



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: 26 January 2010
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 26 January 2010

PROSECUTOR

v.

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

PUBLIC

**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**

The Office of the Prosecutor:

Mr. Peter Kremer QC
Ms. Christine Dahl

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 “General Vladimir Lazarević’s Motion to Admit Additional Evidence Pursuant to Rule 115 with Annexes A, B, C, D, E, F”, filed confidentially by Counsel for Vladimir Lazarević (“Lazarević”) on 16 November 2009 (“Motion”). The Office of the Prosecutor (“Prosecution”) responded to the Motion on 16 December 2009.¹ Lazarević did not file a reply.

2. The Appeals Chamber is further seised of the “Prosecution Motion for Order Requiring Translations of Excerpts of Annex E of Lazarević’s Rule 115 Motion” filed confidentially on 8 December 2009 (“Motion for Translation”). Lazarević did not file a response thereto.

I. BACKGROUND

3. On 26 February 2009 Trial Chamber III (“Trial Chamber”) convicted Lazarević pursuant to Article 7(1) of the Tribunal’s Statute (“Statute”) of aiding and abetting the crimes of deportation and other inhumane acts (forcible transfer) charged as crimes against humanity under Article 5 of the Statute.² It imposed on him a single sentence of 15 years of imprisonment.³ Lazarević appealed his conviction on four grounds.⁴ The Trial Judgement has also been appealed by Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Sreten Lukić and the Prosecution.⁵

4. In his Motion, Lazarević requests the admission as additional evidence on appeal of several documents attached as Annexes A, B C, D, E, and F thereto.⁶ The Prosecution responds that the

¹ Prosecution Response to Lazarević Motion to Admit Additional Evidence Pursuant to Rule 115 (confidential and partly *ex parte*), 16 December 2009 (“Response”). See also, Appendices A (confidential), B and C (confidential and *ex parte*) to Prosecution Response to Lazarević Rule 115 Motion, 16 December 2009.

² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), vol. 3, paras 930, 1211.

³ Trial Judgement, vol. 3, para. 1211.

⁴ Vladimir Lazarević’s [*sic*] Defence Notice of Appeal, 27 May 2009 (confidential) and Defence Submission: Lifting Confidential Status of the Notice of Appeal, 29 May 2009; General Vladimir Lazarević’s Refiled Appeal Brief 2 October 2009 (confidential; public redacted version filed on 20 October 2009).

⁵ Defence Submission Notice of Appeal, 27 May 2009, and Defence Appeal Brief, 23 September 2009 (filed by Counsel for Nikola Šainović); General Ojdanić’s [*sic*] Second Amended Notice of Appeal, 16 October 2009 (filed as Annex C to General Ojdanić’s [*sic*] Motion to Amend his Amended Notice of Appeal of 29 July 2009, 16 October 2009), and General Ojdanić’s Amended Appeal Brief, 11 December 2009 (filed as Annex B to General Ojdanić’s [*sic*] Motion Submitting Amended Appeal Brief, 11 December 2009); Notice of Appeal from the Judgement of 26 February 2009, 29 September 2009 (filed by Counsel for Nebojša Pavković as Annex A to General Pavković Submission of his Amended Notice of Appeal, 29 September 2009), and General Pavković’s Amended Appeal Brief, 30 September 2009 (filed as Annex A to General Pavković’s Submission of his Amended Appeal Brief, 30 September 2009); Sreten Lukić’s [*sic*] Notice of Appeal from Judgment [*sic*] and Request for Leave to Exceed the Page Limit, 27 May 2009, and Defense Appellant’s [*sic*] Brief Refiled, 7 October 2009 (public with confidential annexes) (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 and 15 January 2010.

⁶ Motion, para. 1.

Motion should be dismissed in its entirety as it fails to comply with the requirements of Rule 115 of the Rules of Procedure and Evidence (“Rules”).⁷ In addition, with regards to Annex E which contains an indictment brought by the War Crimes Prosecutor’s Office of the Republic of Serbia against 17 alleged members of the Kosovo Liberation Army (“Serbian Indictment”) in B/C/S with a partial translation into English, the Prosecution requests that the Appeals Chamber order an official translation of further portions of the document, if necessary.⁸

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.⁹

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.¹⁰ The applicant’s duty to act with due diligence includes making “appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber”.¹¹ Counsel is therefore expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question.¹²

7. With respect to the exercise of counsel’s due diligence during trial, the Appeals Chamber recalls that

⁷ Response, paras 1-2.

⁸ Motion for Translation, para. 3.

