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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-05-87-A

Date: 8 September 2010

Original: English

**IN THE APPEALS CHAMBER**

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

**Registrar:** **Mr. John Hocking**

**Decision:** **8 September 2010**

**PROSECUTOR**

**v.**

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

***PUBLIC***

# DECISION ON NIKOLA ŠAINOVIĆ'S SECOND MOTION FOR ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL

**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 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 "Defence Motion Requesting Admission of Additional Evidence Pursuant to Rule 115 with Annex" filed by Counsel for Nikola Šainović ("Šainović") on 9 June 2010 ("Motion"). The Office of the Prosecutor ("Prosecution") responded to the Motion on 7 July 2010.[1] Šainović filed a reply on 20 July 2010.[2]

## I. BACKGROUND

2. On 26 February 2009, Trial Chamber III ("Trial Chamber") convicted Šainović 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.[3] The Trial Chamber sentenced him to 22 years of imprisonment.[4] Šainović appealed his conviction on seven grounds.[5] The Trial Judgement has also been appealed by Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić, and the Prosecution.[6] The briefing of all six appeals has been completed.

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[1] Prosecution Response to Šainović's Second Motion to Admit Additional Evidence, 7 July 2010 (confidential) ("Response").
[2] Defence Reply to "Prosecution Response to Šainović's Second Motion to Admit Additional Evidence", 20 July 2010 ("Reply").
[3] *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 ("Trial Judgement"), vol. 3, paras 458-477, 1208.
[4] *Ibid.*, vol. 3, para. 1208.
[5] Defence Submission: Notice of Appeal, 27 May 2009; Defence Appeal Brief, 23 September 2009 ("Šainović's Appeal Brief").
[6] General Ojdanic's [*sic*] Second Amended Notice of Appeal, 16 October 2009 (filed as Annex C to General Ojdanic's [*sic*] Motion to Amend his Amended Notice of Appeal of 29 July 2009, 16 October 2009), and General Ojdanić's Amended Appeal Brief, 11 December 2009 (filed as Annex B to General Ojdanic's [*sic*] Motion Submitting Amended Appeal Brief, 11 December 2009); Notice of Appeal from the Judgement of 26 February 2009, 29 September 2009 (filed by Counsel for Nebojša Pavković as Annex A to General Pavković Submission of his Amended Notice of Appeal, 29 September 2009), and General Pavković's Amended Appeal Brief, 30 September 2009 (filed as Annex A to General Pavković's Submission of his Amended Appeal Brief, 30 September 2009); Vladimir Lazarevic's [*sic*] Defence Notice of Appeal, 27 May 2009 (confidential), Defence Submission: Lifting Confidential Status of the Notice of Appeal, 29 May 2009, and General Vladimir Lazarević's Refiled Appeal Brief, 6 April 2010; Sreten Lukic's [*sic*] Notice of Appeal from Judgment [*sic*] and Request for Leave to Exceed the Page Limit, 27 May 2009, and Defense Appelant's [*sic*] Brief Refiled, 7 October 2009 (public with confidential annexes) (filed by Counsel for Sreten Lukić); 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, 24 August 2009, 15 January 2010, (confidential), and 14 May 2010.

3. On 26 November 2009, Šainović requested the admission of a single document as additional evidence on appeal.[7] The Appeals Chamber dismissed his request on 28 January 2010, finding that the proffered document did not fully meet the criteria for admission of evidence pursuant to Rule 115 of the Tribunal's Rules of Procedure and Evidence ("Rules").[8]

4. In the Motion, Šainović seeks the admission of a report from the Federal Republic of Yugoslavia ("FRY") Ministry of Foreign Affairs dated 10 January 1999 ("Report") as additional evidence on appeal.[9]

5. On 9 July 2010 Šainović requested the Appeals Chamber to dismiss the Response as untimely or, in the alternative, to grant him leave to file a reply.[10] The Pre-Appeal Judge dismissed Šainović's request, finding that the Response was filed within the prescribed time limit and recalling that the relevant Practice Direction does not require the moving party, in a motion filed during an appeal from judgement, to seek leave prior to filing a reply.[11]

## II. APPLICABLE LAW

6. Pursuant to Rule 115 of the Rules, a party may submit a request to present additional evidence before the Appeals Chamber. This must be done no later than 30 days from the date of filing of the brief in reply unless good cause or, after the appeal hearing, cogent reasons are shown for a delay.[12]

7. For additional evidence to be admissible under Rule 115 of the Rules, the applicant must first demonstrate that the additional evidence tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence.[13] The applicant's duty to act with due diligence includes making "appropriate use of all mechanisms of protection and compulsion

