



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: 12 February 2010  
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**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:** 12 February 2010

**PROSECUTOR**

v.

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

***PUBLIC REDACTED VERSION***

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**DECISION ON NEBOJŠA PAVKOVIĆ'S MOTION TO ADMIT  
ADDITIONAL EVIDENCE**

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**The Office of the Prosecutor:**

Mr. Paul Rogers

**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 Criminal 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 “General Pavković Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, with Annexes A, B, C and Request to Exceed the Word Limit”, filed confidentially by Counsel for Nebojša Pavković (“Pavković”) on 14 October 2009 (“Motion”).<sup>1</sup> The Office of the Prosecutor (“Prosecution”) responded confidentially to the Motion on 12 November 2009.<sup>2</sup> On 25 November 2009, Pavković filed his confidential reply.<sup>3</sup>

## I. BACKGROUND

2. On 26 February 2009, Trial Chamber III (“Trial Chamber”) convicted Pavković pursuant to Article 7(1) of the Statute of the Tribunal (“Statute”) for 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.<sup>4</sup> The Trial Chamber sentenced Pavković to 22 years of imprisonment.<sup>5</sup>

3. Pavković filed his notice of appeal on 27 May 2009, challenging the Trial Judgement on a number of grounds.<sup>6</sup> Subsequently, the Appeals Chamber granted Pavković’s two requests for amendment of his grounds of appeal pursuant to Rule 108 of the Tribunal’s Rules of Procedure and Evidence (“Rules”).<sup>7</sup> The most recent version of Pavković’s amended appeal brief was filed on 30 September 2009.<sup>8</sup> The Prosecution’s response brief was filed on 15 January 2010.<sup>9</sup> Pavković’s reply brief is due to be filed no later than 15 February 2010.<sup>10</sup> The Trial Judgement has also been

<sup>1</sup> See also, Corrigendum to General Pavković Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115 with Annex A and B, 16 October 2009 (“Corrigendum”).

<sup>2</sup> Prosecution Response to Pavković Motion to Admit Additional Evidence, 12 November 2009 (confidential) (“Response”).

<sup>3</sup> General Pavković Reply to Prosecution Response to Motion to Admit Additional Evidence, 25 November 2009 (confidential) (“Reply”).

<sup>4</sup> *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), vol. 3, paras 788, 790, 1210.

<sup>5</sup> Trial Judgement, vol. 3, para. 1210.

<sup>6</sup> Notice of Appeal from the Judgement of 26 February 2009, 27 May 2009.

<sup>7</sup> Decision on Nebojša Pavković’s Motion to Amend his Notice of Appeal, 9 September 2009; Decision on Nebojša Pavković’s Second Motion to Amend his Notice of Appeal, 22 September 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).

<sup>8</sup> General Pavković’s Submission of his Amended Appeal Brief, 30 September 2009 (“Pavković’s Appeal Brief”).

<sup>9</sup> Prosecution Response to General Pavković’s Amended Appeal Brief, 15 January 2010 (confidential).

<sup>10</sup> Decision on Defence Requests for Extension of Time and Word Limits to File Reply Briefs, 20 January 2010.

appealed by Nikola Šainović, Dragoljub Ojdanić (“Ojdanić”), Vladimir Lazarević (“Lazarević”), Sreten Lukić and the Prosecution.<sup>11</sup>

4. In the present Motion, Pavković requests the admission as additional evidence on appeal of 35 documents that he received from the State Archives of Serbia (“State Archive”), as well as one other document.<sup>12</sup>

## 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.<sup>13</sup>

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.<sup>14</sup> 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”.<sup>15</sup> Counsel is therefore expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question.<sup>16</sup>

7. The applicant must then show that the evidence is both relevant to a material issue and credible.<sup>17</sup> Evidence is relevant if it relates to findings material to the conviction or sentence, in the

<sup>11</sup> 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); Vladimir Lazarević’s [*sic*] Defence Notice of Appeal, 27 May 2009 (confidential), Defence Submission: Lifting Confidential Status of the Notice of Appeal, 29 May 2009, and General Vladimir Lazarević’s Refiled Appeal Brief, 2 October 2009 (confidential; public redacted version filed on 20 October 2009); Sreten Lukic’s [*sic*] Notice of Appeal from Judgement 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) (filed by Counsel for Sreten Lukić); Prosecution Notice of Appeal, 27 May 2009, 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.

<sup>12</sup> Motion, paras 1, 40; See also Annexes A, B, and C to the Motion and Annexes A and B to the Corrigendum.

<sup>13</sup> Rule 115(A) of the Rules; 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, and references cited therein; see also Decision on Nikola Šainović’s Motion Requesting Admission of Additional Evidence pursuant to Rule 115 of the Rules, 28 January 2009 (“Šainović Rule 115 Decision”), para. 4, and references cited therein.

<sup>14</sup> Lazarević Rule 115 Decision, para. 6; Šainović Rule 115 Decision, para. 5.

<sup>15</sup> Lazarević Rule 115 Decision, para. 6; Šainović Rule 115 Decision, para. 5.

<sup>16</sup> Lazarević Rule 115 Decision, para. 6; Šainović Rule 115 Decision, para. 5.

<sup>17</sup> Lazarević Rule 115 Decision, para. 8; Šainović Rule 115 Decision, para. 6.

sense that those findings were crucial or instrumental to the conviction or sentence.<sup>18</sup> Evidence is credible if it appears to be reasonably capable of belief or reliance.<sup>19</sup>

8. 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 given at trial, it could show that the verdict was unsafe.<sup>20</sup> 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.<sup>21</sup>

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 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.<sup>22</sup>

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 specifying with sufficient clarity the impact the additional evidence could or would have had on the Trial Chamber's verdict.<sup>23</sup> A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.<sup>24</sup>

11. 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.<sup>25</sup>

### III. DISCUSSION

#### A. Preliminary issues

##### (a) Standard for admission of additional evidence on appeal

12. The Appeals Chamber first notes that, with respect to the standard for admission of evidence on appeal, Pavković submits that two prerequisites must be met: (i) the material must have been unavailable at trial and (ii) its consideration by the Appeals Chamber must be in the interests of

<sup>18</sup> Lazarević Rule 115 Decision, para. 8; Šainović Rule 115 Decision, para. 6.

