



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

Case No. IT-05-87-A
Date: 12 May 2011
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: 12 May 2011

PROSECUTOR

v.

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

PUBLIC

**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**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Defence:

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 “Sreten Lukic’s [*sic*] Third Motion to Present Additional Evidence Before Appeals Chamber” (“Motion”), filed by Counsel for Sreten Lukić (“Lukić”) on 15 February 2011. The Appeals Chamber is also seised of “Nebojša Pavković’s Motion to Join Sreten Lukic’s [*sic*] Third Motion to Present Additional Evidence Before Appeals Chamber and Motion to Present Dick Marty as a Witness Before the Appeals Chamber” (“Motion to Join”), filed by Counsel for Nebojša Pavković (“Pavković”) on 24 February 2011 (collectively “Motions”). The Office of the Prosecutor (“Prosecution”) filed a joint response on 16 March 2011.¹ Lukić filed a reply on 30 March 2011.²

2. The Appeals Chamber is also seised of the “Prosecution Motion to Strike Sreten Lukić’s Reply in Support of his Third Rule 115 Motion” (“Motion to Strike”), filed by the Prosecution on 1 April 2011, and of “Sreten Lukic’s [*sic*] Motion Seeking Enlargement of Word Count for its Reply Brief in Support of Third Motion to Present Additional Evidence Before Appeals Chamber” (“Motion for Extension of Word Limit”), filed by Lukić on 5 April 2011.

I. BACKGROUND

3. On 26 February 2009, Trial Chamber III (“Trial Chamber”) convicted Lukić and Pavković pursuant to Article 7(1) of the Tribunal’s Statute (“Statute”) of committing, through participation in a joint criminal enterprise, the crimes of deportation, other inhumane acts (forcible transfer), murder and persecutions as crimes against humanity under Article 5 of the Statute, and the crime of murder as a violation of the laws or customs of war under Article 3 of the Statute.³ The Trial Chamber sentenced Lukić and Pavković to 22 years of imprisonment.⁴ Both have appealed their convictions.⁵

4. In his Motion, Lukić seeks the admission into evidence of three documents:⁶ (a) 6DA1, a Report entitled “Inhuman treatment of people and illicit trafficking in human organs in Kosovo” authored by Dick Marty, Rapporteur for the Parliamentary Assembly of the Council of Europe

¹ Prosecution Joint Response to Lukić’s Third Motion to Present Additional Evidence and Pavković’s Motion to Join, 16 March 2011 (“Response”).

² Sreten Lukic’s [*sic*] Reply Brief in Support of Third Motion to Present Additional Evidence Before Appeals Chamber, 30 March 2011 (“Reply”).

³ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), vol. 3, paras 788, 790, 1138, 1140, 1210, 1212.

⁴ *Ibid.*, vol. 3, paras 1210, 1212.

⁵ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Sreten Lukic’s [*sic*] Notice of Appeal from Judgment and Request for Leave to Exceed the Page Limit, 27 May 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).

⁶ Motion, para. 2; Annex A thereto.

(“PACE”), dated 7 January 2011;⁷ (b) 6DA2, PACE Resolution 1782, entitled “Investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo”, dated 25 January 2011;⁸ and (c) 6DA3, PACE Resolution 1784, entitled “The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans”, dated 26 January 2011⁹ (collectively “Documents”). In his Motion to Join, Pavković supports Lukić’s request for admission of additional evidence on appeal, requests that Dick Marty appear as a witness before the Appeals Chamber, and, should the Appeals Chamber grant the above requests, allow the parties to file supplemental briefs.¹⁰

5. The Prosecution argues in its Response that the Motions should be dismissed as they fail to meet the requirements of Rule 115 of the Rules.¹¹ In his Reply, Lukić provides further submissions in support of his Motion and joins Pavković’s request to call Dick Marty as a witness.¹² The Prosecution requests that the Reply be stricken on the ground that it exceeds the allotted word limit.¹³ Lukić in turn seeks an extension of the word limit for the Reply and requests that the Reply be considered as validly filed.¹⁴