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[7] Defence Motion Requesting Admission of Additional Evidence Pursuant to Rule 115 with Annex, 26 November 2009 (confidential), paras 4, 16-17.
[8] 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"), paras 21-25.
[9] Motion, paras 9, 19; see also Annex thereto.
[10] Defence Request to File a Reply to Confidential "Prosecution Response to Šainović's Second Motion to Admit Additional Evidence", 9 July 2010 (originally filed as confidential but confidential status lifted by Decision on "Defence Request to File a Reply to Confidential 'Prosecution Response to Šainović's Second Motion to Admit Additional Evidence'", 12 July 2010 ("Decision of 12 July 2010"), p. 2), paras 2-4.
[11] Decision of 12 July 2010, p. 1, referring to Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev. 3, 16 September 2005, ("Practice Direction"), paras 13-14.
[12] Rule 115(A) of the Rules; see also Decision on Sreten Lukić's Second Motion to Admit Additional Evidence on Appeal, 29 April 2010 ("*Lukić* Second Rule 115 Decision"), para. 5; *Šainović* Rule 115 Decision, para. 4; Decision on Vladimir Lazarević's Motion to Present Additional Evidence and on Prosecution's Motion for Order Requiring Translations of Excerpts of Annex E of Lazarević's Rule 115 Motion, 26 January 2010 ("*Lazarević* Rule 115 Decision"), para. 5.
[13] *Lazarević* Rule 115 Decision, para. 6, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 6; *Šainović* Rule 115 Decision, para. 5.

available under the Statute and the Rules of the [...] Tribunal to bring evidence on behalf of an accused before the Trial Chamber".[14] Counsel is therefore expected to apprise the Trial Chamber of all difficulties that he encounters in obtaining the evidence in question.[15]

8. The applicant must then show that the evidence is both relevant to a material issue and credible.[16] Evidence is relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence.[17] Evidence is credible if it appears to be reasonably capable of belief or reliance.[18]

9. The applicant must further demonstrate that the evidence *could* have had an impact upon the verdict, in other words, the evidence must be such that, if considered in the context of the evidence given at trial, it could show that the verdict was unsafe.[19] A decision will be considered unsafe if the Appeals Chamber ascertains that there is a realistic possibility that the Trial Chamber's verdict might have been different if the new evidence had been admitted.[20]

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

11. In both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the Trial Chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon

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[14] *Lazarević* Rule 115 Decision, para. 6, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 6; *Šainović* Rule 115 Decision, para. 5.
[15] *Lazarević* Rule 115 Decision, para. 6, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 6; *Šainović* Rule 115 Decision, para. 5.
[16] *Lazarević* Rule 115 Decision, para. 8, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 7; *Šainović* Rule 115 Decision, para. 6.
[17] *Lazarević* Rule 115 Decision, para. 8, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 7; *Šainović* Rule 115 Decision, para. 6.
[18] *Lazarević* Rule 115 Decision, para. 8, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 7; *Šainović* Rule 115 Decision, para. 6.
[19] *Lazarević* Rule 115 Decision, para. 9, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 8; *Šainović* Rule 115 Decision, para. 7.
[20] *Lazarević* Rule 115 Decision, para. 9, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 8; *Šainović* Rule 115 Decision, para. 7.
[21] *Lazarević* Rule 115 Decision, para. 10, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 9; *Šainović* Rule 115 Decision, para. 8.

the Trial Chamber's verdict.[22] A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.[23]

12. Finally, the Appeals Chamber has repeatedly stated that the significance and potential impact of the tendered material are not to be assessed in isolation, but in the context of the evidence presented at trial.[24]

## III. DISCUSSION

### A. Arguments of the parties

13. Šainović contends that the Report was disclosed to him by the Prosecution on 5 March 2010 and therefore was unavailable at trial.[25] Šainović further argues that the Report is reliable and relevant to the Trial Chamber's finding that he shared the common purpose of the JCE to forcibly displace part of the Kosovo Albanian population.[26] In particular, Šainović refers to the Trial Chamber's conclusion that the manner in which the authorities of the FRY and of Serbia made use of the period of the Rambouillet and Paris negotiations was indicative of the existence of the common purpose.[27] According to Šainović, the Report shows that he was in favour of the adoption of a prompt political solution. He adds that the Report further demonstrates that he favoured local elections through which the role and influence of political parties, including Albanian ones, was to be established.[28] Šainović maintains that the Report is indicative of his determination to expedite the "political process of reconciliation" which he believed was the solution to existing and future security concerns.[29]

