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-05-88-A

Date: 20 October 2011

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz

Registrar: **Mr. John Hocking**

Decision of: **20 October 2011**

PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC

DECISION ON VUJADIN POPOVIĆ'S MOTION FOR ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL PURSUANT TO RULE 115

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Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Mr. Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Mr. Vinko Pandurević

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 "Vujadin Popovic's [*sic*] Motion Pursuant to Rule 115" filed confidentially by Counsel for Vujadin Popović ("Popović") on 2 June 2011 ("Motion"), seeking admission of additional evidence on appeal pursuant to Rule 115 of the Tribunal's Rules of Procedure and Evidence ("Rules").[1] The Office of the Prosecutor ("Prosecution") responded on 30 June 2011, opposing the Motion.[2] Popović filed his reply on 13 July 2011, attempting to tender further additional evidence on appeal.[3]

I. BACKGROUND

2. On 10 June 2010, Trial Chamber II of the Tribunal ("Trial Chamber") convicted Vujadin Popović pursuant to Article 7(1) of the Tribunal's Statute ("Statute") of committing genocide, extermination and persecution as crimes against humanity, and murder as a violation of the laws or customs of war.[4] The Trial Chamber sentenced him to life imprisonment.[5]

3. Popović appealed his convictions and sentence.[6] Briefing in relation to Popović's appeal has been complete since 2 May 2011.[7]

4. On 10 May 2011, Popović requested an extension of the time-limit for filing motions seeking admission of additional evidence on appeal pursuant to Rule 115 of the Rules.[8]

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[1] See also Notice of Re-Filing of Annexes to Rule 115 Motion of Vujadin Popovic [*sic*], 9 June 2011 (confidential) ("Re-Filed Annex").
[2] Prosecution Response to Vujadin Popović's Motion Pursuant to Rule 115, 30 June 2011 (confidential; public redacted version filed on the same date) ("Response"), para. 15.
[3] Vujadin Popović's Consolidated Reply to the Prosecution's Response to Rule 115 Motion and Second Rule 115 Motion, 13 July 2011 (confidential) ("Reply"), paras 1, 12-13. See also Prosecution Response to Vujadin Popović's Second Rule 115 Motion, 11 August 2011 (confidential) ("Second Response"); Vujadin Popović's Second Reply to the Prosecution's Response to the Second Rule 115 Motion, 24 August 2011 (confidential) ("Second Reply").
[4] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version) ("Trial Judgement"). p. 826.
[5] Trial Judgement, p. 826.
[6] Vujadin Popovic's [*sic*] Notice of Appeal, 8 September 2010 (confidential); Notice of Withdrawal and Refiling of Public Redacted Version of Vujadin Popovic's [*sic*] Notice of Appeal, 25 February 2011; Appeal Brief on Behalf of Vujadin Popovic [*sic*], 21 January 2011 (confidential; public redacted version filed on 14 April 2011) ("Popović's Appeal Brief").
[7] Notice of Filing of Prosecution Responses to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 4 April 2011 (confidential; public redacted version filed on 3 August 2011), appending Prosecution Response to Popović Appeal ("Prosecution's Response Brief (Popović)") (see also Corrigendum to Prosecution Responses to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 3 June 2011 (confidential); Second Corrigendum to Prosecution Responses to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 2 August 2011 (confidential)); Reply Brief on Behalf of Vujadin Popović, 2 May 2011 (confidential; public redacted version filed on 6 July 2011) (see also Corrigendum to Brief in Reply on Behalf of Vujadin Popovic [*sic*] and Notice of Refiling of Vujadin Popovic's [*sic*] Reply Brief, 18 May 2011 (confidential)).
[8] Vujadin Popovic's [*sic*] Motion for Enlargement of Time to File Rule 115 Motion, 10 May 2011, appending Annex: List of Post-Trial Extraordinary Disclosures (confidential).