II. APPLICABLE LAW

A. Admission of additional evidence pursuant to Rule 115 of the Rules

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.¹⁵

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.¹⁶ The applicant’s duty to act with due diligence includes making “appropriate use of all mechanisms of protection and compulsion

⁷ Motion, para. 9; Annex A, 6DA1. Lukić points out that the draft Report was issued and made public on 12 December 2010, the official text, dated 7 January 2011, was adopted by PACE on 25 January 2011. See Motion, para. 13(a).

⁸ Motion, para. 10; Annex A, 6DA2.

⁹ Motion, para. 11; Annex A, 6DA3.

¹⁰ Motion to Join, paras 1, 8, 9, p. 4.

¹¹ Response, paras 1, 20.

¹² Reply, paras 2, 41.

¹³ Motion to Strike, p. 1.

¹⁴ Motion for Extension of Word Limit, para. 3, p. 5.

¹⁵ Rule 115(A) of the Rules. See also Decision on Nikola Šainović’s Second Motion for Admission of Additional Evidence on Appeal, 8 September 2010 (“Šainović Rule 115 Decision”), para. 6.

¹⁶ *Ibid.*, para. 7, and references cited therein.

available under the Statute and the Rules of the [...] Tribunal to bring evidence on behalf of an accused before the Trial Chamber".¹⁷ The applicant is therefore expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question.¹⁸

8. The applicant must then show that the evidence is both relevant to a material issue and credible.¹⁹ 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.²⁰ Evidence is credible if it appears to be reasonably capable of belief or reliance.²¹

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.²² 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.²³

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.²⁴

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.²⁵ A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.²⁶

12. Finally, the Appeals Chamber has repeatedly recognized that the significance and potential impact of the tendered material shall not be assessed in isolation, but in the context of the evidence presented at trial.²⁷

¹⁷ Šainović Rule 115 Decision, para. 7, and references cited therein.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para. 8, and references cited therein.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*, para. 9, and references cited therein.

²³ *Ibid.*

²⁴ *Ibid.*, para. 10, and references cited therein.

²⁵ *Ibid.*, para. 11, and references cited therein.

²⁶ *Ibid.*

²⁷ *Ibid.*, para. 12, and references cited therein.

B. Length of Replies

13. Pursuant to paragraph (C)(5) of the Practice Direction on the Length of Briefs and Motions,²⁸ where related to a motion for admission of additional evidence on appeal, a reply shall not exceed 3,000 words. A party wishing to exceed the word limit must seek authorisation in advance and provide an explanation of the exceptional circumstances that necessitate the oversized filing.²⁹

III. DISCUSSION

A. Motion to Strike and Motion for Extension of Word Limit

14. In its Motion to Strike, the Prosecution requests that the Reply be stricken on the ground that it exceeds the word limit imposed by the Practice Direction and Lukić was not granted leave by the Appeals Chamber to file an oversized reply.³⁰ In turn, in his Motion for Extension of Word Limit, Lukić seeks retroactive authorisation to exceed the word limit of his Reply by 1,099 words, and requests that the Appeals Chamber accept the Reply as validly filed.³¹ Lukić submits that the following factors constitute good cause for the filing of the oversized Reply: (i) the need to address the arguments contained in both the Response and the Motion to Join;³² (ii) “several material misrepresentations” and “broad and over-reaching assertions” contained in the Response which require portions of document 6DA1 to be addressed in detail in the Reply;³³ (iii) the complexity and unprecedented size of the Trial Judgement;³⁴ (iv) the lack of prejudice to the Prosecution;³⁵ and (v) given the “grave importance” of the matter at hand, the interests of justice require that the Appeals Chamber be apprised of the “full picture so that it can consider the arguments and see how the now offered Rule 115 material is of importance and relevance”.³⁶

15. The Appeals Chamber notes that the Reply contains 4,099 words,³⁷ which exceeds the allowed word limit by 1,099 words.³⁸ Pursuant to paragraph C(7) of the Practice Direction, Lukić

²⁸ Practice Direction on the Length of Briefs and Motions, IT/184 Rev. 2, 16 September 2005 (“Practice Direction”).

