

BEFORE THE APPEALS CHAMBER

Before:

Judge Inés Mónica Weinberg de Roca, Presiding
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar:

Mr. Hans Holthius

Decision of:

31 August 2004

PROSECUTOR

v.

MIODRAG JOKIC

**DECISION ON APPELLANT'S MOTIONS FOR ADMISSION OF ADDITIONAL EVIDENCE
PURSUANT TO RULE 115**

The Office of the Prosecutor:

Mr. Norman Farrell

Counsel for the Accused:

Mr. Zarko Nikolic
Mr. Eugene O'Sullivan

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 (International Tribunal),

BEING SEISED of the following motions to admit additional evidence on appeal filed by Miodrag Jokic (Appellant) pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Tribunal (Rules):

- i. "Motion to Present Additional Evidence pursuant to Rule 115" dated 27 May 2004 but filed partly confidentially on 1 June 2004 (First Motion), seeking to admit a witness statement (Annex A (confidential) to First Motion) and evidence relating to the Appellant's cooperation with the Prosecutor, including transcripts from his witness testimony in the case of *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T (Annex B, C (confidential), and D (confidential) to

the First Motion);

- ii. "Motion to Present the Expert Opinion of Dr. Stanko Pihler as Additional Evidence Pursuant to Rule 115" filed 21 June 2004 (Additional First Motion), seeking to admit the Curriculum Vitae and Expert Opinion of Dr. Stanko Pihler (Annex E to the First Motion);²
- iii. "Second Motion to Present Additional Evidence Pursuant to Rule 115", filed 21 June 2004 (Second Motion), seeking to admit two further documents relating to the Appellant's cooperation with the Prosecutor (Annexes A and B to the Second Motion);
- iv. "Third Motion to Present Additional Evidence pursuant to Rule 115", filed confidentially on 16 August 2004 (Third Motion), seeking to admit further evidence relating to the Appellant's cooperation with the Prosecutor (Annex A (confidential) to the Third Motion);

NOTING the "Prosecution's Response to Miodrag Jokic's Motion to Present Additional Evidence pursuant to Rule 115" filed confidentially on 14 June 2004; the "Prosecution's Response to 'Motion to Present the Expert Opinion of Dr Stanko Pihler as Additional Evidence Pursuant to Rule 115' and 'Second Motion to Present Additional Evidence Pursuant to Rule 115', both dated 21 June 2004" filed 1 July 2004; and the "Prosecution's Response to Miodrag Jokic's Third Motion to Present Additional Evidence Pursuant to Rule 115", filed confidentially on 23 August 2004;

NOTING the Appellant's replies;³

NOTING the Appellant's Notice of Appeal filed on 16 April 2004 against the "Sentencing Judgement" rendered in this case by Trial Chamber I on 18 March 2004 (Judgement)⁴;

CONSIDERING that, pursuant to Rule 115 of the Rules, a party may apply to present additional evidence before the Appeals Chamber "not later than seventy-five days from the date of the judgement, unless good cause is shown or further delay";

NOTING that the Additional First Motion, the Second Motion, and the Third Motion were filed outside of this time limit,

CONSIDERING that the Appellant explained in the First Motion, filed within the 75-day deadline, that the Report of Dr. Pihler was being prepared and that the Appellant brought the report to the attention of the Chamber promptly upon its completion, the Appeals Chamber finds that good cause has been shown for further delay and accepts the Additional First Motion as validly filed;

CONSIDERING that, in relation to the Second Motion, the Appellant submits that he only became aware of Annex A⁵ on 18 June 2004 and that although Annex B was available prior to the expiry of the 75 day period it is only submitted "for the sake of completeness", the Appeals Chamber finds that good cause has been shown for this further delay and accepts the Second Motion as validly filed;

CONSIDERING that, in relation to the Third Motion, the Appellant submits that Annex A merely supplements and completes the previous filings concerning the Appellant's cooperation with the Prosecution, the Appeals Chamber finds that good cause has been shown for this further delay and accepts the Third Motion as validly filed;

CONSIDERING that, under Rule 115 of the Rules, the Appellant is required primarily to establish that the evidence sought to be admitted was not available at trial in any form and could not have been discovered through the exercise of due diligence;⁶

CONSIDERING that evidence that was unavailable at trial and could not have been discovered through

the exercise of due diligence is admissible under Rule 115 of the Rules if it is relevant to a material issue and credible and if it *could* have had an impact on the verdict, inclusive of a sentence;

CONSIDERING that evidence that was available at trial or could have been discovered through the exercise of due diligence is not admissible unless the moving party shows that its exclusion *would* lead to a miscarriage of justice, in that, if it had been available at trial it *would* have affected the verdict;⁷

CONSIDERING that the Appellant has failed to demonstrate that the witness statement contained in Annex A to the First Motion was unavailable at the time of the judgement, and that the Appeals Chamber is not convinced that exclusion of this evidence would lead to a miscarriage of justice;

CONSIDERING that the Curriculum Vitae and Expert Opinion of Dr. Stanko Pihler (Annex E to the First Motion) concerning the proper interpretation of sentencing practice in the Former Yugoslavia is legal argumentation rather than additional evidence, and that, in any event, such material could have been produced through the exercise of due diligence, and it has not been demonstrated that the exclusion of this report would lead to a miscarriage of justice;

CONSIDERING that, although the evidence relating to the Appellant's cooperation with the Prosecutor provided in Annexes B, C, and D to the First Motion, Annexes A and B to the Second Motion, and Annex A to the Third Motion were not available at the time of the Judgement and could not have been discovered through the exercise of due diligence, this evidence merely serves to provide further proof of cooperation and/or the execution of the terms of the Plea Agreement, an issue already taken into account by the Trial Chamber in sentencing and thus this evidence not such that it could have affected the verdict;

HEREBY denies the First Motion, Additional First Motion, Second Motion, and Third Motion.

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

Done this 31st day of August 2004,
At The Hague,
The Netherlands

Judge Inés Mónica Weinberg de Roca
Presiding

[Seal of the International Tribunal]

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1. The First Motion mentions the expert report of Dr. Pihler, but indicates that it is not yet completed.
 2. The Appellant first filed the Expert report as additional Annex E to the First Motion by the "Filing of Expert Report by Dr. Stanko Pihler" 16 June 2004. The Report was then re-filed as the subject of the Additional First Motion.
 3. "Application for Leave to File a Reply to the Prosecution's Reponse (sic) to Miodrag Joki's Motion to Present Additional Evidence Pursuant to Rule 115 and Reply to the Prosecution's Reponse (sic) to Miodrag Joki's Motion to Present Additional Evidence pursuant to Rule 115", filed confidentially on 18 June 2004, and "Appellant's Reply to the Prosecution's Response to 'Motion to Present the Expert Opinion of Dr. Stanko Pihler as Additional Evidence Pursuant to Rule 115' and 'Second Motion to Present Additional Evidence Pursuant to Rule 115', both dated 21 June 2004", 6 July 2004.
 4. "Miodrag Joki's Notice of Appeal", 16 April 2004.
 5. *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, "Prosecution's response to Defence Motion for Acquittal", 7 June 2004.
 6. See *Prosecutor v. Krstic*, "Decision on Applications for Admission of Additional Evidence on Appeal", ICTY Case No. IT-98-33-A, 5 August 2003 (Krstic Rule 115 Decision), p. 3.
 7. *Krstic* Rule 115 Decision, p. 4.