On 1 June 2011, the Appeals Chamber dismissed his and other Defence motions "as premature, without prejudice to the right to file motions seeking admission of additional evidence on appeal, provided that [the applicants] demonstrate good cause or cogent reasons, as applicable, for the late filing with respect to the proffered evidence."[9]

5. In his present Motion, Popović requests the admission as additional evidence on appeal of a report which concerns the separation of Bosnian Muslim men in Potočari purportedly sent by Popović at 5:30 p.m. on 12 July 1995 from the Drina Corps Forward Command Post in Bratunac to the Main Staff of the Army of Republika Srpska Sector for Intelligence and Security Affairs and the Drina Corps Security Department ("Report").[10] According to Popović, the Report is "the only document of which he is thus far aware [...] that directly affects and indeed contradicts the Trial Chamber's findings of fact".[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 available under the Statute and the Rules of the Tribunal to bring evidence on behalf of an accused before the Trial Chamber.[14] The applicant is therefore expected to apprise the Trial Chamber of all the difficulties he encounters in obtaining the evidence in question.[15]

[9] Decision on Defence Requests for Extension of Time to File Motions Pursuant to Rule 115, 1 June 2011 ("Decision of 1 June 2011"), para. 13.
[10] Motion, paras 6-7, Annex 1. Popović submitted the English translation of the Report (see *ibid.*, Annex 1; Re-filed Annex). A copy of the original Report in Bosnian/Croatian/Serbian is filed as Appendix A to the Response.
[11] Motion, para. 5.
[12] Rule 115(A) of the Rules. See also Decision of 1 June 2011, para. 10; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's Motions for Admission of Additional Evidence on Appeal and for Extension of Word Limit, Nebojša Pavković's Motions to Join and to Call Dick Marty as a Witness Before the Appeals Chamber, and Prosecution's Motion to Strike, 12 May 2011 ("*Šainović et al.* Decision of 12 May 2011"), para. 6.
[13] *Šainović et al.* Decision of 12 May 2011, para. 7, and references cited therein.
[14] *Šainović et al.* Decision of 12 May 2011, para. 7, and references cited therein.
[15] *Šainović et al.* Decision of 12 May 2011, para. 7, and references cited therein.

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 on the verdict, in other words, the evidence must be such that, if considered in the context of the evidence presented 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 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.[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 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 significance and potential impact of the tendered material shall not be assessed in isolation, but in the context of the evidence presented at trial.[24]

III. DISCUSSION

A. Arguments of the parties

13. Popović requests the admission as additional evidence on appeal of the Report signed under his name[25] which, according to him, proves that the screening of the Bosnian Muslim men separated

[16] *Šainović et al.* Decision of 12 May 2011, para. 8, and references cited therein.
[17] *Šainović et al.* Decision of 12 May 2011, para. 8, and references cited therein.
[18] *Šainović et al.* Decision of 12 May 2011, para. 8, and references cited therein.
[19] *Šainović et al.* Decision of 12 May 2011, para. 9, and references cited therein.
[20] *Šainović et al.* Decision of 12 May 2011, para. 9, and references cited therein.
[21] *Šainović et al.* Decision of 12 May 2011, para. 10, and references cited therein.
[22] *Šainović et al.* Decision of 12 May 2011, para. 11, and references cited therein.
[23] *Šainović et al.* Decision of 12 May 2011, para. 11, and references cited therein.
[24] *Šainović et al.* Decision of 12 May 2011, para. 12, and references cited therein.
[25] Popović argues, however, that he neither wrote nor signed this document and that the real author of the report was most likely Momir Nikolić (Motion, fn. 3; Reply, para. 9). See also *infra*, para. 23.

in Potočari on 12 July 1995 was legitimate.[26] He submits that the Report was not available to him during trial, and was disclosed by the Prosecution only on 9 February 2010, *i.e.* several months after the closing arguments were heard.[27] He further argues that he could not discover the Report through the exercise of due diligence prior to its disclosure because neither he nor the Prosecution were aware of the existence of this document, which was allegedly discovered during a search of Dragomir Pećanac's premises.[28]

14. Popović argues that the Report is relevant to the Trial Chamber's findings with regard to the existence of the plan to murder on 12 July 1995 and his knowledge of any such plan.[29] He therefore submits that "all convictions associated with his culpability for JCE to Murder – Genocide, Extermination, and Persecution – should be overturned."[30]

15. Popović claims that the Report could have had an impact on the Trial Chamber's findings, because it allegedly shows that the separation of "men from 17 – 60 years of age" was taking place and that no transfer of these men had been planned.[31] According to Popović, the Report clarifies that there were only 70 men separated in Potočari and that they were interrogated with the view to determine whether they were war criminals.[32] Therefore, Popović asserts that the tendered evidence supports his submission at trial that at the end of 12 July 1995 the purpose of the screening and separation in Potočari was to identify suspected war criminals and not to kill the separated Bosnian Muslim men.[33] According to Popović, if the plan was to kill the separated persons, they would not have been "subject to the State Security for interrogation, but to executioners."[34]