⁹ Rule 115(A) of the Rules.

¹⁰ *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. 7; *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. 4; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115 (public redacted version), 26 June 2008 (“*Stanišić* Rule 115 Decision”), para. 6.

¹¹ *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, 16 October 1998 (“*Tadić* Decision on Extension of Time Limit”), para. 47. See also *Milošević* Rule 115 Decision, para. 7; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 4; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškić et al.* Appeal Judgement”), para. 50; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, *Décision sur les Requêtes de Ferdinand Nahimana aux fins de divulgation d’éléments en possession du Procureur et nécessaires à la Défense de l’Appellant et aux fins d’assistance du Greffe pour accomplir des investigations complémentaires en phase d’appel*, 8 December 2006, para. 24.

¹² *Prosecutor v. André Ntagerura et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 (“*Ntagerura et al.* Rule 115 Decision”), para. 9 (footnotes omitted).

[c]ounsel may have chosen not to present the evidence at trial because of his litigation strategy or because of the view taken by him of the probative value of the evidence. The determination which the Chamber has to make, except in cases where there is evidence of gross negligence, is whether the evidence was available at the time of trial. Subject to that exception, counsel's decision not to call evidence at trial does not serve to make it unavailable.¹³

8. The applicant must then show that the evidence is both relevant to a material issue and credible.¹⁴ 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.¹⁵ Evidence is credible if it appears to be reasonably capable of belief or reliance.¹⁶

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 given at trial, it could show that the verdict was unsafe.¹⁷ 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.¹⁸

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.¹⁹

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 on the Trial Chamber's verdict.²⁰ A party that fails to do so runs the risk that the tendered material will be

¹³ *Tadić* Decision on Extension of Time Limit, para. 50. 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. 31.

¹⁴ *Milošević* Rule 115 Decision, para. 8; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 5; *Stanišić* Rule 115 Decision, para. 6.

¹⁵ *Kupreškić et al.* Appeal Judgement, para. 62. See also *Krajišnik* Rule 115 Decision of 16 October 2008, para. 5; *Stanišić* Rule 115 Decision, para. 7.

¹⁶ *Milošević* Rule 115 Decision, para. 8; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 5; *Stanišić* Rule 115 Decision, para. 7; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.1, Confidential Decision on Prosecution's Application to Present Additional Evidence in Its Appeal Against the Re-Assessment Decision, 10 March 2006 ("*Haradinaj et al.* Rule 115 Decision of 10 March 2006"), para. 16; *Kupreškić et al.* Appeal Judgement, para. 63. See also *Ntagerura et al.* Rule 115 Decision, para. 22.

¹⁷ *Milošević* Rule 115 Decision, para. 9; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 6; *Stanišić* Rule 115 Decision, para. 7.

¹⁸ *Milošević* Rule 115 Decision, para. 9.

¹⁹ *Milošević* Rule 115 Decision, para. 10, referring to *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Blagoje Simić's Motion for Admission of Additional Evidence, Alternatively for Taking of Judicial Notice, 1 June 2006 ("*Simić* Rule 115 Decision"), para. 13. See also *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003 ("*Krstić* Rule 115 Decision"), p. 4; *Stanišić* Rule 115 Decision, para. 8.

²⁰ *Milošević* Rule 115 Decision, para. 11; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 7; *Stanišić* Rule 115 Decision, para. 6; *Kupreškić et al.* Appeal Judgement, para. 69.

rejected without detailed consideration.²¹ In addition, the tendered material shall be translated into one of the official languages of the Tribunal.²²

12. Finally, the Appeals Chamber has repeatedly recognised 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.²³

III. DISCUSSION

A. Preliminary issues

13. The Appeals Chamber first notes that with respect to the standard for admission of evidence on appeal, Lazarević 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 justice.²⁴ Had the material been available at trial, Lazarević argues that the Appeals Chamber retains the inherent power to consider it, if a failure to do so would result in a miscarriage of justice.²⁵ The Appeals Chamber finds that Lazarević 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.²⁶ The Appeals Chamber will therefore examine Lazarević’s submissions in accordance with the correct standard articulated above.²⁷

14. The Appeals Chamber further notes that both the Motion and the Response were filed confidentially, with Appendices B and C to the Response filed *ex parte*. Recalling that under Rules 78 and 107 of the Rules, all proceedings before the Appeals Chamber, including the Appeals Chamber’s orders and decisions, shall be public unless there are exceptional reasons for keeping

²¹ *Ibid.*

²² Practice Direction on Formal Requirements for Appeals from Judgement, 7 March 2002, IT/201, Article 11.