²⁹ *Ibid.*, para. C(7).

³⁰ Motion to Strike, p. 1, referring to Practice Direction, pp. 3, 4. Although the Prosecution refers to page 5, the Appeals Chamber understands the reference to be to page 4.

³¹ Motion for Extension of Word Limit, para. 3, p. 5.

³² *Ibid.*, para. 5.

³³ *Ibid.*, paras 6-7. Although Lukić refers to document “IDA1”, the Appeals Chamber understands the reference to be to document 6DA1.

³⁴ *Ibid.*, para. 8.

³⁵ *Ibid.*, para. 9.

³⁶ *Ibid.*, para. 10.

³⁷ Reply, p. 15.

³⁸ See *supra*, para. 13.

should have requested authorisation in advance to exceed the word limit for his Reply.³⁹ The late filing of his Motion for Extension of Word Limit is sufficient grounds for the Appeals Chamber to strike the Reply as not validly filed. Moreover, the Appeals Chamber is not persuaded that exceptional circumstances exist to justify the oversized filing of the Reply. In particular, the Appeals Chamber notes that the Reply addresses a limited range of matters and largely repeats arguments previously raised in the Motion.⁴⁰ The Appeals Chamber further observes that the submissions in the Reply that address Pavković's Motion to Join are limited to supporting Pavković's request to call Dick Marty as a witness and form only a minimal part of the Reply.⁴¹ Finally, the Appeals Chamber is not satisfied that the lack of prejudice to the Prosecution, in and of itself, constitutes exceptional circumstances necessitating the oversized filing of the Reply in this case. In light of these considerations, the Appeals Chamber does not consider the Reply to be validly filed.

B. Material tendered pursuant to Rule 115 of the Rules

1. Arguments of the parties

16. Lukić argues that the Documents sought to be admitted into evidence became public only after the expiry of the 30 day time limit prescribed by Rule 115 of the Rules, and therefore good cause exists for the delayed filing of the Motion.⁴² He claims that neither the Documents nor their contents were available to him at trial or obtainable through the exercise of due diligence.⁴³

17. Lukić further argues that the Documents are both relevant and credible.⁴⁴ With respect to document 6DA1, Lukić submits that the document is based upon a "variety of credible and knowledgeable sources of information",⁴⁵ including testimonial and documentary accounts from primary sources.⁴⁶ Concerning its relevance, Lukić asserts that document "6DA1 consists of a verification of the criminal activities of the KLA [Kosovo Liberation Army]" in Kosovo in 1998 and 1999, as well as after the conflict.⁴⁷ In his view, these activities are relevant to the

³⁹ See *supra*, para. 13.

⁴⁰ For example, compare Motion, paras 9, 21, 28, 35, 38-40 with Reply, paras 18, 32, 34-35. In this context, the Appeals Chamber underscores that the quality and effectiveness of a submission is not dependent on the length but on the cogency and clarity of the arguments contained therein, and thus excessively long submissions do not necessarily facilitate the efficient administration of justice. See *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Motion of Radivoje Miletić for Permission to Further Exceed Word Limitation, 18 January 2011, p. 2, referring to Decision on Nikola Šainović's and Dragoljub Ojdanić's Joint Motion for Extension of Word Limit, 11 September 2009, p. 4, and references cited therein.

⁴¹ See Reply, paras 2, 25, 41.

⁴² Motion, paras 12, 14.

⁴³ *Ibid.*, paras 1, 12-14.

⁴⁴ *Ibid.*, paras 15-29.

⁴⁵ *Ibid.*, para. 28.

⁴⁶ *Ibid.*, para. 28(a), (c), citing Motion, Annex A, 6DA1, paras 23, 72.