16. Popović further claims that the Report "undermines the Trial Chamber's conclusion, based on the evidence of Momir Nikolic [*sic*], 'that the forecasted separation process in Potočari, which began later that day, marked the commencement of the implementation of the plan to murder the Bosnian Muslim males from Srebrenica'",[35] and refutes the finding that the plan to kill the Bosnian Muslim men in Potočari existed before 10 a.m. on 12 July 1995.[36]

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[26] Motion, paras 6-9, Annex 1. However, the Appeals Chamber notes that Popović fails to present any discernible arguments with respect to the admission into evidence of Annexes 2-5 to the Motion. The Prosecution does not provide any arguments with respect to the admissibility of the documents in these annexes.
[27] Motion, para. 6.
[28] Motion, para. 6. See also Reply, para. 4.
[29] Motion, para. 10.
[30] Motion, para. 10, referring to Trial Judgement, paras 1052, 1097-1099, 1166, 2157, fn. 3453.
[31] Motion, paras 7-9.
[32] Motion, para. 7.
[33] Motion, paras 8-9, referring to Popović's Appeal Brief, paras 34-118.
[34] Reply, para. 8.
[35] Motion, para. 9, citing Trial Judgement, para. 1052.
[36] Motion, para. 9, referring to Trial Judgement, paras 779, 861, 883, 1050-1051.

17. In addition, and with no apparent link to his arguments regarding the admission of the Report, Popović claims that a correct translation of an intercept relied upon by the Trial Chamber in reaching its conclusion that he arranged for the murder of the wounded prisoners from the Standard Barracks, indicates that he "merely went to relay a message, but not to take any active role."[37] He therefore argues that this translation supports his argument that the evidence did not prove his custody of the prisoners or responsibility for their death.[38]

18. The Prosecution responds that Popović failed to satisfy the requirements of Rule 115 of the Rules with respect to his request to have the Report admitted as additional evidence on appeal.[39] The Prosecution submits that it disclosed the Report to Popović on 29 January 2010, more than four months before the Trial Judgement was rendered,[40] and that he failed to bring the Report to the attention of the Trial Chamber and apply to re-open his case in order to tender it into evidence.[41]

19. In any event, the Prosecution argues that the tendered material would not have affected the verdict.[42] The Prosecution contends that the Report does not undermine the findings in the Trial Judgement but, instead, further inculpates Popović.[43] The Prosecution asserts that Popović overstates the inferences that can be drawn from the Report concerning the number of victims, the purpose of the separation, and Popović's knowledge of the plan to murder Bosnian Muslim men on 12 July 1995.[44]

20. In particular, the Prosecution points out that the Report only refers to "a snapshot of a moment in time – 17:30 on 12 July – at which point the separation process had just begun" and would not affect the findings of the Trial Chamber with respect to the total number of separated and murdered Bosnian Muslim men, which were based on ample evidence.[45] Furthermore, with respect to Popović's argument regarding the allegedly legitimate screening efforts conducted at that time, the Prosecution submits that the Trial Chamber "considered evidence that some efforts were made

[37] Motion, para. 11, referring to Trial Judgement, paras 573, 577, 1153, 1380, 1411. See also *ibid.*, Annex 6.
[38] Motion, para. 11, referring to Popović's Appeal Brief, paras 357-360.
[39] Response, para. 2.
[40] Response, paras 2-4, Annex B. The Prosecution adds that in addition to disclosing the Report, it also sent an email to Popović's Defence Team on 29 January 2010, specifically drawing attention to it (*ibid.*, para. 4, Annex B).
[41] Response, paras 5-6. In this regard, the Prosecution argues that evidence that becomes available after completion of the trial hearings but before the issuance of a trial judgement, should be presented to the Trial Chamber in a motion to reopen a case (*ibid.*, para. 3, referring to *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Appellant Vidoje Blagojević's Motion for Additional Evidence Pursuant to Rule 115, 21 July 2005 (confidential) ("*Blagojević* Decision of 21 July 2005"), paras 10-12; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005 ("*Blagojević* Decision of 16 November 2005").
[42] Response, paras 2, 7, 10, 14.
[43] Response, paras 7, 10-13.
[44] Response, paras 8-9.
[45] Response, para. 10, referring to Trial Judgement, paras 266, 327, 329, 331, 338, fn. 3591; Exhibits P02047, P02057, P03040.