²³ See *Milošević* Rule 115 Decision, para. 12; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 6; *Simić* Rule 115 Decision, para. 14; *Krstić* Rule 115 Decision, p. 4. See also, e.g., *Kupreškić et al.* Appeal Judgement, paras 66, 75.

²⁴ Motion, paras 5, 8, 15.

²⁵ *Ibid.*, para. 7.

²⁶ The jurisprudence relied upon by Lazarević refers to Rule 115 (B) prior to its amendment in July 2002 (Motion, paras 5, 8, referring to *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.*, IT-95-16-A, Appeal Judgement, 23 October 2001, paras 75-76). Prior to its amendment, Rule 115 (B) 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. *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on the Fourth Defence Motion to Present Additional Evidence Before the Appeals Chamber (confidential), 29 August 2005, para. 19).

²⁷ See *supra*, paras 5-12.

them confidential,²⁸ and considering that no confidential information from the tendered material is cited herein, the Appeals Chamber renders the present decision publicly.

B. Material tendered pursuant to Rule 115

15. Lazarević seeks admission into evidence of a number of documents (grouped and marked by Lazarević as 5DA1, 5DA2, 5DA3, 5DA4, 5DA5, and 5DA6)²⁹ acquired from the Serbian National Council for Cooperation with the International Criminal Tribunal for the former Yugoslavia (“Council for Cooperation”), the Military Archives of the Republic of Serbia (“Military Archives”), the Military Hospital in Niš and the Special Hospital for Psychiatric Diseases “G. Toponica”.³⁰ He argues that the proffered evidence was unavailable during trial, and that had it been admitted, it would have resulted in the imposition of a more lenient sentence or acquittal.³¹

1. Documents 5DA1 and 5DA2

(a) Arguments of the parties

16. Lazarević seeks admission into evidence of two documents issued by the Serbian Supreme Command Staff and signed by Dragoljub Ojdanić.³² Document 5DA1, dated 4 June 1999, authorizes a team of which Lazarević was a member, to negotiate on behalf of the Yugoslav Army (“VJ”) on all issues of implementation of the peace plan of the European Union and the Russian Federation, and to sign a plan for withdrawal from the territory of Kosovo.³³ Document 5DA2 issued the same day, is an order designating a team, which also includes Lazarević, for the negotiation and preparation of a plan for withdrawal from Kosovo.³⁴

17. Lazarević submits that his Defence team had actively searched for these documents in different departments of the Military Archives, and that he sent a request to the Council for

²⁸ *Milošević* Rule 115 Decision, para. 15, referring to *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on Mile Mrkšić’s Second Rule 115 Motion, 13 February 2009, fn. 4; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007, fn. 38; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Order Withdrawing Confidential Status of Pre-Review Order and Decisions, 5 December 2005, p. 2, citing *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Vinko Martinović’s Withdrawal of Confidential Status of Appeal Brief, 4 May 2005, p. 3.

²⁹ Motion para. 16.

³⁰ *Ibid.*, para. 1.

³¹ *Ibid.*, para. 15; see also *ibid.*, para. 2.

³² *Ibid.*, paras 9-10.

³³ *Ibid.*, Annex A.

³⁴ *Ibid.*, Annex B.

Cooperation on 17 September 2009, immediately after having identified them, seeking authorization to use the documents in the proceedings before the Tribunal.³⁵

18. Lazarević argues that the proffered evidence supports his claim that he did not possess the requisite *mens rea* in relation to the “illegality of his acts or omissions”.³⁶ In his view, the documents indicate that (i) he was the only one, among those present in Kosovo at the relevant time, to be appointed by the Supreme Command Staff as a member of the negotiating team; (ii) the Supreme Command Staff had recognized his readiness to resolve the conflict in Kosovo by peaceful means; and (iii) Lazarević had the intention to actively participate in the peaceful resolution of the conflict.³⁷ Lazarević seeks the admission of the two documents “if for no other reason than because of the sentencing”.³⁸