<sup>19</sup> Lazarević Rule 115 Decision, para. 8; Šainović Rule 115 Decision, para. 6.

<sup>20</sup> Lazarević Rule 115 Decision, para. 9; Šainović Rule 115 Decision, para. 7.

<sup>21</sup> Lazarević Rule 115 Decision, para. 9; Šainović Rule 115 Decision, para. 7.

<sup>22</sup> Lazarević Rule 115 Decision, para. 10; Šainović Rule 115 Decision, para. 8.

<sup>23</sup> Lazarević Rule 115 Decision, para. 11; Šainović Rule 115 Decision, para. 9.

<sup>24</sup> Lazarević Rule 115 Decision, para. 11; Šainović Rule 115 Decision, para. 9.

<sup>25</sup> Lazarević Rule 115 Decision, para. 12; Šainović Rule 115 Decision, para. 10.

justice.<sup>26</sup> Pavković argues that the admission of evidence is in the “interests of justice” if it is relevant to a material issue, credible and “would probably show that the conviction or sentence was unsafe”.<sup>27</sup> Pavković asserts, moreover, that any doubt as to whether the admission of additional evidence would be in the interests of justice must be resolved in favour of the appellant.<sup>28</sup> The Appeals Chamber finds that Pavković misapprehends the standard for admission of additional evidence on appeal, as the “interests of justice” test reflects neither the current requirements of Rule 115(B) of the Rules nor the established jurisprudence of the Tribunal.<sup>29</sup> The Appeals Chamber will therefore examine Pavković’s submissions in accordance with the correct standard articulated above.<sup>30</sup>

(b) Request for an extension of word limit

13. Pavković seeks leave to exceed the word limit for his Motion “so as to fully address each document which is sought admission”.<sup>31</sup> The Prosecution submits that Pavković’s request is moot because the Motion is within the 9,000 words permitted for motions filed pursuant to Rule 115 of the Rules.<sup>32</sup> While Pavković has not withdrawn his request for an extension of the word limit, the Appeals Chamber notes that his Motion is indeed substantially less than the 9,000 words permissible pursuant to paragraph 5 of the applicable Practice Direction on Length of Briefs and Motions. His request is therefore moot.<sup>33</sup>

<sup>26</sup> Motion, paras 5, 8-9.

<sup>27</sup> *Ibid.*, para. 8.

<sup>28</sup> *Ibid.*, para. 9.

<sup>29</sup> The jurisprudence relied upon by Pavković refers to Rule 115(B) of the Rules prior to its amendment in July 2002 (Motion, paras 5, 8-9, referring to *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para. 73; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001 (confidential), 11 April 2001, para. 6; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, paras 75-76). Prior to its amendment, Rule 115(B) of the Rules provided the following with respect to the admissibility of evidence that was unavailable at trial: “The Appeals Chamber shall authorize the presentation of such evidence if it considers that the interests of justice so require”. Following the amendment in 2002, the provision reads: “If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial”. Therefore, the “interests of justice” is no longer the applicable standard for admissibility of additional evidence on appeal (*cf. Lazarević* Rule 115 Decision, para. 13).

<sup>30</sup> See *supra*, paras 5-11.

<sup>31</sup> Motion, para. 3.

<sup>32</sup> Response, fn. 1.

<sup>33</sup> Practice Direction on the Length of Briefs and Motions, IT/184/Rev.2, 16 September 2005.

## B. Material tendered as additional evidence on appeal

### 1. Availability and due diligence

#### (a) Arguments of the parties

14. The Appeals Chamber understands Pavković to offer three main arguments as to why the 36 tendered documents were unavailable to him at trial. First, Pavković argues that these documents were only disclosed to him by the Serbian Government on 18 August 2009.<sup>34</sup> Second, Pavković argues that the majority of the proposed material pertains to events in 1998 which, according to him, were outside of the time-period of crimes charged in the Third Amended Joinder Indictment (“Indictment”).<sup>35</sup> In Pavković’s submission, the Prosecution began to place greater emphasis on events in 1998 as the basis of its JCE theory of the case at a relatively late stage in the trial proceedings.<sup>36</sup> Pavković refers to his arguments presented under the eleventh ground of appeal relating to fair trial, claiming that this, combined with the speed at which the trial proceeded, meant that his Defence team was unable to conduct adequate investigations into the Prosecution’s allegations pertaining to events in 1998.<sup>37</sup> Finally, Pavković submits that the majority of the documents sought to be admitted pertain to events about which witness Dimitrijević testified.<sup>38</sup> He contends that the time period between the Trial Chamber’s order for witness Dimitrijević to testify, his appearance in court, and the deadline for filing the final trial briefs, was too short for him to obtain and put those documents to witness Dimitrijević in court.<sup>39</sup>

15. In relation to Pavković’s claim that he received some of the documents from Serbia in August 2009, the Prosecution responds that Pavković did not provide any details regarding his efforts to obtain these materials earlier.<sup>40</sup> It further responds that simply presenting information as to when the material was received by the applicant is insufficient for the purposes of Rule 115 of the Rules.<sup>41</sup> The Prosecution argues that, in order to demonstrate unavailability and due diligence,

<sup>34</sup> Motion, para. 11, referring to document [REDACTED].

<sup>35</sup> *Ibid.*, para. 12; *Prosecutor v. Milan Milutinović*, Case No. IT-05-87-PT, Third Amended Joinder Indictment, 21 June 2006.

<sup>36</sup> *Ibid.*, paras 12-13; See also, Pavković’s Appeal Brief, para. 334.

<sup>37</sup> *Ibid.*, para. 12.