to screen the Bosnian Muslim prisoners and concluded that the efforts were 'so sporadic and void of [a] superior direction or supervision that one cannot derive a sincere intention on the part of the Bosnian Serb Forces to carry out a legitimate screening operation.'"[46] According to the Prosecution, nothing in the Report contradicts either this conclusion or the Trial Chamber's finding that the separation process in Potočari "marked the commencement of the implementation of the plan to murder the Bosnian Muslim males from Srebrenica".[47] Finally, the Prosecution argues that, with respect to Popović's knowledge of and participation in the plan to murder, the Report does not contradict the Trial Chamber's findings.[48]

21. With respect to the document in Annex 6 to the Motion, the Prosecution states that Popović merely repeats the arguments made in his Appeal Brief concerning "his preferred interpretation of Exhibit P01310, and offers at Annex 6 a translation which was not admitted at trial."[49] The Prosecution further claims that documents admitted at trial are not the proper subject of a motion pursuant to Rule 115 of the Rules.[50]

22. In reply, Popović argues that the Prosecution misstated the law and is wrong to suggest that "the term 'during trial' includes the period between the end of trial proceedings and the issuance of the judgment".[51] In any event, he argues that in light of the Trial Chamber's instruction not to file any additional evidence, an attempt to have the case re-opened and to tender the Report before the Trial Chamber would have been "imprudent, ineffectual or even subject to sanction".[52] Popović claims that, contrary to the Prosecution's arguments, the Appeals Chamber's jurisprudence in fact supports his position.[53]

23. Popović also argues that the fact that the separated men were subject to investigation led by the State Security proves that this was a legitimate screening operation and there was no plan to murder them.[54] Popović further contends that he was not the author of the Report as he "would not address a report he personally wrote to himself, and thus could not have signed [the Report]

[46] Response, para. 11, citing Trial Judgement, fn. 3453, and referring to Trial Judgement, paras 320, 323.
[47] Response, para. 11, citing Trial Judgement, para. 1052.
[48] Response, para. 12, referring to Trial Judgement, paras 1050-1053, 1097-1099, 1166-1168, 1178-1181, 1190, 1196.
[49] Response, fn. 27, referring, *inter alia*, to Popović's Appeal Brief, para. 362.
[50] Response, fn. 27, referring to the Prosecution's Response Brief (Popović), para. 256.
[51] Reply, para. 2.
[52] Reply, para. 3, referring to *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Consolidated Decision on Motions for the Admission of Evidence and Other Related Motions, 22 July 2009 ("Decision of 22 July 2009"), p. 3.
[53] Reply, paras 4-5, referring to *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Nikola Šainović's Motion Requesting Admission of Additional Evidence Pursuant to Rule 115 of the Rules, 28 January 2010 ("*Šainović* Decision of 28 January 2010"), para. 15; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, 22 March 2005 ("*Galić* Decision of 22 March 2005"), paras 10-15.
[54] Reply, para. 11, referring to Popović's Appeal Brief, paras 65-73.

at 17:30."[55] Consequently, Popović claims that this further undermines the finding that he participated in the plan to murder.[56]

24. Finally, in his Reply, Popović includes a new motion pursuant to Rule 115 of the Rules tendering "an additional Report from 12 July 1995, disclosed in December 2010."[57]

B. Analysis

1. Preliminary matters

(a) Timeliness of the Motion

25. As recalled in the Decision of 1 June 2011, the 30-day time-limit prescribed under Rule 115 of the Rules was to expire that very day.[58] Consequently, for all motions filed after this deadline, the moving party must "demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in question as soon as possible after it became aware of the existence of the evidence sought to be admitted."[59]

26. Popović filed his Motion with the Registry of the Tribunal on 2 June 2011 at 00:05 a.m.,[60] and thus five minutes after the expiration of the 30-day deadline imposed by the Rules.[61] Although the Motion contains no arguments in relation to the delayed filing, the Appeals Chamber accepts the Motion as validly filed in light of the lack of opposition by the Prosecution to the Motion on this basis, and the nominal delay occasioned by the late filing.