19. The Prosecution responds that document 5DA1 was admitted in evidence at trial on 3 October 2007 as Exhibit P1748 (public) in connection with the testimony of witness Krga.³⁹ Moreover, even though the Trial Chamber did not specifically discuss Lazarević’s role, the Prosecution submits that the reference to Exhibit P1748 in the Trial Judgement shows that the Trial Chamber considered evidence that Lazarević was a member of the VJ negotiating team.⁴⁰ As for document 5DA2, the Prosecution argues that apart from some irrelevant logistical information, the document duplicates Exhibit P1748 and therefore could not be considered for the purposes of Rule 115 of the Rules.⁴¹ Moreover, the document was available to Lazarević at trial.⁴² The Prosecution further contends that Lazarević neither elaborates on how the tendered material shows his lack of criminal intent, nor specifies the factual findings of the Trial Chamber that would have been affected, had the evidence been admitted at trial.⁴³ Regarding the relevance of the proffered material to Lazarević’s sentence, the Prosecution asserts that Lazarević’s argument in this respect should be dismissed as it has been raised for the first time on appeal despite it being “within both the trial record and Lazarević’s personal knowledge”.⁴⁴

³⁵ *Ibid.*, para. 10.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Response, para. 5, referring to Branko Krga, 3 Oct 2007, T. 16816-16817.

⁴⁰ *Ibid.*, para. 6, referring to Trial Judgement, vol. 1, para. 1215 and fn. 3321.

⁴¹ *Ibid.*, paras 5-6, 9.

⁴² *Ibid.*, fn. 11.

⁴³ *Ibid.*, para. 7.

⁴⁴ *Ibid.*, para. 8, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Vladimir Lazarević’s Final Trial Brief (confidential), 15 July 2008; Vladimir Lazarević, 12 Nov 2007, T. 18123-18124.

(b) Analysis

20. The Appeals Chamber observes that document 5DA1 had been admitted at trial as Exhibit P1748 and therefore cannot constitute “additional evidence” pursuant to Rule 115 of the Rules.⁴⁵ Thus, Lazarević’s request with respect to this document is moot.

21. Concerning document 5DA2, the Appeals Chamber observes that, according to the Prosecution, it was disclosed to Lazarević on 29 September 2005.⁴⁶ Given that Lazarević did not file a reply, the Appeals Chamber considers that he is not disputing this fact. Therefore, the Appeals Chamber considers that for the purpose of Rule 115 of the Rules the document was available to Lazarević at trial. Consequently, it can only be admitted as additional evidence on appeal if Lazarević demonstrates that the document is credible, relevant and *would* have had an impact on the verdict.⁴⁷

22. The Appeals Chamber finds document 5DA2 to be *prima facie* credible. As to its relevance however, it finds that Lazarević has failed to demonstrate how the document relates to any of the Trial Chamber’s findings concerning his *mens rea* with respect to the crimes he was convicted of. At most, had it been admitted at trial, document 5DA2 may have been of relevance to the Trial Chamber’s sentencing considerations. Turning to its potential impact on the sentence, the Appeals Chamber notes that the Trial Chamber was fully aware of Lazarević’s involvement in the withdrawal of units from Kosovo, at least on the basis of his participation in the signing of the plan for withdrawal.⁴⁸ The Appeals Chamber is not convinced that the proffered material substantially adds to what was already presented at trial and that had it been before the Trial Chamber, it would have affected the verdict. Lazarević’s request for the admission of document 5DA2 as additional evidence on appeal is therefore dismissed.

2. Document 5DA3(a) Arguments of the parties

23. Lazarević seeks admission into evidence of a letter sent to his counsel by the Council for Cooperation on 14 September 2009.⁴⁹ The document states that in a letter dated 26 August 2009, the Ministry of Defence confirmed that in the period 1998 – 1999, the VJ did not possess flame-

⁴⁵ Cf. *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Appellant Momčilo Krajišnik’s Motion to Present Additional Evidence, 20 August 2008, para. 10; *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, para. 21.

⁴⁶ Response, fn. 11.

⁴⁷ See *supra*, para. 10.

⁴⁸ Trial Judgement, vol. 1, para. 1215.

throwers.⁵⁰ As to the unavailability of the material at trial, Lazarević submits that he has actively searched the Military Archives for an official specification of the VJ's weaponry during the relevant period.⁵¹ Not being able to find the said specification, he addressed the VJ General Staff through the Council for Cooperation.⁵² Lazarević states that he had considered the aforementioned specification to be of a "greater probative value" and therefore he decided to seek the admission of document 5DA3 only after he had realized that it could not be obtained in a timely manner.⁵³ Lazarević argues that in light of the testimony of the Prosecution witnesses that the VJ did possess flame-throwers, the admission of the proffered evidence is in the "interests of justice".⁵⁴