<sup>38</sup> *Ibid.*, para. 15.

<sup>39</sup> Pavković notes that the Trial Chamber only issued an order for this witness to appear on 26 June 2008, witness Dimitrijević testified via video link on 8 and 9 July 2008 and closing briefs by all parties were to be filed on 15 July 2008 (Motion, para. 14).

<sup>40</sup> Response, para. 1.

<sup>41</sup> *Ibid.*, para. 9, referring to *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Dragomir Milošević’s Third Motion to Present Additional Evidence, 8 September 2009 (“*Milošević* Rule 115 Decision”), para. 16; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence Before the Appeals Chamber, 30 June 2005 (“*Galić* Rule 115 Decision”), paras 22, 94; *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-A, Decision on Request to Admit Additional Evidence, 27 April 2007, para. 11 [*sic*].

Pavković should have explained his efforts to obtain the evidence earlier, his problems in obtaining the evidence, and his communication of these problems to the Trial Chamber.<sup>42</sup> Moreover, in relation to those documents pertaining to witness Dimitrijević's testimony, the Prosecution submits that issues such as Pavković operating outside of the chain of command in 1998, and his "tense relationship" with Dušan Samardžić, the 3<sup>rd</sup> Army Commander at that time, were not raised for the first time through witness Dimitrijević's testimony.<sup>43</sup>

16. The Prosecution adds that documents 4DA7 and 4DA35 were available to Pavković prior to the start of the trial.<sup>44</sup> More specifically, it argues that Pavković must have been aware of document 4DA7 before trial commenced, as it is on a list of Army of Yugoslavia ("VJ") documents compiled by Pavković in 2001,<sup>45</sup> and that document 4DA35 was publicly available, as it is an excerpt of Lord Gilbert's testimony on 20 June 2000 to the British House of Commons Defence Select Committee ("Defence Committee") and was published as part of its public report, "Lessons of Kosovo", in the same year.<sup>46</sup> In the Prosecution's view, this Defence Committee inquiry formed a basis for the cross-examination of witness Naumann by Ojdanić's Counsel and was therefore available to Pavković at trial.<sup>47</sup> The Prosecution further adds that documents 4DA1, 4DA28, and a 26 June 1998 Combat Report were demonstrably available to Pavković at trial.<sup>48</sup>

17. The Prosecution finally responds that documents 4DA1, 4DA2 and 4DA27 are not on the list of the materials sent by the Serbian Government on 18 August 2009. The Prosecution submits that these documents should be rejected because Pavković has failed to demonstrate otherwise when he obtained these documents or how they were unavailable to him at trial.<sup>49</sup>

18. In his Reply, Pavković accepts that documents 4DA1, 4DA7, 4DA28, and the 26 June 1998 Combat Report were available to him at trial and should not have been included in the Motion.<sup>50</sup> In relation to document 4DA35, Pavković replies that Lord Gilbert's testimony before the Defence

<sup>42</sup> *Ibid.*, para. 9.

<sup>43</sup> *Ibid.*, para. 14.

<sup>44</sup> *Ibid.*, para. 7.

<sup>45</sup> *Ibid.*, para. 7, fn. 17 referring to Exhibit 6D1130.

<sup>46</sup> *Ibid.*, para. 7, fn. 19 referring to "Lessons of Kosovo," HC 347 (2000), available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmdfence/347/34702.htm>.

<sup>47</sup> *Ibid.*, para. 7, referring to Klaus Naumann, 13 Dec 2006, T. 8277 and Exhibit 3D377, pp. 1-2.

<sup>48</sup> *Ibid.*, paras 5-6, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Pavković First Renewed Motion for Admission of Documents from Bar Table, 27 September 2007, para. 7(a). The Prosecution notes further that (i) document 4DA1 was admitted into evidence at trial as Exhibits 5D60 and 4D130 (both public); and (ii) the 26 June 1998 Combat Report is the same as the document that was admitted into evidence as Exhibit 5D63 (public). Document 4DA28 was, according to the Prosecution, also clearly available at trial, because it is the same as document 6D1417, which was not admitted but was mentioned in Lazarević's testimony (Response, para. 6, referring to Trial Judgement, vol. 1, para. 1015 and Vladimir Lazarević, 8 Nov 2007, T. 17905).

<sup>49</sup> *Ibid.*, para. 8, referring to *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence, 20 August 2008 ("Krajišnik Rule 115 Decision of 20 August 2008"), para. 23 and *Galić* Rule 115 Decision, para. 94.

<sup>50</sup> Reply, para. 3.

Committee was never mentioned during the cross-examination of witness Naumann by Ojdanić's Counsel nor is Exhibit 3D377 a transcript of Lord Gilbert's testimony.<sup>51</sup> Pavković submits that he first became aware of Lord Gilbert's testimony before the Defence Committee upon reading the book "First Do No Harm" which was published in 2009.<sup>52</sup>

19. In relation to the remainder of the documents, Pavković replies that the exercise of due diligence is inextricably linked with the right to "adequate time and facilities for the preparation of his defence", guaranteed by Article 21 of the Statute.<sup>53</sup> Pavković reiterates his claim that this provision was violated during the trial and refers to the arguments raised in his eleventh ground of appeal.<sup>54</sup> He contends that "[w]hen the implicit presumption of Rule 115 that adequate time has been allotted an accused under Article 21 [of the Statute] fails, then the Rule must be interpreted very liberally in allowing additional evidence during the appeals stage".<sup>55</sup>

(b) Analysis

(i) Documents 4DA1, 4DA7, 4DA28 and the 26 June 1998 Combat Report

20. Given Pavković's concession that these documents were available to him at trial and should not have been included in the Motion, and that they already form part of the trial record,<sup>56</sup> the Appeals Chamber finds that they cannot constitute additional evidence to be admitted on appeal in this case. It is, consequently, unnecessary to examine them in considering the Motion.<sup>57</sup>

(ii) Documents 4DA3 through 4DA6, 4DA8 through 4DA26, and 4DA29 through 4DA34

21. The Appeals Chamber turns to Pavković's argument that these documents were unavailable because they pertain to issues raised during witness Dimitrijević's testimony which occurred at a very late stage in the proceedings, after the closure of both the Prosecution and the Defence cases.<sup>58</sup> In this regard, the Appeals Chamber recalls that the party seeking the admission of evidence pursuant to Rule 115 of the Rules bears the burden of demonstrating *how* it exercised due

<sup>51</sup> *Ibid.*, paras 4-5.