⁴⁷ *Ibid.*, para. 16. See also *ibid.*, paras 18(a), (d), (e).

circumstances within which population movements took place, and illustrate the pressure exercised by the KLA upon Kosovo Albanian witnesses who “denied or downplayed the presence and activities of the KLA and the impact this had on persons leaving their homes during the conflict.”⁴⁸ Lukić further submits that document 6DA1 confirms that “witnesses from NATO or with ties to the governments of the NATO countries could potentially be testifying in a tainted manner to conceal KLA crimes, do [*sic*] to the ongoing working relationship [...] with the KLA.”⁴⁹ Lukić submits that for the same reasons documents 6DA2 and 6DA3 are relevant to his conviction.⁵⁰

18. Lukić further contends that the Documents could have affected his conviction,⁵¹ as they show that (i) the KLA’s conduct, rather than the actions of the Federal Republic of Yugoslavia (“FRY”)/Serbian forces caused the flight of civilians from Kosovo;⁵² (ii) Lukić “genuinely believed” that his acts and the acts of others were “legitimate law-enforcement actions aimed at a terrorist, criminal organization”, and that civilians were leaving their homes as a result of the actions of NATO and the KLA;⁵³ (iii) had the Trial Chamber been aware of the threats and actual violence that Kosovo Albanian witnesses face, it would not have relied upon their testimony in the absence of protective measures⁵⁴ and “would have had a more logical explanation for the ‘irrational’ testimony of Kosovo Albanian witnesses and would not have relied upon their testimony as the only testimony to convict [the] Appellant”;⁵⁵ and (iv) NATO and its member countries concealed evidence of crimes committed by the KLA “in order to impose stability and insofar as they were looking to the future when they had to work with the same persons from the KLA”, and as a result a number of witnesses “had an incentive to minimize KLA crimes and testify untruthfully”.⁵⁶

19. Pavković in turn submits that document 6DA1 demonstrates the difficulties he would have encountered in trying to obtain reliable evidence from witnesses in Kosovo.⁵⁷ He contends that, even if a safe visit to Kosovo had been possible during the pre-trial phase of the case, it would have

⁴⁸ Motion, paras 16, 18(c), 20, 22. Lukić further submits that the evidence corroborates the testimony of witnesses who were “ignored or discounted by the Trial Chamber” (*ibid.* para. 19).

⁴⁹ *Ibid.*, para. 21. See also *ibid.*, paras 17, 18(b).

⁵⁰ *Ibid.*, paras 24-25.

⁵¹ *Ibid.*, para. 41.

⁵² *Ibid.*, paras 30-31.

⁵³ *Ibid.*, para. 33. See also *ibid.*, paras 32, 34, referring to Trial Judgement, vol. 3, paras 1117, 1201.

⁵⁴ *Ibid.*, paras 25, 35-38, referring to Trial Judgement, vol. 1, para. 55; vol. 2, paras 30, 244; Motion, Annex A, 6DA1, paras 3 (pp. 5-6), 13 (pp. 7-8), 21, 24-26.

⁵⁵ Motion, para. 38.

⁵⁶ *Ibid.*, para. 40 (p. 16). See also *ibid.*, paras 39-40 (pp. 14-16), referring to witnesses Richard Ciaglinski, Klaus Naumann, John Crosland, Shaun Byrnes, Karol John Drewienkiewicz, and Michael Phillips. Noting the irregular numbering of some paragraphs in the Motion, the Appeals Chamber also refers to the relevant page numbers where necessary.