24. The Prosecution responds that Lazarević fails to address the "evidentiary weight" that should be accorded to the letter sent by the Council for Cooperation, and that the letter itself does not provide any further details regarding the source of the information or any indicia by which to assess its reliability.⁵⁵ The Prosecution further argues that the Trial Chamber considered conflicting evidence as to whether the VJ used flame-throwers and rejected the testimony of Božidar Delić who claimed the VJ had decommissioned them in the 1950's.⁵⁶ In the Prosecution's view, document 5DA3 fails to add to what has already been considered and rejected at trial and therefore should be dismissed.⁵⁷

(b) Analysis

25. Concerning the availability of the proffered material at trial, the Appeals Chamber recalls that in exercising due diligence counsel is expected to apprise the Trial Chamber of any difficulties in relation to obtaining evidence.⁵⁸ Lazarević does not show that he had notified the Trial Chamber of his difficulties in obtaining the VJ's catalogue of weaponry, which he deemed essential for demonstrating that the VJ did not possess flame-throwers. Such an omission to notify the Trial Chamber makes it apparent that counsel failed to exercise due diligence.

26. Lazarević concedes that he could have sent a request concerning this evidence at an earlier date.⁵⁹ He asserts, however, that he considered an official specification relative to all types of weaponry in the relevant period, which he had actively searched for, to be of greater probative

⁴⁹ Motion, para. 11.

⁵⁰ *Ibid.*, Annex C.

⁵¹ *Ibid.*, para. 11.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*, referring to witness Popaj's testimony in relation to Bela Crkva/Bellacërka, Orahovac/Rahovec municipality.

⁵⁵ Response, para. 11.

⁵⁶ *Ibid.*, para. 12, referring to Trial Judgement, vol. 2, paras 380, 1160, fn. 2837.

⁵⁷ *Ibid.*

⁵⁸ See *supra*, para. 6.

⁵⁹ Motion, para. 11.

value and therefore did not seek the admission of substitute evidence.⁶⁰ In considering this argument, the Appeals Chamber is cognisant that counsel has wide discretion as to the manner in which proceedings are conducted, including the choice of the best tactics with respect to the presentation of evidence.⁶¹ However, a tactical decision not to seek the admission of certain evidence due to the expectation that evidence of greater probative value might become available later in the proceedings does not render the first evidence unavailable at trial in terms of its assessment for the purposes of admission under Rule 115 of the Rules.⁶² In light of these considerations, the Appeals Chamber finds that document 5DA3 was available at trial as it could have been discovered through the exercise of due diligence. Consequently, this document cannot be admitted as additional evidence on appeal unless the Appeals Chamber is satisfied that Lazarević succeeded in demonstrating that the material is credible, relevant and 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.⁶³

27. Concerning the credibility of the document, the Appeals Chamber is required to ascertain whether the evidence appears to be reasonably capable of belief or reliance, and need not at this stage make a finding as to the weight to be accorded to it.⁶⁴ In this respect, the Appeals Chamber observes that document 5DA3 identifies the Ministry of Defence as the source, indicating the date and the way in which the information concerning the VJ's possession of flame-throwers was communicated. Accordingly, the Appeals Chamber finds that the tendered material is *prima facie* credible. It also appears relevant to an issue material to Lazarević's conviction, notably the methods employed by the VJ forces in carrying out the crimes of deportation and forcible transfer of civilians.⁶⁵

28. The Appeals Chamber notes, however, that Lazarević generally contends that document 5DA3 contradicts the testimony of witness Popaj concerning the events that took place in Bela Crkva/Bellacërka, without providing any reference to the relevant finding of the Trial Chamber. He

⁶⁰ *Ibid.*

⁶¹ *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Motion to Admit Additional Evidence (Public redacted version), 9 December 2004, paras 37-40.

⁶² See also *supra*, para. 7.

⁶³ See *supra*, para. 10.

⁶⁴ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Dragomir Milošević's Further Motion to Present Additional Evidence, 9 April 2009, para. 6, referring to *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Dragomir Milošević's Motion to Present Additional Evidence, 20 January 2009, para. 7. See also *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence, 20 August 2008, para. 6; *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), para 10, fn 32; *Kupreškić et al.* Appeal Judgement, para 63.