<sup>52</sup> *Ibid.*, para. 5, referring to David N. Gibbs, *First Do No Harm* (Vanderbilt University Press, 2009).

<sup>53</sup> *Ibid.*, para. 7.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, para. 16

<sup>56</sup> Exhibits 4D130 and 5D60 in relation to document 4DA1; Exhibit 5D63 in relation to the 26 June 1998 Combat Report; Exhibit 6D1130 and Milovan Vlajković, 21 Sep 2007, T. 16116-16117 in relation to document 4DA7; Document 6D1417, Trial Judgement, vol. 1, para. 1015, and Vladimir Lazarević, 8 Nov 2007, T. 17905 in relation to document 4DA28.

<sup>57</sup> *Cf. Lazarević Rule 115 Decision*, para. 20, and references cited therein.

<sup>58</sup> Motion, paras 12-14; Pavković specifies that witness Dimitrijević testified via video-link on 8 and 9 July 2008, whereas the parties were ordered to file their final briefs by 15 July 2008, just days later (*ibid.*, para. 14).



diligence.<sup>59</sup> The Appeals Chamber finds that the simple assertion that he lacked sufficient time between the Trial Chamber's order for the witness to testify and his appearance in court is *per se* insufficient to meet this burden.

22. However, the Appeals Chamber also notes Pavković's submission that, at earlier stages of proceedings, he lacked sufficient notice that events in 1998 would be included in the Indictment<sup>60</sup> and because the trial progressed rapidly, he was unable to investigate these allegations properly.<sup>61</sup> In particular, the Appeals Chamber takes note of Pavković's claim that he made the Trial Chamber aware of the difficulties he encountered in reviewing all of the material disclosed to him under Rule 68 of the Rules in preparation for the trial and as it progressed.<sup>62</sup> The Appeals Chamber also takes into account his submission that, at the status conference of 31 March 2006, the Prosecution announced that it would call 40-50 additional witnesses in relation to whom disclosure had not been provided.<sup>63</sup> The trial commenced on 10 July 2006.<sup>64</sup> In these circumstances, it is plausible that Pavković was unable, at the relevant time, to take the necessary steps to identify and locate these documents.

23. Without expressing any views on the merits of Pavković's eleventh ground of appeal, the Appeals Chamber considers that, in the particular circumstances of this case, it is conceivable that these documents remained undiscovered at trial despite the exercise of required due diligence. In this sense, the Appeals Chamber is of the view that if, at the stage of rendering its judgement in this case, it were to grant Pavković's eleventh ground of appeal but refuse, at present, to consider the tendered material as unavailable at trial, hence applying a much stricter standard for their admission, it would be difficult to remedy the potential prejudice to Pavković. Consequently and for reasons of fairness, the Appeals Chamber is satisfied that the abovementioned documents were unavailable to Pavković for the purposes of Rule 115 of the Rules.

(iii) Documents not included in the list sent by the Serbian Government on 18 August 2009

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<sup>59</sup> See *Krajišnik* Rule 115 Decision of 20 August 2008, para. 23.

<sup>60</sup> Pavković Appeal Brief, para. 334.

<sup>61</sup> Motion, para. 12.

<sup>62</sup> See Reply, paras 9-13. Pavković emphasises that the Prosecution was authorised to "include in the indictment a list of 1998 crimes that could become part of the evidence in the case" on 22 March 2006, *i.e.* "only a few short weeks before the trial was to begin". He states that his team continued to investigate these crimes until August 2009, but considering the amount of the disclosure under Rule 68 of the Rules ongoing through the same period, his team could not abandon the Rule 68 examination "to go off on an expedition into the military archives in Belgrade in search of documents from 1998" (Reply, paras 8, 13).

<sup>63</sup> Status Conference, 31 Mar 2006, T. 164; see also Pavković Appeal Brief, para. 333.

<sup>64</sup> Trial Judgement, vol. 1, para. 3.

24. The Appeals Chamber notes that documents 4DA2 and 4DA27 are not on the list of documents sent by the Serbian Government on 18 August 2009. Pavković does not offer any explicit explanation as to why documents not on that list were unavailable during trial. Pavković also fails to explain how such documents were otherwise obtained. Moreover, the Appeals Chamber is unable to ascertain why Pavković could not, with the exercise of due diligence, acquire these documents during trial. Therefore, the Appeals Chamber finds that these documents were available to Pavković at trial for the purposes of Rule 115 of the Rules.

(iv) Document 4DA35

25. The Appeals Chamber recalls that, in assessing the availability of evidence at trial, it will also consider whether any of the information sought to be admitted was available in any other form during trial.<sup>65</sup> Although Lord Gilbert's testimony before the Defence Committee is not expressly referenced in Exhibit 3D377 or during the cross-examination of witness Naumann by Ojdanić's Counsel, document 4DA35 forms part of a range of publicly available hearings taken before the Defence Committee from March to June 2000.<sup>66</sup> Some of these hearings served as the basis of the cross-examination of witness Naumann by Ojdanić's Counsel.<sup>67</sup> Considering the well-publicised nature of this inquiry at the time, the fact that Pavković was put on notice of its relevance through Ojdanić's cross-examination, and the fact that other testimony from these hearings was easily and publicly accessible, it is reasonable to expect Pavković to have examined the entire range of Defence Committee hearings during trial. Consequently, the Appeals Chamber is not convinced that this document was unavailable and finds that Pavković, with the exercise of due diligence, could have obtained this document at trial.