27. However, the Appeals Chamber notes that Popović appears to misinterpret the Decision of 1 June 2011 with respect to the requirements applicable upon the passing of the 30-day deadline under Rule 115 of the Rules.[62] The Appeals Chamber therefore reiterates that any party wishing to tender additional evidence after this deadline must show good cause or, if the filing is made after the appeals hearing, cogent reasons for the delay in order for the untimely motion to be considered

[55] Reply, para. 9. See also *ibid.*, para. 10; Motion, fn. 3.
[56] Reply, para. 9.
[57] Reply, para. 12. See also *ibid.*, para. 1.
[58] Decision of 1 June 2011, para. 10.
[59] Decision of 1 June 2011, para. 10 (emphasis omitted), and references cited therein.
[60] See ICTY Notification About Electronic Filing, D/A 8735, 2 June 2011.
[61] See Directive for the Court Management and Support Services Section Judicial Support Services Registry, IT/121/REV.2, 19 January 2011, Article 25.3.
[62] Motion, para. 4; Reply, para. 6.

validly filed.[63] It is a separate and further requirement to demonstrate that the tendered material was unavailable at trial or could be discovered through the exercise of due diligence.[64]

(b) Confidentiality

28. The Appeals Chamber notes that Popović filed the Motion confidentially without justifying why the submission or proposed evidence warrants this classification.[65] Moreover, the Appeals Chamber cannot discern any such reason for confidentiality. Recalling that all submissions filed before the Tribunal shall be public unless there are exceptional reasons for keeping them confidential,[66] the Appeals Chamber renders the present decision publicly.

(c) Formal requirements

29. In addition to the specificity requirement recalled above,[67] the Appeals Chamber emphasizes that motions filed pursuant to Rule 115 of the Rules must include, *inter alia*, "a precise list of the evidence the party is seeking to have presented".[68] The Appeals Chamber notes that the Motion contains no such list and as a result lacks sufficient clarity as to which of the annexed documents are being tendered for admission as additional evidence on appeal. Indeed, the Motion only refers to the Report[69] and an allegedly revised translation of Exhibit P01310.[70] There are no arguments regarding the admissibility of the documents contained in Annexes 2-5 to the Motion.[71] The Appeals Chamber therefore finds that the formal requirements applicable to a motion seeking to present additional evidence on appeal have not been satisfied in relation to the documents submitted as Annexes 2-5 to the Motion, and will not consider them for the purposes of admission of additional evidence on appeal.[72]

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[63] Decision of 1 June 2011, para. 11.
[64] See *supra*, paras 7, 9-10.
[65] The Appeals Chamber notes that the Response and Reply were correctly filed confidentially because they refer to a confidential decision. However, the Appeals Chamber has the discretion to render this decision publicly despite the references to this confidential decision (*cf. In The Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 52).
[66] *Šainović et al.* Decision of 28 January 2010, para. 19; *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 references cited therein.
[67] See *supra*, para. 11.
[68] Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002 ("Practice Direction"), para. 11(a).
[69] Motion, paras 5-10, Annex 1.
[70] Motion, para. 11, Annex 6. See also *supra*, para. 21.
[71] The Appeals Chamber notes that in footnote 3 of the Motion, Popović refers to these documents arguing that the Report was most likely prepared not by Popović but by Momir Nikolić. However, these submissions do not relate to the admissibility of these documents as additional evidence on appeal.
[72] *Cf. Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Formal Requirements Applicable to the Parties' Filings Related to the Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence, 23 January 2006, pp. 6-7; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006 ("*Nahimana et al.* Decision of 5 May 2006"), paras 11-13, 18-19.

30. With respect to the document in Annex 6 to the Motion, which indeed appears to be a different translation of Exhibit P01310,[73] the Appeals Chamber recalls that when the original language version of an exhibit is already part of the trial record, "the English translation of the exhibit does not constitute 'new' or 'additional' evidence pursuant to Rule 115 of the Rules".[74] Moreover, challenges concerning the Trial Chamber's interpretation of a translated document in evidence are matters for the consideration of the merits of the appeal.[75] Without prejudice to Popović's respective arguments in his Appeal Brief, the Appeals Chamber therefore declines to consider the document in Annex 6 to the Motion for the purposes of admission of additional evidence on appeal.

31. Finally, with respect to Popović's attempt to submit another piece of additional evidence as part of his Reply,[76] the Appeals Chamber recalls that "a reply should be limited to arguments contained in the response" and that including any completely new submission of law or fact in a reply to a motion filed pursuant to Rule 115 of the Rules is improper.[77] Consequently, the Appeals Chamber rejects Popović's request to admit the document contained in Annex 1 to the Reply as additional evidence on appeal.[78] In light of this conclusion, there is no need for the Appeals Chamber to address the parties' arguments on the merits of admitting this document.