⁶⁵ Trial Judgement, vol. 2, para. 1160.

further fails to specify the impact the additional evidence would have had on the Trial Chamber's decision, had it been admitted at trial.⁶⁶

29. Such omissions are, in principle, sufficient for the proffered evidence to be dismissed.⁶⁷ The Appeals Chamber has nevertheless decided, in the interests of justice, to examine document 5DA3 so as to ensure that an important piece of evidence has not been overlooked.⁶⁸ Several witnesses testified at trial that the VJ employed flame-throwers. Their evidence concerned, *inter alia*, the VJ attack on Bela Crkva/Bellacërka on 25 March 1999,⁶⁹ and the setting fire to houses in Celina on 26 March 1999.⁷⁰ Witness Delić contradicted their testimony by stating that the VJ had not used flame-throwers since 1956.⁷¹ The Trial Chamber carefully considered this inconsistency in the evidence and ultimately accepted the "very detailed and consistent eye-witness evidence" of witnesses Zhuniqi and Popaj about the events in Bela Crkva/Bellacërka. Conversely, it found the credibility of witness Delić questionable and decided not to rely on his testimony in relation to the said events.⁷² It reiterated that in light of the consistent evidence of witnesses as to the use of flame-throwers by the forces of FRY and Serbia for the purposes of torching buildings, it did not accept the testimony of witness Delić that such weapons had been decommissioned by the VJ in the 1950s.⁷³ On the totality of the evidence considered by the Trial Chamber and absent any specific arguments by Lazarević, the Appeals Chamber is not convinced that if document 5DA3 had been admitted at trial, it would have affected the verdict. Lazarević's request for its admission is therefore dismissed.

3. Document 5DA4

(a) Arguments of the parties

30. Document 5DA4, dated 17 September 2009, is a certificate issued by the Council for Cooperation stating that following Lazarević's voluntary surrender, 11 individuals from Serbia had voluntarily surrendered to the Tribunal.⁷⁴ With regards to the reasons for not seeking the admission of this evidence earlier, Lazarević submits that he has been awaiting the possible voluntary surrender of Mr. Goran Hadžić.⁷⁵ In Lazarević's view, document 5DA4 shows that his voluntary

⁶⁶ The Appeals Chamber notes that Lazarević was not convicted of the crimes committed in Bela Crkva / Bellacërka.

⁶⁷ See *supra*, para. 11.

⁶⁸ Cf. *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Confidential Decision on Stakić's Rule 115 Motion to Admit Additional Evidence on Appeal, 25 January 2005, para. 13.

⁶⁹ Trial Judgement, vol. 2, para. 341, referring to Sabri Popaj, 2 Nov 2006, T. 5771-5772; Exhibit P2446, p. 3.

⁷⁰ Trial Judgement, vol. 2, para. 322, referring to Exhibit P2338, p. 4.

⁷¹ Trial Judgement, vol. 2, para. 362, referring to Božidar Delić, 29 Nov 2007, T. 19356.

⁷² Trial Judgement, vol. 2, para. 380.

⁷³ Trial Judgement, vol. 2, para. 1160.

⁷⁴ Motion, Annex D.

⁷⁵ *Ibid.*, para. 12.

surrender “has positively influenced a large number of persons to voluntary [*sic*] surrender to the ICTY” and considers it to be “important in respect to the sentencing decision”.⁷⁶

31. The Prosecution responds that Lazarević’s argument should be dismissed as it is being made for the first time on appeal based on information that was publicly available during trial.⁷⁷ It further argues that, as a matter of law, the voluntary surrender of other indictees would not mitigate Lazarević’s sentence beyond the credit he already received for his own voluntary surrender.⁷⁸

(b) Analysis

32. The Appeals Chamber observes that document 5DA4 is dated 17 September 2009, which is after the Trial Judgement was rendered. However, the information on individuals who surrendered to the Tribunal has been available and easily obtainable long before that date and it was apparently the decision of Lazarević’s Counsel not to refer to it at trial.⁷⁹ As explained above, such tactical decision concerning the presentation of evidence does not mean that the information Lazarević presently seeks to rely upon was unavailable at trial.⁸⁰ Therefore, for the purposes of Rule 115, the information contained in document 5DA4 must be regarded as having been available at trial.

33. Furthermore, the Appeals Chamber is not convinced that document 5DA4 is crucial or instrumental to the sentence imposed on Lazarević, as it does not support the conclusions Lazarević seeks to draw from it. In this regard, the Appeals Chamber finds Lazarević’s claim that his voluntary surrender “has positively influenced” 11 other individuals to follow his example, to be purely speculative. The proffered evidence contains no indication whatsoever that Lazarević’s act had any impact on the decision of those persons. More importantly, it should be recalled that the Trial Chamber already considered Lazarević’s voluntary surrender as a mitigating circumstance.⁸¹ The Appeals Chamber therefore finds that contrary to Lazarević’s suggestion, had the tendered material been admitted at trial it would have not affected the verdict. This document will therefore not be admitted into evidence.⁸²

⁷⁶ *Ibid.*

⁷⁷ Response, paras 14-15.