(c) Conclusion

26. In light of the above, the Appeals Chamber will proceed to consider whether documents 4DA3 through 4DA6, 4DA8 through 4DA26, and 4DA29 through 4DA34, satisfy the remainder of the criteria provided for in Rule 115 of the Rules. As for documents 4DA2, 4DA27 and 4DA35, the Appeals Chamber recalls that they cannot be admitted as additional evidence on appeal unless it has been demonstrated that their exclusion would lead to a miscarriage of justice, in that if they had been admitted at trial, they *would* have affected the verdict.<sup>68</sup>

<sup>65</sup> See *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-31/1-A, Decision on Mile Mrkšić's Second Rule 115 Motion, 13 February 2009, para. 15.

<sup>66</sup> See "Lessons of Kosovo" HC 347 (2000), available at <http://www.publications.parliament.uk/pa/cm/199900/cmselect/cmdfence/347/34702.htm>.

<sup>67</sup> See, Klaus Naumann, 13 Dec 2006, T. 8277.

<sup>68</sup> See *supra* para. 9.

## 2. Credibility of the proposed documents

27. Pavković makes no specific submissions on the credibility of any of the documents tendered. However, in most cases, he does make reference to their provenance.<sup>69</sup> The Prosecution does not address the issue of credibility either.

28. The Appeals Chamber recalls that evidence is credible if it appears to be reasonably capable of belief or reliance.<sup>70</sup> The Prosecution does not dispute the credibility of any of the submitted documents. The Appeals Chamber notes that, of the 32 remaining documents, 29 are drawn from the State Archive. All of them are military documents, and most of them bear indicia of credibility such as signatures and relevant stamps. Accordingly, the Appeals Chamber finds the 29 documents originating from the State Archive to be *prima facie* credible for the purposes of Rule 115(B) of the Rules. Document 4DA35 originates from the Defence Committee and, as noted above, is available on the official web page of the Parliament of the United Kingdom.<sup>71</sup> The Appeals Chamber thus finds this document also to be *prima facie* credible. As to the two remaining documents, 4DA2 and 4DA27, both bear sufficient indicia of credibility, such as stamps or signatures or both, and the Appeals Chamber finds them also to be *prima facie* credible in the sense of Rule 115(B) of the Rules.

## 3. Relevance and potential impact upon verdict

29. At the outset, the Appeals Chamber notes that Pavković makes a number of general arguments as to relevance and potential impact which relate either to all of the tendered material, or to a large or unspecific grouping thereof. In particular, Pavković submits that “[t]he majority of documents for which admission is sought pertain to events about which Dimitrijević testified”.<sup>72</sup> Pavković adds that the level of the Trial Chamber’s reliance upon the testimony of witness Dimitrijević means that the documents which address this testimony are relevant to a material issue in the case and should be admitted.<sup>73</sup>

<sup>69</sup> Motion, paras 18-23, 25-30, 32-38.

<sup>70</sup> *Milošević* Rule 115 Decision, para. 8; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Appellant Momčilo Krajišnik’s Motion to Call Radovan Karadžić pursuant to Rule 115, 16 October 2008 (“*Krajišnik* Rule 115 Decision of 16 October 2008”), para. 5; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.1, Decision on Prosecution’s Application to Present Additional Evidence in Its Appeal Against the Re-Assessment Decision, 10 March 2006 (confidential), para. 16; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 63.

<sup>71</sup> See *supra*, fn. 46.

<sup>72</sup> Motion, para. 15.

<sup>73</sup> *Ibid.*, para. 16, referring to Trial Judgement, vol. 3, fns 1538-1541, 1554-1555, 1575, 1605, 1606, 1611, 1614, 1616, 1653, 1684-1688, and 1979.

30. The Prosecution responds that the issues raised by the proposed evidence were not first raised through witness Dimitrijević's testimony at the end of trial.<sup>74</sup> It submits that issues such as Pavković operating outside the chain of command in 1998 and Pavković's tense relationship with Samardžić were raised in the Prosecution's Pre-Trial Brief and addressed by Pavković in his Rule 98bis submissions.<sup>75</sup> The Prosecution also contends that the evidence is irrelevant because it does not address findings that were "crucial or instrumental to the conviction or sentence".<sup>76</sup> [REDACTED] The Prosecution asserts that the Trial Chamber did not discuss, in its conclusions on responsibility, Pavković operating outside the chain of command in 1998.<sup>77</sup>

31. The Prosecution also argues that Pavković has not explained how any of the documents may have or would have affected the verdict.<sup>78</sup> The Prosecution argues that Pavković's Motion fails to identify with precision the specific finding of fact to which the additional evidence is directed, lacks support, and merely repeats his trial submissions.<sup>79</sup> It adds that Pavković's arguments as to the impact of documents 4DA3, 4DA4, 4DA8 through 4DA27, 4DA30 through 4DA32 and 4DA35 must be rejected and that the Motion should be summarily dismissed.<sup>80</sup>

32. In his Reply, Pavković submits that all of the proposed evidence bears upon the findings as to Pavković's participation in the JCE and his intent to participate therein.<sup>81</sup> [REDACTED] As to factual findings, Pavković asserts that the documents would have had an impact on the verdict in relation to events in 1998,<sup>82</sup> particularly the chain of command in the Priština Corps at that time.<sup>83</sup> He argues that the cumulative effect of the proposed exhibits would have shown a reasonable alternative to the Trial Chamber's findings in relation to chain of command, existence of a common criminal plan and the relationship between Pavković and Samardžić, which would have favoured him and altered the verdict.<sup>84</sup>

33. Having considered Pavković's general submissions, the Appeals Chamber finds that, as such, these assertions fall short of demonstrating why the Trial Chamber could or would have come to a different conclusion had it considered the proposed evidence. Moreover, these broad arguments relate to many and various factual findings made by the Trial Chamber. The Appeals Chamber

<sup>74</sup> Response, para. 14, referring to Motion, paras 14-16, fn. 13.