⁵⁷ Motion to Join, paras 2-3, citing Motion, Annex A, 6DA1, para. 25.

been “largely futile”, as shown by document 6DA1.⁵⁸ Pavković further argues that document 6DA1 raises “questions regarding the destruction of evidence” by the Prosecution.⁵⁹ He requests that Dick Marty appear as a witness before the Appeals Chamber in order to testify on the above-mentioned matters, particularly with respect to the “image” of the KLA.⁶⁰

20. In response, the Prosecution submits that document 6DA1 is largely irrelevant as it is primarily focused on events occurring in Albania during the summer of 1999 in the post-conflict period, when the KLA took control of Kosovo.⁶¹ The Prosecution further asserts that documents 6DA2 and 6DA3 are irrelevant as they contain no evidence or findings of fact about the events in Kosovo during the period concerned in the Indictment, and have no relevance to Lukić’s or Pavković’s convictions.⁶² Specifically with regard to document 6DA3, the Prosecution submits that it is a generic statement by PACE on witness protection, lacking “reference to any specific pressure that any specific witnesses may have faced in this case.”⁶³

21. The Prosecution further submits that document 6DA1 could not have affected the verdict.⁶⁴ It argues that the Trial Chamber carefully analysed the evidence and considered the KLA’s misconduct.⁶⁵ The Prosecution adds that the alleged existence of three detention facilities in Albania could not have created a reasonable doubt as to the reasons for the flight of hundreds of thousands of Kosovo Albanians from Kosovo.⁶⁶ It further contends that none of the crimes described in document 6DA1 took place in Kosovo and that none of them was known to Lukić.⁶⁷ Thus, the Prosecution argues, they could not have had an impact on Lukić’s *mens rea*.⁶⁸ As to the credibility of Kosovo Albanian witnesses, the Prosecution submits that the Trial Chamber carefully assessed their testimony, and that nothing in document 6DA1 raises specific doubts about any particular witness.⁶⁹ Similarly, the Prosecution argues that general allegations about the attitude of

⁵⁸ Motion to Join, para. 6. See also *ibid.*, paras 4-5, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, General Ojdanić’s [*sic*] Motion for Stay of Proceedings, 1 June 2006; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Joinder by Nebojša Pavković in General Ojdanić’s Motion for Stay of Proceedings, 6 June 2006; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Decision on Ojdanić Motion for Stay of Proceedings, 9 June 2006 (“Decision of 9 June 2006”).

⁵⁹ Motion to Join, para. 7.

⁶⁰ *Ibid.*, para. 9, citing Motion, Annex A, 6DA1, para. 31. See also *ibid.*, para. 8.

⁶¹ Response, paras 6-7, referring, *inter alia*, to Motion, Annex A, 6DA1, paras 4 (p. 6), 13 (pp. 7-8), 87-88, 129-167.

⁶² *Ibid.*, paras 3-4.

⁶³ *Ibid.*, para. 5.

⁶⁴ *Ibid.*, paras 2, 8.

⁶⁵ *Ibid.*, paras 9-11.

⁶⁶ *Ibid.*, para. 9, referring to Motion, Annex A, 6DA1, para. 103.

⁶⁷ *Ibid.*, para. 15, referring to Motion, Annex A, 6DA1, paras 102-128.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, para. 16.

international organizations and their post-conflict “pragmatic political approach” are insufficient to cast any doubt on the credibility or reliability of any particular witness who testified at trial.⁷⁰

22. In response to Pavković’s Motion to Join, the Prosecution submits that Pavković fails to identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence pertains, or to show how this evidence renders his conviction unsafe.⁷¹ The Prosecution further submits that Pavković did not appeal the Decision of 9 June 2006, and therefore, to the extent that he seeks to raise a new ground of appeal, his motion should be dismissed as “improper and untimely”.⁷²

23. Finally, the Prosecution submits that document 6DA1 relies on multiple sources of hearsay evidence and therefore, irrespective of whether its author is called to testify before the Appeals Chamber, the document could not be accorded any weight.⁷³

2. Analysis

24. The Appeals Chamber recalls that, under Rule 115(A) of the Rules, a party may submit a request to present additional evidence on appeal no later than 30 days from the date of filing of the brief in reply unless good cause is shown for the delay.⁷⁴ Considering that Lukić and Pavković filed their respective briefs in reply on 15 February 2010,⁷⁵ the said time limit expired on 17 March 2010. The Appeals Chamber notes, however, that the proposed evidence, including the results of the investigation conducted by Dick Marty, became public only in January 2011. In these circumstances, the Appeals Chamber considers that good cause for the late filing of the Motions has been shown and will accordingly consider the requests to admit the additional evidence as validly filed.