2. Admissibility of the Report

(a) Availability at trial

32. The Appeals Chamber notes that it is not disputed that the Report was made available to Popović in early 2010.[79] The Appeals Chamber recalls that the presentation of the Defence cases at trial started with Popović's case, which commenced on 2 June 2008 and concluded on

[73] See *supra*, paras 17, 21.
[74] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Milan Lukić's First Motion to Admit Additional Evidence on Appeal, 6 July 2011, p. 1.
[75] *Cf. Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Ferdinand Nahimana's Motion for the Translation of RTLM Tapes in Exhibit C7, 20 November 2006, para. 13.
[76] Reply, paras 1, 12-13, Annex 1.
[77] *Nahimana et al.* Decision of 5 May 2006, paras 8, 15.
[78] This conclusion is without prejudice to Popović's right to file a new motion under Rule 115 of the Rules in full compliance with the requirements recalled in this Decision. In this regard, the Appeals Chamber notes that the Reply contains no arguments as to the timeliness of Popović's request to submit another document as additional evidence on appeal. As correctly noted by the Prosecution, Popović must – but failed to – show good cause for filing a motion under Rule 115 of the Rules after the expiration of the prescribed time-limit (Second Response, para. 8). The arguments on this matter contained in Popović's Second Reply are unconvincing as Popović simply states that while the document was disclosed to him on 22 December 2010, his Defence team had no time to analyse it in light of the amount of material disclosed after trial and purported lack of resources for the supporting staff, combined with the need to complete the briefing of his appeal (Second Reply, para. 2). The Appeals Chamber considers that these circumstances are the realities of practically any case on appeal and do not constitute good cause for the late filing. Consequently, even if the Appeals Chamber were to accept the second request for admission of additional evidence as a valid motion despite it being filed as part of the Reply, it would have rejected it as untimely.
[79] Motion, para. 6; Response, para. 4.

8 July 2008.[80] The last Defence case concluded on 12 March 2009.[81] The cases of the Prosecution, Popović, Miletić, and Gvero were subsequently re-opened on several occasions.[82] In its Decision of 22 July 2009, the Trial Chamber rejected further evidence and submissions as it was not persuaded that those specific arguments and evidence warranted re-opening and admission, respectively.[83] It also issued a notice that it would "not entertain any further Motions seeking the introduction of additional evidence."[84] Popović made his closing argument on 7 September 2009.[85]

33. In the Motion, Popović does not offer any argument as to why he did not attempt to have the Report admitted by the Trial Chamber, including through a motion to re-open the case as suggested by the Prosecution.[86] At the same time, the Appeals Chamber notes his respective submissions presented in the Reply,[87] without however finding them convincing. The Appeals Chamber rejects Popović's argument that the Decision of 22 July 2009 categorically barred him from filing another request to re-open the case and have new evidence admitted at the risk of being sanctioned. The Appeals Chamber considers that Popović could have explored other avenues that were still open to him, including a request for certification to appeal against the Decision of 22 July 2009 or a request for reconsideration before or after he received the disclosed Report.[88] In this sense, Popović has not fulfilled his obligation to exercise due diligence in at least attempting to bring the evidence before the Trial Chamber.[89]

34. Moreover, the Appeals Chamber rejects Popović's argument that he could not have been aware of the relevant jurisprudence contained in the *Blagojević* Decision of 21 July 2005.[90] As the Prosecution correctly points out, Popović was granted access to confidential materials from that case, including the said decision, by the *Blagojević* Decision of 16 November 2005. In the *Blagojević* Decision of 21 July 2005, the Appeals Chamber clarified that

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[80] Trial Judgement, Annex 2, para. 19.
[81] Trial Judgement, Annex 2, para. 25.
[82] Trial Judgement, Annex 2, paras 28-35.
[83] Decision of 22 July 2009, p. 3.
[84] Decision of 22 July 2009, p. 3.
[85] Trial Judgement, Annex 2, para. 36.
[86] Response, paras 3, 5-6.
[87] *Supra*, para. 22.
[88] See *Prosecutor. v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 18. In addition, once Popović received the Report, he could have filed a motion for re-opening of the case and admission of the Report despite the notice in the Decision of 22 July 2009 and, had the Trial Chamber denied it, he could have filed for certification of an appeal against such a decision and/or challenge it as part of his appeal against the Trial Judgement (*cf. Siméon Nchamihigo v. The Prosecutor,* Case No. ICTR-01-63-A, Decision on Siméon Nchamihigo's Second Motion for Leave to Present Additional Evidence on Appeal, 28 September 2009, paras 13-14). If Popović had succeeded in showing how crucial the Report was for his case, it is unlikely that he would have run a risk of being sanctioned at that stage.
[89] See *supra*, para. 7.
[90] Reply, fn. 2. Popović also argues that "there is no record of this Decision in the Judicial Database" (*ibid.*), which is not correct.