<sup>75</sup> *Ibid.*, para. 14, referring to Prosecution's Pre-Trial Brief Pursuant to Rule 65ter(E)(i), 10 May 2006, paras 109-113 and Rule 98bis Hearing, 2 May 2007, T. 12483-12485.

<sup>76</sup> *Ibid.*, para. 13, referring to *Milošević* Rule 115 Decision, para. 8.

<sup>77</sup> *Ibid.*, para. 13, referring to Trial Judgement, vol. 3, paras 767-790.

<sup>78</sup> *Ibid.*, paras 2, 12.

<sup>79</sup> *Ibid.*, paras 11, 15.

<sup>80</sup> *Ibid.*, paras 2, 11, 15.

<sup>81</sup> Reply, paras 18-22.

<sup>82</sup> *Ibid.*, para. 20, fn. 10.

<sup>83</sup> [REDACTED].

<sup>84</sup> Reply, para. 26.

recalls that the applicant bears the burden of identifying with precision the specific finding made by the Trial Chamber to which the additional evidence is directed, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the Trial Chamber's decision.<sup>85</sup> In this sense, the Appeals Chamber will proceed with the analysis subject to whether Pavković provides, in addition to the said general arguments, sufficient submissions to show the relevance and the potential impact upon the verdict in relation to each of the documents. Absent such specific submissions, the Appeals Chamber is unable to discern which findings of the Trial Chamber are susceptible of being affected by the proffered material.

34. The Appeals Chamber will first consider the documents found to have been unavailable to Pavković at trial, and then turn to the three documents it found to have been available or discoverable through the exercise of due diligence.

(a) Admissibility of documents found to have been unavailable at trial

(i) Document 4DA3

35. [REDACTED] The Prosecution submits that this document would not have affected the verdict as it is not relevant, does not address contrary findings and evidence, and repeats some of Pavković's trial submissions.<sup>86</sup>

36. The Appeals Chamber considers that Pavković has not demonstrated that the knowledge of Perišić and the General staff of the VJ as to the overall situation in Kosovo and use of the units of the Priština Corps were key elements in the Trial Chamber's reasoning concerning his *mens rea* and his contribution to the JCE.<sup>87</sup> Pavković has failed to specify a finding of fact made by the Trial Chamber to which this document pertains and has not substantiated with sufficient clarity the impact that this document could have had on the Trial Chamber's verdict. The Appeals Chamber therefore dismisses the request for admission of this document into evidence.

(ii) Documents 4DA4, 4DA6, 4DA8 through 4DA17, 4DA19 through 4DA26, 4DA32 through 4DA34

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<sup>85</sup> See *supra*, para. 10.

<sup>86</sup> Response, Appendix, p. 1.

<sup>87</sup> See Trial Judgement, vol. 3, paras 767-782.

37. [REDACTED] Pavković adds that in paragraphs 640-678 of the Trial Judgement the Trial Chamber discussed Pavković's role as the commander of the Priština Corps in 1998 and made a number of findings relevant to his criminal responsibility.<sup>88</sup> [REDACTED]

38. [REDACTED] The Prosecution also argues that this proposed evidence does not address the relevant Trial Chamber findings.<sup>89</sup> The Prosecution submits that the Trial Chamber has found that on 20 July 1998 Perišić, Chief of the VJ General Staff at that time, banned use of VJ in Kosovo's interior absent his instructions and that a week later, on 28 July 1998, Perišić authorised VJ operations in the interior.<sup>90</sup> The Prosecution adds that all but one of these documents relate to the period outside the 20 – 28 July 1998 time-frame and that any references in these reports to VJ operations in Kosovo would be consistent with Perišić's 28 July 1998 authorisation. Therefore, these documents would not have affected the verdict.<sup>91</sup>

39. Pavković replies that the Prosecution's contention that the only time Pavković used the VJ outside the chain of command was between 20 and 28 July 1998, is neither in line with Prosecution's arguments at trial nor with the Trial Judgement.<sup>92</sup>

40. The Appeals Chamber understands that Pavković's submissions in relation to these documents go to the issue of the chain of command between Pavković and his superiors in 1998, and the question of whether Pavković operated within it. This issue is relevant to the Trial Chamber's analysis of Pavković's *mens rea* and his contribution to the JCE.<sup>93</sup> [REDACTED] As to the Prosecution's argument that the documents do not address the relevant time-frame of 20-28 July 1998, the Appeals Chamber notes that the Trial Chamber has found, *inter alia*, that Pavković had clashed with Samardžić and Perišić in early August, in September, and in October 1998.<sup>94</sup> The period to which the clash between Pavković and his superiors is relevant is therefore not limited to that indicated by the Prosecution. In view of the Trial Chamber's findings that Pavković had acted outside the chain-of-command in 1998,<sup>95</sup> the Appeals Chamber finds these documents relevant to the Trial Chamber's findings as to the divergence between Pavković and other senior figures and his level of influence.<sup>96</sup>

<sup>88</sup> Reply, para. 20.

<sup>89</sup> Response, para. 16, referring to Trial Judgement, vol. 1, para. 572; vol. 3, paras 649, 655, 656.

<sup>90</sup> *Ibid.*, para. 16, referring to Trial Judgement, vol. 1, para. 572; vol. 3, paras 649, 655, 656.

<sup>91</sup> *Ibid.*, para. 17.

<sup>92</sup> Reply, para. 24, referring to Pavković Appeal Brief, paras 111-150, and Trial Judgement, vol. 3, para. 665.

<sup>93</sup> Trial Judgement, vol. 3, paras 773-774, 778.

<sup>94</sup> *Ibid.*, paras 657-665.

<sup>95</sup> *Ibid.*, paras 657-665.

<sup>96</sup> See *ibid.*, paras 643-664, 680-698, 773, 774, 778.