⁷⁸ *Ibid.*, para. 16.

⁷⁹ As indicated by the Prosecution, the website of the Tribunal provides ample information in this respect and is accessible to the general public (Response, fn. 35).

⁸⁰ See *supra*, paras 7, 26.

⁸¹ Trial Judgement, vol. 3, para. 1200. The Appeals Chamber has previously held that the underlying rationale for treating voluntary surrender as a mitigating factor rests in part on the assumption that the voluntary surrender of one individual may encourage others to surrender (*Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 600). Accordingly, the possibility that other individuals be prompted to voluntary surrender following Lazarević’s example is part and parcel of the rationale behind treating Lazarević’s own voluntary surrender as a mitigating factor.

⁸² 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 proffered material.

4. Document 5DA5

(a) Arguments of the parties

34. Document 5DA5, dated 11 August 2009, consists of the Serbian Indictment.⁸³ In Lazarević's view, the document shows that "the Trial Chamber conclusion that there were no KLA members in the Gnjilane region during the relevant time is erroneous".⁸⁴

35. The Prosecution responds that four reasons militate against the admission of document 5DA5 into evidence.⁸⁵ First, the Serbian Indictment by itself lacks probative value and it cannot be substituted for evidence.⁸⁶ Second, the Serbian Indictment concerns events that took place in Kosovo between June and December 1999, whereas the relevant period in the present case is between March and May 1999.⁸⁷ Third, the information contained therein was publicly available at least as early as December 1999.⁸⁸ Fourth, even if the Serbian Indictment were to be considered credible and reliable, the Trial Chamber already took into account the evidence concerning the presence of KLA members in the region of Gnjilane during the relevant time and found that Kosovo Albanians had fled the region due to the criminal activities of the VJ and MUP.⁸⁹ The Prosecution argues that Lazarević fails to show how consideration of document 5DA5 would have had influenced the verdict.⁹⁰

(b) Analysis

36. At the outset, the Appeals Chamber notes that document 5DA5 purportedly relates to a Trial Chamber's finding that "there were no KLA members in the Gnjilane region during the relevant time".⁹¹ In the absence of any specific reference to the relevant paragraphs, the Appeals Chamber was unable to discern any such finding in the Trial Judgement. The only Trial Chamber's finding that the KLA was not present in the area refers specifically to Prilepnica/Përlepnica village (Gnjilane/Gjilan municipality) on 13 April 1999.⁹² The Appeals Chamber recalls that Lazarević was convicted of the crimes of deportation and other inhumane acts (forcible transfer) committed in March and April 1999 in three villages of the Gnjilane/Gjilan municipality – Žegra/Zhegra,

⁸³ Motion, Annex E; see *supra*, para. 4.

⁸⁴ *Ibid.*, para. 13.

⁸⁵ Response, para. 17.

⁸⁶ *Ibid.*, para. 18.

⁸⁷ *Ibid.*, para. 19.

⁸⁸ *Ibid.*, para. 20.

⁸⁹ *Ibid.*, para. 21.

⁹⁰ *Ibid.*

⁹¹ Motion, para. 13.

⁹² Trial Judgement, vol. 2, para. 1246. The Appeals Chamber further notes that the Trial Chamber considered conflicting evidence as to military actions against, or attacks by, the KLA, including evidence that KLA members were present but not active in the area (Trial Judgement, vol. 2, paras 896-899, 901, 916, 930, 932, 943-949).

Vladovo/Lladova and Prilepnica/Përlepnică.⁹³ It further notes the Prosecution's submission that the Serbian Indictment only alleges KLA presence in the area as of June 1999.⁹⁴ More importantly, in light of the evidence considered by the Trial Chamber in support of its findings,⁹⁵ Lazarević fails to elaborate in any way on the impact the proffered material could or would have had on the verdict had it been admitted at trial. In light of Lazarević's vague and unsubstantiated allegation, the Appeals Chamber will not seek to establish whether any of the remaining requirements of Rule 115 have been met. The request for admission of document 5DA5 is thus dismissed.

37. Considering that Lazarević's request to have the Serbian Indictment admitted as additional evidence on appeal is summarily dismissed for failure to comply with the formal requirements applicable to motions filed pursuant to Rule 115 of the Rules, the Appeals Chamber need not receive a full translation thereof. Consequently, the Motion for Translation is thereby rendered moot.