25. The Appeals Chamber is satisfied that documents 6DA1, 6DA2, and 6DA3 were unavailable at trial as they were issued after the Trial Judgement was rendered. The Appeals Chamber is also satisfied that the information contained in the Documents was not discoverable through the exercise of due diligence, since it was generated as the result of an extensive

⁷⁰ Response, para. 17, citing Motion, Annex A, 6DA1, para. 10 (p. 2).

⁷¹ *Ibid.*, para. 18.

⁷² *Ibid.*, para. 19.

⁷³ *Ibid.*, paras 12-13, referring to Motion, Annex A, 6DA1, paras 21, 23-28, 120, 141, 145.

⁷⁴ See *supra*, para. 6.

⁷⁵ Sreten Lukic’s [*sic*] Reply Brief in Support of His Defense Appellant’s Brief, 15 February 2010 (confidential; public redacted version filed on 14 September 2010); General Pavković’s Reply to Prosecution Response to Amended Appeal Brief, 15 February 2010.

investigation which only commenced in mid-2008.⁷⁶ Consequently, the tendered documents will be admitted as additional evidence on appeal if the Appeals Chamber is satisfied that they are credible, relevant, and *could* have had an impact on the verdict.⁷⁷

(a) Document 6DA1

26. Document 6DA1 is a report commissioned by the Committee on Legal Affairs and Human Rights of PACE, following the publication of allegations of trafficking in human organs carried out by KLA leaders.⁷⁸ Document 6DA1 refers to “testimonial and documentary accounts from several dozen primary sources”, and provides a general description of the sources relied upon.⁷⁹ Notwithstanding its hearsay nature, the Appeals Chamber finds the document to be *prima facie* credible. As to its relevance, although Lukić argues that the document “consists of a verification of the criminal activities of the KLA on the same territory, during the same time period” as the crimes he was convicted of,⁸⁰ the Appeals Chamber notes that in fact the document focuses on acts “alleged to have occurred for the most part from the summer of 1999 onwards”.⁸¹ By contrast, Lukić and Pavković were convicted of crimes committed between March and May 1999.⁸² The Appeals Chamber notes, however, that subsection 3.3.1. of document 6DA1, entitled “KLA detentions in wartime – First subset of captives: the ‘prisoners of war’”, describes events that took place between April and June 1999.⁸³ It contains information concerning the alleged mistreatment of civilians of mostly ethnic Albanian origin who were held at KLA detention facilities in Albania.⁸⁴ The Appeals Chamber thus considers this part of document 6DA1 relevant, as it pertains to KLA conduct in April and May 1999, a period which is material to Lukić’s and Pavković’s convictions.

27. The Appeals Chamber further notes that document 6DA1 contains disturbing observations on the situation of witness intimidation prevailing in Kosovo, and the subsequent reluctance of witnesses to testify about crimes committed by the KLA.⁸⁵ In this context, the Appeals Chamber recalls that witness intimidation can undermine “the fundamental objective of the Tribunal, enshrined in Article 20(1) of the Statute: to ensure that trials are fair, expeditious, and conducted

⁷⁶ See Motion, Annex A, 6DA1, paras 1-2 (p. 5). See also PACE Document 11574, “Inhumane treatment of people and illicit trafficking in human organs in Kosovo”, Motion for a resolution presented by Mr Konstantin Kosachev and others, 15 April 2008.

⁷⁷ See *supra*, paras 8-9.

⁷⁸ Motion, Annex A, 6DA1, paras 1-2 (pp. 1-2), paras 1-2 (p. 5).