41. Furthermore, these factual matters were of considerable importance in the Trial Chamber's reasoning underpinning its findings that (i) Pavković possessed the *mens rea* necessary for JCE liability and (ii) he contributed significantly to the realisation of the common purpose.<sup>97</sup> Accordingly and without prejudging the outcome of the appeals pending in this case, the Appeals Chamber finds that these documents could have had an effect upon the determination that Pavković possessed the *mens rea* necessary for JCE liability or upon the finding that he contributed significantly to the crimes. The Appeals Chamber concludes that documents 4DA4, 4DA6, 4DA8 through 4DA17, 4DA19 through 4DA26, and 4DA32 through 4DA34 could have affected the verdict and admits them as additional evidence on appeal.

(iii) Document 4DA5

42. [REDACTED] The Prosecution also argues that it would not have affected the verdict because the information contained therein was already before the Trial Chamber.<sup>98</sup>

43. The mere indication by Pavković that this document shows [REDACTED], do not meet the requirements of Rule 115 of the Rules, even when considered in conjunction with Pavković's general assertions discussed above.<sup>99</sup> Pavković has failed to specify a finding of fact made by the Trial Chamber to which this document pertains and has not substantiated with sufficient clarity the impact that this document could have had upon the Trial Chamber's verdict. The Appeals Chamber therefore dismisses Pavković's request for admission of this document into evidence.

(iv) Document 4DA18

44. [REDACTED] The Prosecution submits that the document is neither relevant nor that it would have affected the Trial Chamber's verdict.<sup>100</sup>

45. The Appeals Chamber understands Pavković to suggest that this document shows [REDACTED] In light of the Appeals Chamber's findings in relation to documents 4DA4, 4DA6, 4DA8 through 4DA17, 4DA19 through 4DA26, 4DA32 through 4DA34,<sup>101</sup> the Appeals Chamber finds this document relevant for the purposes of Rule 115 of the Rules. Likewise, taking into consideration the findings as to the said documents, the Appeals Chamber also finds that that document 4DA18 could have had an effect upon the verdict. This document is therefore admitted as additional evidence on appeal.

<sup>97</sup> See *ibid.*, paras 773-774, 778, 781-782.

<sup>98</sup> Response, para. 18, referring to Trial Judgement, vol. 3, para. 656 and Exhibit P1468, p. 13.

<sup>99</sup> See *supra*, para. 33.

<sup>100</sup> Response, paras 13, 15, Appendix, p. 4.

<sup>101</sup> See *supra*, paras 40-41.

(v) Document 4DA29

46. Other than describing the document as communication “from the National Council for Cooperation with the International Criminal Tribunal for the Former Yugoslavia to Aleksandar Aleksić, Co-Counsel for General Pavković”,<sup>102</sup> Pavković makes no specific reference to the relevance or impact of document 4DA29. The Prosecution makes no arguments in relation thereto either.

47. Document 4DA29 is the correspondence between Pavković’s counsel and Serbia’s Office of the National Council for Cooperation with the Tribunal. The document contains a list of documents provided to Pavković by Serbia and it provides some history to the requests made in the Motion. As such, document 4DA29 assists the Appeals Chamber in the consideration of the Motion. However, Pavković failed to show that it is of any relevance to, and could have any impact upon, any of the Trial Chamber’s findings. Pavković’s request for admission of document 4DA29 as additional evidence on appeal is therefore dismissed.

(vi) Document 4DA30

48. [REDACTED] The Prosecution submits that this document is irrelevant, and would not have affected the verdict as it does not address contrary findings and evidence, and repeats some of Pavković’s trial submissions.<sup>103</sup>

49. Pavković has failed to specify a finding of fact made by the Trial Chamber to which this document pertains and has not substantiated with sufficient clarity the impact that this document could have had upon the Trial Chamber’s verdict. The Appeals Chamber therefore dismisses the request for admission of this document into evidence.

(vii) Document 4DA31

50. [REDACTED] The Prosecution submits that the document is irrelevant, that it does not address any contrary findings, and that it would not have affected the Trial Chamber’s verdict.<sup>104</sup>

51. As stated above, the issue of the chain of command, and whether Pavković operated within it, is material to the Trial Chamber’s analysis of Pavković’s *mens rea* and contribution to the

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<sup>102</sup> Motion, paras 11, 32.

<sup>103</sup> Response, Appendix, p. 5.

<sup>104</sup> Response, paras 13, 15, Appendix, p. 5.



JCE.<sup>105</sup> The Appeals Chamber finds, therefore, that document 4DA3 is relevant for the purposes of Rule 115 of the Rules.

52. As to the impact of this document, Pavković refers to paragraph 643 of volume 3 of the Trial Judgement.<sup>106</sup> Exhibit P1401 pertains only to the first three sentences of that paragraph. The relevant section reads as follows

From 21 April to 12 May 1998 Pavković used a variety of VJ units to engage in combat operations in Kosovo. However, these efforts were not successful in destroying the KLA. Consequently, in May and June 1998 Pavković was involved in a series of meetings concerning the increased use of the VJ in Kosovo to combat the KLA. In May Pavković presented a plan to take action against the KLA in Kosovo, first to Samardžić and then to Perišić.<sup>107</sup>

53. Exhibit P1401 is a document sent by Pavković, also on 13 May 1998, which is entitled “Submitting conclusions from the assessment and proposal for the engagement of the PrK/Priština Corps forces”. [REDACTED] Pavković has therefore failed to show how the admission of document 4DA31 could have affected the verdict. The Appeals Chamber accordingly dismisses the request for its admission pursuant to Rule 115 of the Rules.

(b) Admissibility of documents found to have been available at trial

(i) Documents 4DA2 and 4DA27

54. [REDACTED] The Prosecution responds that the documents are not relevant and that they would not have affected the verdict.<sup>108</sup> In his Reply, Pavković makes a general argument that these documents pertain to the issue of the chain of command in the Priština Corps in 1998.<sup>109</sup>

55. Pavković has failed to specify with sufficient clarity the impact this additional evidence would have had on the Trial Chamber’s verdict and has therefore not met this requirement of Rule 115 of the Rules. The Appeals Chamber will therefore not consider the tendered material any further and dismisses Pavković’s request for their admission as additional evidence on appeal.