14. According to Šainović, the Report further demonstrates that he did not see the negotiations as an alternative, "but rather [they] represented his sincere attempt to solve the problems in [Kosovo and Metohija] swiftly, decisively and justly, through a political process".[30] He argues that had his proposal been accepted, there would have been no delay in the negotiations.[31]

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[22] *Lazarević* Rule 115 Decision, para. 11, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 10; *Šainović* Rule 115 Decision, para. 9.
[23] *Lazarević* Rule 115 Decision, para. 11, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 10; *Šainović* Rule 115 Decision, para. 9.
[24] *Lazarević* Rule 115 Decision, para. 12, and references cited therein; see also *Lukić* Second Rule 115 Decision, para. 11; *Šainović* Rule 115 Decision, para. 10.
[25] Motion, paras 1-2, 9, 18.
[26] *Ibid.*, paras 14, 17.
[27] *Ibid.*, paras 6-7, citing Trial Judgement, vol. 3, para. 76.
[28] *Ibid.*, paras 10-13.
[29] *Ibid.*, paras 12-13.
[30] *Ibid.*, para. 16.
[31] *Ibid.*, para. 15.

15. In response, the Prosecution submits that the Report was disclosed to Šainović on 17 November 2005[32] and that Šainović fails to show good cause for the delay in seeking its admission into evidence.[33] The Prosecution adds that even if good cause had been shown, Šainović fails to demonstrate that the Report would have affected the verdict, if it had been admitted at trial.[34]

16. Specifically, the Prosecution argues that, contrary to Šainović's assertion, the Report supports the Trial Chamber's findings regarding Šainović's *mens rea* and is repetitive of other evidence already considered at trial.[35] The Prosecution submits that the Trial Chamber took into account evidence suggesting that at a certain point in time Šainović "might have favoured some form of political outcome to the Kosovo crisis".[36] However, the Prosecution argues that following the failure of the Rambouillet and Paris negotiations, Šainović pursued the goals of the JCE despite his knowledge of the commission of crimes, which indicates his intent to further the common criminal purpose.[37]

17. The Prosecution further contends that Šainović mischaracterizes the proposed evidence,[38] and submits that the Report does not affect the Trial Chamber's finding that the actions of the authorities of the FRY and of Serbia during the negotiations were indicative of the common purpose.[39] It also argues that Šainović's submission that there would have been no delay in the negotiations had his proposal to hold elections been followed is speculative and not supported by the proposed evidence.[40]

18. In reply, Šainović argues that the communication he received on 7 November 2005 that the evidence was "'in the process of being placed on the Electronic Disclosure [Suite] ("EDS")'" while in fact it became available on the EDS on 17 November 2005, "has created a certain level of confusion".[41] Šainović, however, emphasizes that the exclusion of the Report at this stage of the proceedings would lead to a miscarriage of justice.[42] In particular, he contends that the Trial Chamber based its conclusion regarding his *mens rea* on a portion of witness Phillips' testimony

[32] Response, paras 1-2, 4-6.
[33] *Ibid.*, paras 1-3, and the references cited therein.
[34] *Ibid.*, paras 1, 7, 14-15.
[35] *Ibid.*, para. 8.
[36] *Ibid.*, para. 10, and the references cited therein.
[37] *Ibid.*
[38] *Ibid.*, para. 11.
[39] *Ibid.*, para. 12.
[40] *Ibid.*, para. 13.
[41] Reply, para. 4, citing Response, Annex C.
[42] *Ibid.*, paras 4, 12.

relating to the same time period as the proposed evidence.[43] In Šainović's view, the Report shows that contrary to the Trial Chamber's finding, he "did not believe that the Albanian population did not belong in Kosovo".[44] With regard to the Prosecution's argument that following the failure of the Rambouillet and Paris negotiations he did not continue to favour a political solution, Šainović contends that such a proposition does not find support in the Trial Judgement.[45] Finally, Šainović argues that the Prosecution misinterprets the Report and maintains that his "intensive and continuous attempt [...] to solve the crisis via political means" is plainly demonstrated by the evidence.[46]

## B. Analysis

19. As a preliminary matter, the Appeals Chamber will consider whether the Response should remain confidential. It recalls in this respect that pursuant to Rules 78 and 107 of the Rules, all submissions before the Tribunal shall be public unless there are exceptional reasons for keeping them confidential.[47] The Prosecution explains that the confidential filing of the Response is warranted by the references contained therein to Šainović's Reply Brief filed confidentially on 15 February 2010.[48] The Appeals Chamber notes that, in the meantime, Šainović has filed a public redacted version of his Reply Brief.[49] Accordingly, and considering that the reference to Šainović's Reply Brief contained in the Response pertains strictly to the date on which the confidential Reply Brief was filed,[50] the Appeals Chamber finds that there are no exceptional reasons for keeping the Response confidential and therefore lifts the confidential status thereof.