⁷⁹ *Ibid.*, para. 23.

⁸⁰ Motion, para. 16.

⁸¹ Motion, Annex A, 6DA1, para. 4 (p. 6).

⁸² Trial Judgement, vol. 2, paras 1179-1262; vol. 3, paras 788, 1138.

⁸³ Motion, Annex A, 6DA1, paras 102-128.

⁸⁴ *Ibid.*, paras 109, 111, 121.

⁸⁵ *Ibid.*, paras 3 (pp. 5-6), 21, 24-26, 69.

with due regard for the protection of victims and witnesses.”⁸⁶ However, notwithstanding the seriousness of this matter, the Appeals Chamber notes that document 6DA1 does not provide specific information on witnesses who appeared in this case and who were subject to such intimidation. Thus the document does not directly relate to the credibility or reliability of a particular witness in this case. In the absence of such information, it is sufficient to note that the Trial Chamber was particularly alert to any potential bias or partiality when evaluating the credibility and reliability of the witnesses testifying before it.⁸⁷ Likewise, the Appeals Chamber considers that although document 6DA1 refers to the “pragmatic political approach” adopted by the international organisations in place in Kosovo, it does not provide specific information relevant to the credibility of any witness affiliated with such an organisation who testified in this case.⁸⁸

28. As to the impact upon the verdict of the portions of document 6DA1 which deal with KLA activity between April and June 1999, the Appeals Chamber notes the Trial Chamber’s finding that although the activities of the KLA were “factors in the complicated situation on the ground, they were not the cause of over 700,000 people moving *en masse* both within Kosovo and then across the border.”⁸⁹ In reaching this conclusion, the Trial Chamber considered the testimony of Nebojša Ognjenović that people were seeking to cross the border with Albania mostly because of the NATO bombing and the conflicts between the KLA and members of the VJ.⁹⁰ It was also apprised of the evidence of Božidar Delić, Saša Antić, Krsman Jelić, Zdravko Vintar, Milutin Filipović, and Nebojša Bogunović, that civilians left the area under pressure from the KLA or in order to avoid forcible mobilisation by the KLA.⁹¹ Indeed, in relation to certain areas in the Vučitrn/Vushtrria and Suva Reka/Suhareka municipalities, the Trial Chamber found that the departure of the civilians was caused by the KLA’s actions, including KLA instructions or orders.⁹² Nevertheless, after having examined extensive evidence in relation to each of the 13 municipalities where specific crimes were charged,⁹³ the Trial Chamber concluded that it was the deliberate actions of the FRY/Serbian forces that caused the massive exodus of Kosovo Albanian civilians.⁹⁴ The Appeals Chamber considers that, in the context of the evidence presented at trial, the information contained in document 6DA1

⁸⁶ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Judgement, 19 July 2010, para. 35.

⁸⁷ Trial Judgement, vol. 1, paras 55, 60-61; vol. 2, paras 30, 244, 1073.

⁸⁸ Motion, Annex A, 6DA1, p. 1, para. 10 (p. 2).

⁸⁹ Trial Judgement, vol. 3, para. 45.

⁹⁰ *Ibid.*, vol. 2, para. 1152, referring to Nebojša Ognjenović, 20 Feb 2008, T. 22882-22884.

⁹¹ *Ibid.*, vol. 2, paras 1153-1154, referring, *inter alia*, to Exhibits 5D885, pp. 1-2, 3D1052, para. 2.2; 5D1398 (under seal), paras 13-14; 5D1394, para. 15; 5D1364; 6D1614, para. 65; Krsman Jelić, 23 Nov 2007, T. 18934; Milutin Filipović, 27 Nov 2007, T. 19183-19184.

⁹² *Ibid.*, vol. 2, paras 551, 796, 1175.

⁹³ *Ibid.*, vol. 2, paras 48, 68-69, 147, 163, 230, 286, 334, 380, 432, 555, 675, 727-728, 795, 800, 885-888, 947, 998-999, 1002-1003, 1067, 1099, 1116, 1148.