5. Documents 5DA6

(a) Arguments of the parties

38. Finally, Lazarević seeks the admission of a number of documents grouped under 5DA6⁹⁶ for the purpose of updating the Appeals Chamber on certain health related issues.⁹⁷ According to him, the proffered material indicates that his health condition, as well as that of members of his family, is "gravely endangered" and is "deteriorating on a daily basis".⁹⁸

39. The Prosecution responds that Lazarević "overstates" his and his family's health problems and that none of the tendered documents meets the requirements of Rule 115 of the Rules.⁹⁹ It emphasizes that the documents are irrelevant to Lazarević's appeal concerning sentencing, which must proceed solely on the basis of the trial record.¹⁰⁰ As to their relevance to the Appeals Chamber's own sentencing considerations should it decide to impose a new sentence, the Prosecution submits that the tendered documents show neither a new serious health condition nor a deterioration of an existing health condition.¹⁰¹ Rather, in the Prosecution's view the proffered materials fall within one of the following categories: (i) records that predate the Trial Judgement

⁹³ Trial Judgement, vol. 3, para. 930.

⁹⁴ Response, para. 19.

⁹⁵ Trial Judgement, vol. 2, paras 896-899, 901, 930, 932, 943-949.

⁹⁶ Motion, Annex F.

⁹⁷ *Ibid.*, para. 14.

⁹⁸ *Ibid.*

⁹⁹ Response, para. 22; Part III.D of the Prosecution Response to Lazarević's Rule 115 Motion, para. 28.

¹⁰⁰ Part III.D of the Prosecution Response to Lazarević's Rule 115 Motion, para. 24.

¹⁰¹ *Ibid.*, para. 24.

and were considered by the Trial Chamber in mitigation;¹⁰² (ii) records that show no change in the medical conditions that the Trial Chamber already considered;¹⁰³ or (iii) records relating to medical conditions that arose after the Trial Judgement was rendered and that have been successfully resolved through treatment.¹⁰⁴ The Prosecution further submits that the Appeals Chamber has been regularly informed about Lazarević's health status through his motions requesting temporary provisional release and most recently through the report of the United Nations Detention Unit Medical Officer.¹⁰⁵ In the Prosecution's view, even if the proffered material were to be considered, none of it presents an "exceptional" or "rare circumstance" justifying additional mitigation.¹⁰⁶

40. Finally, with regard to the illness of Lazarević's family members, the Prosecution argues that none of the medical information annexed to the Motion relates to a new condition,¹⁰⁷ and that relevant evidence has already been considered by the Trial Chamber.¹⁰⁸ It further contends that some of Lazarević's arguments in this regard are submitted for the first time on appeal and are thus impermissible.¹⁰⁹

(b) Analysis

41. The Appeals Chamber notes Lazarević's generic assertion that had any of the documents annexed to his Motion been available at trial, they would have resulted in the imposition of a more lenient sentence or acquittal.¹¹⁰ Lazarević fails, however, to develop any specific argument with respect to documents 5DA6, neither concerning their relevance, nor as to how they could have influenced the Trial Chamber's decision, including its sentencing considerations. Nor has he specified the possible impact of the documents should the Appeals Chamber consider Lazarević's post-trial health as a mitigating circumstance on appeal.¹¹¹ Merely apprising the Appeals Chamber of health-related issues without presenting any argument with respect to the conditions of admissibility of the proffered evidence is plainly insufficient for the purposes of Rule 115 of the Rules. The Appeals Chamber therefore dismisses without detailed consideration the request for admission of documents 5DA6 as additional evidence on appeal.

¹⁰² *Ibid.*, para. 24, referring to Motion, Annex F, pp. 4592-4608; Trial Judgement, vol. 3, para. 1199, fn. 2958.

¹⁰³ *Ibid.*, referring to Motion, Annex F, pp. 4584-4591, 4575-4581, 4541-4554.

¹⁰⁴ *Ibid.*, referring to Motion, Annex F, pp. 4582-4583, 4555-4574. The Prosecution also attaches a chart relating to Lazarević's and his family's medical conditions to the proffered material (Appendix C to Prosecution Response to Lazarević's Rule 115 Motion).

¹⁰⁵ *Ibid.*, paras 25-26.

¹⁰⁶ *Ibid.*, para. 26.

¹⁰⁷ *Ibid.*, para. 27.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

IV. DISPOSITION

42. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion in its entirety. The Motion for Translation is **DISMISSED** as moot.

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

Done this 26th day of January 2010

At The Hague,
The Netherlands.



J. Daqun
Judge Liu Daqun, Presiding

¹¹⁰ Motion, para. 15, referring to Annexes A-F.

¹¹¹ Cf. *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008, paras 389-393.