20. Turning to Šainović's submissions, the Appeals Chamber recalls that under Rule 115(1) of the Rules, a party may submit a request to present additional evidence on appeal no later than 30 days from the date of filing of the brief in reply unless good cause is shown for the delay.[51] Considering that Šainović filed his Reply Brief on 15 February 2010,[52] the said time limit expired on 16 March 2010. Therefore, in order for the Appeals Chamber to consider the merits of the Motion, Šainović must show that good cause exists for its delayed filing. It is pertinent to recall in this respect that "the good cause requirement obliges the moving party to demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in

[43] *Ibid.*, paras 7-8.
[44] *Ibid.*, para. 8, referring to Trial Judgement, vol. 3, para. 438.
[45] *Ibid.*, para. 9.
[46] *Ibid.*, paras 10-11.
[47] Decision of 12 July 2010, p. 2, referring to *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Decision on Lahi Brahimaj's Application for Provisional Release, 25 May 2009, para. 5, and the references cited therein.
[48] Response, fn. 1.
[49] Notice of Filing of Public Redacted Version of "Defence Brief in Reply", 22 July 2010.
[50] Response, para. 2.
[51] See *supra*, para. 6.

question as soon as possible after it became aware of the existence of the evidence sought to be admitted".[53]

21. The Appeals Chamber notes that on 7 November 2005 Counsel for Šainović was informed that the sixth batch of documents, including the Report sought to be admitted on appeal, was "in the process of being placed on the [EDS] in a case specific disclosure folder".[54] An index with the description of the documents was communicated to him and as of 17 November 2005 the documents were made available to Šainović,[55] more than seven months before the commencement of the trial on 10 July 2006.[56] The Appeals Chamber notes Šainović's submission that the way the disclosure was communicated to him "has created a certain level of confusion", although he does not specifically allege any faults in the disclosure process.[57] Such a generic submission is, in principle, insufficient to show good cause for the delayed filing of the Motion. In light of the disclosure circumstances recalled above and Šainović's failure to substantiate his claims, the Appeals Chamber is satisfied that the tendered material was made reasonably available and accessible to Šainović as of November 2005.

22. Moreover, even if the Appeals Chamber were to accept Šainović's submission that he could only familiarise himself with the Report when it was disclosed to him again on 5 March 2010, Šainović provides no arguments as to why he only sought its admission more than three months thereafter.

23. The Appeals Chamber considers, however, that even if good cause had been shown for the late filing of the Motion, the tendered material does not fulfil the remaining requirements for

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[52] Defence Brief in Reply, 15 February 2010 (confidential); see also Rule 126 of the Rules.
[53] *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Miroslav Bralo's Motion for Admission of Additional Evidence, 12 January 2007 (confidential) ("*Bralo* Decision of 12 January 2007"), para. 13, citing *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Prosecution's Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 17 December 2004, p. 2. See also *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 16.
[54] See Response, Annexes C and C1.
[55] See *ibid.*, Annex D.
[56] See Trial Judgement, vol. 1, para. 17.
[57] Reply, para. 4; *Cf. Bralo* Decision of 12 January 2007, paras 15, 23. In this sense, the Appeals Chamber recalls the Prosecution's Rule 68 obligation to disclose "extends beyond simply making available its entire evidence collection in a searchable format" and that "[a] search engine cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession" (*ibid.*, para. 23 citing *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 35; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 10. The Appeals Chamber has also held that "[w]hile it is true that the Prosecution may be relieved of its Rule 68 obligation if the existence of the relevant exculpatory material is known to the Defence and if it is reasonably accessible through the exercise of due diligence, [...] such a searchable database does not necessarily make access to such material reasonable" (*Bralo* Decision of 12 January 2007, para. 23 (footnotes omitted) and references cited therein).

admission of additional evidence on appeal given that, for reasons explained below, it would not have affected the verdict had it been admitted at trial.[58]

24. The Appeals Chamber notes that the Report contains information regarding a meeting between Šainović and U.S. Ambassador Christopher Hill held on 10 January 1999.[59] During the meeting Šainović purportedly proposed

> uninterrupted negotiations, pointing out that the best solution would be if the role of all political parties, including Albanian ones, as well as their influence were to be established through local elections, based on these adopted political solutions and not the previous process.[60]

The Appeals Chamber understands Šainović to argue that had the Report been admitted at trial, it would have had an impact on the Trial Chamber's finding concerning his *mens rea*.[61]