> evidence is "available at trial" if it becomes available at a stage when it is still reasonably possible for the relevant party to seek to introduce it before the Trial Chamber. Depending on the circumstances, evidence received after closing arguments in a case may meet this standard.[91]

The Appeals Chamber is of the view that this logic applies to any considerations of availability at trial in the sense of Rule 115 of the Rules, and in particular the due diligence requirement.[92] In light of its findings above, the Appeals Chamber concludes that it could have been reasonably possible for Popović to seek to introduce the Report before the Trial Chamber.[93]

35. Finally, the Appeals Chamber finds Popović's arguments regarding the *Šainović* Decision of 28 January 2010 and the *Galić* Decision of 22 March 2005 to be misguided,[94] as in both cases the Appeals Chamber clearly found that the proposed evidence was available at trial or could have been obtained through the exercise of due diligence.[95] It does not follow from the reasoning and the conclusions of those decisions that a document disclosed to an applicant after his case was closed but before the trial judgement was rendered, should be considered unavailable at trial in the sense of Rule 115 of the Rules.

36. In sum, the Appeals Chamber is not convinced that Popović has demonstrated that he fulfilled his duty to act with due diligence and made "the best case in the first instance"[96] by bringing the evidence that he considers crucial before the Trial Chamber.[97] Therefore, the Appeals Chamber finds that the Report was available at trial for the purposes of Rule 115 of the Rules. As a consequence, the Report can only be admitted as additional evidence on appeal if the Appeals

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[91] *Blagojević* Decision of 21 July 2005, para. 10.

[92] Contrary to Popović's submission that he cannot be "fairly bound" by that jurisprudence (Reply, fn. 2). In fact, the holding in *Blagojević* 21 July 2005 Decision is not a new jurisprudential development but a mere clarification of Rule 115 of the Rules.

[93] *Cf. Blagojević* Decision of 21 July 2005, para. 12: "[M]otions to reopen closed proceedings, which are unusual, might well be denied in the Trial Chamber's discretion, including circumstances in which Rule 115 consideration of the evidence in question remains appropriate on appeal. Had the Trial Chamber refused to reopen the proceedings (on grounds not otherwise disposing of any subsequent Rule 115 motion), the Appellant could then reasonably have argued that the evidence should be considered unavailable at trial for Rule 115 purposes. As it is, however, having not made any effort to introduce the evidence before the Trial Chamber, he cannot claim to have exercised due diligence, taking advantage of all procedural mechanisms available under the Statute and Rules of the [...] Tribunal."

[94] Popović argues that by contrast to his situation, documents tendered as additional evidence in those cases were disclosed to the applicants before trial or while it was ongoing, thus allegedly supporting his argument that the Report, disclosed after his case was closed, should be considered as having been unavailable to him at trial (Reply, paras 4-5; see also *supra*, para. 22).

[95] *Šainović* Decision of 28 January 2010, para. 20; *Galić* Decision of 22 March 2005, para. 15.

[96] *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Naletilić's Consolidated Motion to Present Additional Evidence, 20 October 2004, para. 30, citing *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, 11 April 2001 (confidential), para. 12.

[97] See *supra*, para. 7. *Cf. Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's First Motion to Admit Additional Evidence on Appeal, 11 March 2010, paras 17, 20.

Chamber is satisfied that its exclusion would lead to a miscarriage of justice, in that if it had been admitted at trial, it would have affected the verdict.[98]

(b) Impact on the verdict

37. The Report indicates that on 12 July 1995, women and children were being evacuated to Kladanj, while men aged between 17 and 60 were being separated and not transported.[99] According to the Report, at 5:30 p.m. the time it was prepared, 70 men had been separated and were being screened by the security organs.[100] The Appeals Chamber is not convinced that Popović's suggested conclusion that the "real number of separated Muslim men in Potocari [*sic*] was only 70"[101] can be drawn from the Report. The Appeals Chamber notes that the reference in the Report to 70 men only reflects how many people had been separated at the time the Report was prepared while the separation and screening procedures were still ongoing. The Trial Chamber explicitly noted in this regard that "[t]he transportation and separation lasted until the evening of 12 July" and then resumed the next day.[102] Therefore, Popović fails to show that this information would have affected the Trial Chamber's ultimate conclusion as to the chronology of the events or the number of victims.[103]