⁹⁴ *Ibid.*, vol. 2, paras 1156-1178; vol. 3, paras 41-42, 45-46.

concerning three detention facilities run by the KLA in Albania *could* not have affected the above conclusion.

29. Likewise, the Appeals Chamber finds that Lukić fails to demonstrate that had document 6DA1 been admitted at trial, it *could* have affected the Trial Chamber's conclusion in relation to his *mens rea*. The Trial Chamber found that Lukić "shared the intent to ensure continued control by the FRY and Serbian authorities over Kosovo through the crimes [*sic*] of forcible displacement of the Kosovo Albanian population."⁹⁵ It examined extensive evidence in relation to Lukić's acts and knowledge of crimes committed in 1998 and 1999.⁹⁶ Lukić does not explain how, in the context of the evidence presented at trial, the information contained in document 6DA1 concerning the KLA's activity in Albania could have affected this conclusion.

30. The Appeals Chamber further finds unpersuasive Pavković's argument that he would have faced greater difficulties than Dick Marty in obtaining "useful and reliable information" from witnesses in Kosovo.⁹⁷ Pavković fails to specify how the information contained in document 6DA1 is relevant to the particular difficulties that he actually encountered when trying to obtain reliable testimony from specific witnesses. Pavković's hypothetical argument fails to show that the proposed evidence *could* have affected his conviction. Further, the Appeals Chamber finds that Pavković fails to show how the alleged destruction of evidence in relation to crimes purportedly committed by the KLA in Albania,⁹⁸ is relevant to his case.

31. In light of the above, the Appeals Chamber finds that Lukić and Pavković fail to show that had document 6DA1 been available at trial, it *could* have affected their convictions. Consequently, Pavković's request for Dick Marty to appear as a witness before the Appeals Chamber in order to clarify matters contained in document 6DA1 is moot.

(b) Documents 6DA2 and 6DA3

32. Document 6DA2 is a resolution adopted by PACE, calling upon a number of states and entities to take the necessary measures to ensure the investigation of the allegations described in document 6DA1.⁹⁹ Document 6DA3 is a resolution adopted by PACE on the protection of witnesses.¹⁰⁰ Considering the official nature of these documents, the Appeals Chamber finds documents 6DA2 and 6DA3 to be *prima facie* credible. With respect to 6DA2, the Appeals

⁹⁵ Trial Judgement, vol. 3, para. 1117.

⁹⁶ *Ibid.*, vol. 3, paras 1079-1097, 1119-1131, and the evidence cited therein.

⁹⁷ See Motion to Join, para. 3.

⁹⁸ *Ibid.*, para. 7, referring to Motion, Annex A, 6DA1, para. 16 (p. 8).

⁹⁹ Motion, Annex A, 6DA2.

¹⁰⁰ *Ibid.*, 6DA3.

Chamber notes that the document does not provide any additional information to that contained in document 6DA1.¹⁰¹ Consequently, document 6DA2 fails to meet the requirements of Rule 115 of the Rules for the same reasons as document 6DA1.

33. Finally, the Appeals Chamber notes that document 6DA3 advises on the importance of having witness protection measures in place.¹⁰² However, it contains no reference to protective measures that any specific witness in this case required but was not granted, or information on influence exercised over a witness who testified before the Trial Chamber. The Appeals Chamber therefore finds that document 6DA3 is neither relevant nor *could* have affected Lukić's or Pavković's convictions.

34. The Appeals Chamber emphasizes that the 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

35. For the foregoing reasons, the Appeals Chamber

GRANTS the Motion to Strike;

DISMISSES the Motion for Extension of Word Limit;

DISMISSES the Motions in their entirety.

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

Dated this 12th day of May 2011.

At The Hague,
The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]

¹⁰¹ See Motion, Annex A, 6DA1, pp. 1-4.

¹⁰² *Ibid.*, 6DA3, paras 4-7.