47, referring to Trial Judgement, vol. 2, paras 1152-1156, 1175-1178; vol. 3, para. 45.

¹⁶¹ *Ibid.*, para. 46.

¹⁶² See Annex G; see also Response, para. 46. Although, in the Motion, Lukić does not refer to his Appeal Brief, the Appeals Chamber notes that the issues discussed here are related to the submissions in paragraph 74 of Lukić’s Appeal Brief. The Appeals Chamber emphasizes that at this stage it is only considering the admissibility of the proffered material as evidence on appeal and will not address the merits of Lukić’s appeal.

¹⁶³ *Haradinaj et al.* Rule 115 Decision, para. 26.

¹⁶⁴ See Trial Judgement, vol. 2, para. 1177.

¹⁶⁵ Trial Judgement, vol. 1, paras 820, 841.

¹⁶⁶ *Ibid.*, para. 802, referring to the statistics provided in Exhibits 1D721, 1D707, 1D726.

¹⁶⁷ See *supra*, fn. 146.

¹⁶⁸ See e.g. Trial Judgement, vol. 1, para. 55; vol. 2, paras 797, 1073.

¹⁶⁹ Trial Judgement, vol. 2, para. 1175.

and the forces of FRY and Serbia was not the primary cause of the flight of the Kosovo Albanian population.¹⁷⁰ Lukić fails to show how the evidence sought to be admitted on appeal could have affected the verdict. Lukić's request for the admission of documents 6DA12 through 6DA16 as additional evidence on appeal is therefore dismissed.

(g) Document 6DA17

(i) Arguments of the parties

57. Lukić submits that document 6DA17 shows "the knowledge and approval/support of the International Community in 1992 [*sic*] for the procedure of collecting illegal arms and thus disarming the population as an effort to promote peace".¹⁷¹ According to him, the document refutes the Trial Chamber's conclusions with respect to Lukić's "role and significance", and its findings concerning the MUP activities and the unlawful nature of the disarming of the Kosovo Albanian population.¹⁷²

58. In response, the Prosecution asserts that Lukić neither explains the credibility of document 6DA17, nor identifies the specific findings in the Trial Judgement affected by it.¹⁷³ In the Prosecution's view, Lukić misconstrues the content of the document in claiming that it shows the international community's approval or support for the disarming of the civilian population.¹⁷⁴ Moreover, in light of the evidence considered by the Trial Chamber and its relevant findings, the Prosecution argues that Lukić fails to show that the proffered evidence would have affected the verdict.¹⁷⁵

59. In his Reply, Lukić refers to the Trial Chamber's conclusions "as to the illegality and criminality of disarming of persons".¹⁷⁶

(ii) Analysis

60. The Appeals Chamber observes that document 6DA17, entitled "Note for the file", refers to a meeting held on 22 October 1998 between representatives of the Organization for Security and Cooperation in Europe ("OSCE") and members of the MUP. The participants in the meeting purportedly arrived at "joint conclusions" concerning the return of civilians to the villages of Ostrozub/Astrazub and Dragobilje/Dragobil. These included an agreement "[t]o eliminate the

¹⁷⁰ *Ibid.*, paras 1175, 1177; see also paras 551, 796.

¹⁷¹ Motion, para. 44.

¹⁷² *Ibid.*

¹⁷³ Response, paras 53, 55.

¹⁷⁴ *Ibid.*, para. 54.

¹⁷⁵ *Ibid.*, paras 55-56.

presence of armed and uniformed persons from roads and populated areas and to as the police withdrew have citizens surrender the weapons they had received from armed groups [*sic*”].¹⁷⁷ The document further contains the typed names of the OSCE Mission representative Sean Burns and of General Major Obrad Stevanović representing the MUP. The Appeals Chamber is satisfied that document 6DA17 displays sufficient indicia of *prima facie* credibility. The document is also relevant to the issue of the arming and disarming of the civilian population in Kosovo, which is material to Lukić’s conviction.

61. Concerning the alleged impact of the evidence, as discussed in paragraph 37 above, the Trial Chamber explicitly acknowledged that the primary issue in relation to the process of arming and disarming of the civilian population in Kosovo was whether it was conducted upon ethnic lines.¹⁷⁸ At most, the proffered document shows that on one occasion the disarmament of civilians from two villages in Kosovo was agreed as a pre-condition for their return. In light of the amount of evidence considered at trial, proof of such an isolated incident would not invalidate the general finding of the Trial Chamber that the population in Kosovo was disarmed on ethnic grounds with the purpose of rendering the Kosovo Albanian population vulnerable to the forces of the FRY and Serbia.¹⁷⁹ The Appeals Chamber further notes that Lukić has explained neither how the tendered evidence contradicts the Trial Chamber’s conclusions regarding his “role and significance” nor why exclusion of document 6DA17 would lead to a miscarriage of justice. For the abovementioned reasons, Lukić’s request for admission of document 6DA17 is dismissed.

IV. DISPOSITION

62. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion in its entirety. The Appeals Chamber reiterates that all its findings above pertain strictly to the admissibility of the tendered material and must not be interpreted as expressing any views on the merits of Lukić’s appeal.

¹⁷⁶ Reply, para. 5, fn. 6.

¹⁷⁷ Motion, Annex H.

¹⁷⁸ Trial Judgement, vol. 3, para. 56.

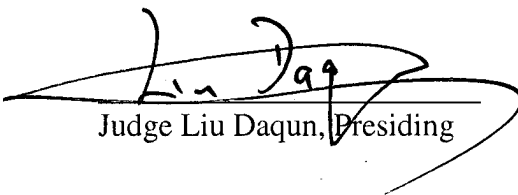
¹⁷⁹ *Ibid.*, para. 72.

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

Done this 11th day of March 2010,

At The Hague,

The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]