38. As regards Popović's contentions concerning the alleged purposes of the screening, the Appeals Chamber is of the view that the Report does not address this issue – it simply states that "the security organs and the DB /state security/ are working with" the separated men.[104] The Trial Chamber considered evidence submitted at trial and concluded that screening efforts with respect to Bosnian Muslim prisoners "were so sporadic and void of a superior direction or supervision that one cannot derive a sincere intention on the part of the Bosnian Serb Forces to carry out a legitimate screening operation."[105] Popović fails to substantiate how the tendered Report, in combination with other evidence considered by the Trial Chamber, would have led it to conclude differently.[106] The Appeals Chamber therefore cannot accept Popović's submission that the Report shows that the purpose of the separation in Potočari at the end of 12 July 1995 was to screen for suspected war criminals and not to kill the separated Bosnian Muslim men on the ground, and that had it been otherwise, the separated men would have been brought to "executioners" and not "subject to the

[98] See *supra*, para. 10.
[99] Report, pp. 1-2.
[100] Report, pp. 1-2.
[101] Motion, para. 7.
[102] Trial Judgement, paras 321, 323.
[103] See Trial Judgement, paras 316-361.
[104] Report, p. 2.
[105] Trial Judgement, fn. 3453.
[106] In this regard, Popović merely refers to his Appeal Brief, paras 65-73. See Reply, para. 11, fn. 12.

State Security".[107] Consequently, had the Report been admitted at trial, it *would* not have affected the Trial Chamber's conclusion in this regard.[108]

39. The Report would have even less impact on the Trial Chamber's findings that the plan to kill the Bosnian Muslim men existed before 10 a.m. on 12 July 1995, and that Popović had knowledge of the plan to murder on that date.[109] These findings were made on the basis of numerous pieces of evidence,[110] none of which are directly contradicted by the contents of the tendered Report. The fact that this Report does not mention that it was intended to murder the Bosnian Muslim men does not, in and of itself, prove that there was no such plan or that Popović did not know about it. As recalled above, the significance and potential impact of the tendered material must be assessed in the context of the evidence presented at trial.[111] Apart from a mere reference to his Appeal Brief,[112] which falls short of fulfilling the requirements recalled above, Popović does not show how the Report refutes any of the evidence relied upon by the Trial Chamber.

40. Finally, and in light of its conclusions above with respect to the alleged impact on the Trial Chamber's conclusions, the Appeals Chamber declines to consider the issue of the authorship of the Report,[113] as it is without bearing on the outcome of this Decision. Furthermore, the Appeals Chamber will not entertain Popović's references to his arguments with respect to the credibility of Momir Nikolić and other challenges presented as part of his appeal against the Trial Judgement. The Appeals Chamber emphasizes that an applicant under Rule 115 of the Rules must fulfil all the requirements applicable to motions for additional evidence; this cannot be done through mere references to an appellant's brief.[114]

[107] See Motion, para. 8; Reply, para. 8.
[108] Trial Judgement, paras 1051-1052, fn. 3453.
[109] Motion, paras 9-10.
[110] See Trial Judgement, paras 1051-1053, 1097-1099, 1166, 2157.
[111] See *supra*, para. 12.
[112] Motion, para. 9, referring to Popović's Appeal Brief, paras 34-118. See also Reply, para. 7, referring to Popović's Appeal Brief, paras 38-61, 65-73.
[113] Motion, fn. 3; Response, fn. 12; Reply, paras 9-10.
[114] The Appeals Chamber notes in this regard that while there is a requirement for the applicant to "identify each ground of appeal to which the additional evidence relates and clearly describe the relationship of the evidence to the respective ground of appeal" (*Prosecutor v. Mladen Naletilić and Vinko Matinović*, Case No. IT-98-34-A, Decision on Naletilić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005, para. 15), mere references to an appeal brief cannot replace the requirement to plead, in the motion, the alleged impact on the verdict in the context of the evidence admitted at trial (see *supra*, paras 9-12).

41. In light of the above, the Appeals Chamber is not convinced that had the Report been admitted at trial, it would have affected the verdict. Consequently, the Appeals Chamber will not admit it as additional evidence on appeal pursuant to Rule 115 of the Rules.[115]

42. 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.

IV. DISPOSITION

43. In light of the foregoing, the Appeals Chamber **DISMISSES** the Motion. The Appeals Chamber further **DENIES** Popović's request to admit the document contained in Annex 1 to the Reply as additional evidence on appeal.

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

Judge Patrick Robinson
Presiding

Dated this 20th day of October 2011,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

[115] The criteria of Rule 115 of the Rules being cumulative, the Appeals Chamber does not need to address the credibility or the relevance of the Report.