(ii) Document 4DA35

56. Document 4DA35 is an extract of the statement given by Lord Gilbert before the Defence Committee on 20 July 2000. Pavković argues that it bears upon the reasons for the failure of the peace negotiations and that “it was NATO that destroyed Rambouillet”.<sup>110</sup> Pavković moreover

<sup>105</sup> See *supra*, paras 40-41.

<sup>106</sup> Motion, para. 34, fn. 16.

<sup>107</sup> Trial Judgement, vol. 3, para. 643, referring to Milan Đaković, 19 May 2008, T. 26409–26411; Exhibit P1401.

<sup>108</sup> Response, Appendix, pp. 1, 5.

<sup>109</sup> Reply, para. 18.

<sup>110</sup> *Ibid.*, para. 23.

contends that the document “goes to the core allegations, that of a Joint Criminal Enterprise by Serb leaders”, and that it “demonstrates the lack of any plan on the part of the Serb authorities as far back as October 1998”.<sup>111</sup> The Prosecution submits that this document would not have affected the verdict as it does not address contrary findings and evidence, and that Pavković’s arguments in relation thereto are repetitive of his trial submissions.<sup>112</sup>

57. In the proposed evidence, Lord Gilbert offers his view of the peace negotiations held in Rambouillet. It is clear from the reasoning of the Trial Chamber that the issue of who was responsible for the failure of the Rambouillet negotiations was a recurring theme in the Trial Judgement, and was a material issue at trial.<sup>113</sup> The Appeals Chamber finds, therefore, that document 4DA35 is relevant for the purposes of Rule 115 of the Rules.

58. However, Pavković has failed to direct the Appeals Chamber to a specific finding of fact by the Trial Chamber to which this document pertains. The Appeals Chamber notes that the Trial Chamber found that there existed a common criminal purpose on the basis of a number of factors such as a discernible pattern of crimes committed in Kosovo by the forces of the Federal Republic of Yugoslavia (“FRY”) and Serbia during the Indictment period,<sup>114</sup> and discriminatory arming of non-Albanians and disarming of Kosovo Albanians.<sup>115</sup> Also relevant, in this regard, were the positioning of high-level officials to facilitate the common purpose,<sup>116</sup> and evidence of attempts at obstruction of justice (such as concealment of bodies).<sup>117</sup> The Appeals Chamber further notes that although the Trial Chamber found partial responsibility on behalf of the FRY delegation for causing the negotiations to fail, it also recognized that the other parties were at fault as well.<sup>118</sup>

59. Pavković has failed to specify a finding of fact by the Trial Chamber according to which the partial responsibility of the FRY/Serbian delegation for the failure to reach a negotiated settlement at Rambouillet was evidence of the existence of the JCE. The Appeals Chamber has considered the Trial Chamber’s finding that the failure of the Rambouillet negotiations provided the FRY authorities with an opportunity to bring in additional forces in breach of the October agreements,<sup>119</sup> yet this falls short of demonstrating that the failure of those negotiations itself was in any way evidence of the existence of the JCE. Therefore, even if document 4DA35 conclusively proved that the FRY/Serbian delegation was not responsible for the failure of the Rambouillet negotiations,

<sup>111</sup> Motion, para. 38; Corrigendum, para. 4.

<sup>112</sup> Response, Appendix, p. 6.

<sup>113</sup> See, *inter alia*, Trial Judgement, vol. 1, paras 353-412, vol. 3, paras 76, 92.

<sup>114</sup> Trial Judgement, vol. 3, para. 46.

<sup>115</sup> *Ibid.*, vol. 3, para. 72.

<sup>116</sup> *Ibid.*, vol. 3, para. 85.

<sup>117</sup> *Ibid.*, vol. 3, para. 88.

<sup>118</sup> See *inter alia*, Trial Judgement, vol. 1, paras 353-412, vol. 3, paras 76, 92.

<sup>119</sup> Trial Judgement, vol. 3, paras 76, 92.

Pavković has not demonstrated how that would have affected the verdict. Pavković's request for admission of document 4DA35 as additional evidence on appeal is therefore dismissed.

#### IV. DISPOSITION

60. For the foregoing reasons, the Appeals Chamber

**GRANTS** the Motion **IN PART**;

**ADMITS** as additional evidence on appeal documents marked by Pavković as 4DA4, 4DA6, 4DA8 through 4DA26, and 4DA32 through 4DA34 as confidential Exhibits 4DA1, 4DA2, 4DA3 through 4DA21, and 4DA22 through 4DA24, respectively; and

**DISMISSES** the Motion in all other respects.

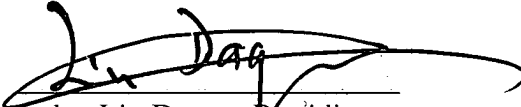
61. The Appeals Chamber **RECALLS** that the Prosecution is allowed to present rebuttal material, if any, within seven days from the date of the present decision. Pursuant to Rule 115(A) of the Rules, if no such material is filed, Pavković may file a supplemental brief on the impact of the additional evidence within 15 days of the expiry of the above-said time limit, *i.e.* within 22 days of the present decision. If rebuttal material is filed, such supplemental brief may be filed within 15 days of the decision on the admissibility of the rebuttal material. The Prosecution may then file a response to the supplemental brief within 10 days of its filing and Pavković may reply within four days thereafter. The Appeals Chamber further **ORDERS** that the word limits for the said submissions should be 2,500 words for the supplemental brief and the response, and 1,000 words for the reply.

62. 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 12<sup>th</sup> day of February 2010,

At The Hague,  
The Netherlands.

  
Judge Liu Daqun, Presiding

[Seal of the Tribunal]