25. Notwithstanding the Trial Chamber's considerations concerning the failure of the Rambouillet and Paris negotiations,[62] the Appeals Chamber notes that in reaching its conclusion on "Šainović's state of mind in relation to Kosovo and Kosovo Albanians",[63] the Trial Chamber considered witness evidence indicating Šainović's willingness to achieve a political solution to the Kosovo crisis.[64] The Trial Chamber accepted witness Phillips' evidence that, at a meeting in November 1998, Šainović considered that the Kosovo Albanian population did not belong in Kosovo.[65] However, it also noted witness Phillips' testimony that Šainović was hopeful that some sort of a political solution could be found.[66] Likewise, witness Byrnes testified about Šainović's attempts in January 1999 to achieve a mutually acceptable political resolution of the Kosovo crisis.[67] The Trial Chamber was also apprised of witness Petritsch's testimony about Šainović's readiness, prior to the Račak/Reçak incident, to achieve an agreement by peaceful means.[68] Specifically with respect to the Rambouillet negotiations which took place after the meeting mentioned in the Report, witness Petritsch testified that Šainović left the impression that he was listening and trying to respond.[69] Furthermore, in reaching its conclusion on Šainović's *mens rea*, the Trial Chamber was particularly cognisant of Šainović's participation in the Rambouillet

[58] The Appeals Chamber recalls that the Report was disclosed to Šainović before the beginning of the trial (see *supra*, para. 21), and can thus only be admitted if Šainović demonstrates that its exclusion would lead to a miscarriage of justice, in that had it been admitted at trial, it would have affected the verdict (see *supra*, para. 10).
[59] Motion, Annex, p. 3.
[60] *Ibid.*, Annex, pp. 3-4.
[61] *Ibid.*, paras 14, 17.
[62] Trial Judgement, vol. 3, para. 76.
[63] *Ibid.*, paras 428-438.
[64] *Ibid.*, paras 433-435, 437, and the references cited therein.
[65] *Ibid.*, paras 433, 438, referring to Michael Phillips, 19 Mar 2007, T. 11840.
[66] *Ibid.*, para. 433, referring to Michael Phillips, 19 Mar 2007, T. 11877-11879, 11886-11887; Exhibit 2D17.
[67] *Ibid.*, para. 434, referring to Shaun Byrnes, 16 Apr 2007, T. 12188-12189.
[68] *Ibid.*, paras 435, 437, referring to Wolfgang Petritsch, 2 Mar 2007, T. 10947; Exhibit 2D15.
[69] *Ibid.*, para. 435, citing Wolfgang Petritsch, 2 Mar 2007, T. 10945; Exhibit P2792, p. 3.

negotiations.[70] In light of this, the Appeals Chamber finds that information of a similar nature and temporal scope as that contained in the Report was considered by the Trial Chamber.

26. The Appeals Chamber further notes that Šainović fails to address the impact of the Report in the context of the totality of the evidence considered by the Trial Chamber with respect to its finding that he shared the common purpose of the JCE to forcibly displace part of the Kosovo Albanian population. For instance, the Trial Chamber relied upon an array of evidence to determine that despite his extensive knowledge of crimes being committed in Kosovo and his *de facto* powers over both the Army of Yugoslavia and the forces of the Ministry of Interior in the area, Šainović failed to take adequate action.[71] These were considerations that the Trial Chamber found particularly relevant when establishing Šainović's intent.[72] In light of the paucity of Šainović's submissions in this regard and taking into account that evidence of similar nature was presented at trial, the Appeals Chamber is not satisfied that Šainović has demonstrated that had the Report been admitted at trial, it would have affected the verdict.[73]

## IV. DISPOSITION

27. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion, and **DIRECTS** the Registrar to lift the confidential status of the Response.

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

Dated this 8th day of September 2010,
At The Hague, The Netherlands.

Judge Liu Daqun, Presiding

**[Seal of the Tribunal]**

[70] *Ibid.*, para. 466.
[71] *Ibid.*, paras 462-465, and the evidence cited therein; see also *ibid.*, paras 441-457.
[72] *Ibid.*, paras 462-466.
[73] The Appeals Chamber notes that under his third ground of appeal Šainović contests the Trial Chamber's finding that he had the intent to forcibly displace part of the Kosovo Albanian population by arguing, *inter alia*, that the Trial Chamber erred in its evaluation of the evidence (see Šainović's Appeal Brief, paras 352-396). The Appeals Chamber emphasizes that at this stage it is only considering the admissibility of the Report as evidence on appeal without addressing the merits of Šainović's appeal.