



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: 28 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: 28 January 2010

PROSECUTOR

v.

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

PUBLIC

**DECISION ON NIKOLA ŠAINOVIĆ'S MOTION REQUESTING
ADMISSION OF ADDITIONAL EVIDENCE PURSUANT TO
RULE 115 OF THE RULES**

The Office of the Prosecutor:

Mr. Peter Kremer QC

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 Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Defence Motion Requesting Admission of Additional Evidence Pursuant to Rule 115 with Annex” filed confidentially by Counsel for Nikola Šainović (“Šainović”) on 26 November 2009 (“Motion”). The Office of the Prosecutor (“Prosecution”) responded to the Motion on 11 December 2009.¹ Šainović did not file a reply.

I. BACKGROUND

2. On 26 February 2009 Trial Chamber III (“Trial Chamber”) convicted Šainović pursuant to Article 7(1) of the Statute of the Tribunal (“Statute”) for committing, through participation in a joint criminal enterprise (“JCE”), the crimes of deportation, other inhumane acts (forcible transfer), murder and persecutions as crimes against humanity under Article 5 of the Statute, and the crime of murder as a violation of the laws or customs of war under Article 3 of the Statute.² The Trial Chamber sentenced him to 22 years of imprisonment.³ Šainović appealed his conviction on seven grounds.⁴ The Trial Judgement has also been appealed by Nebojša Pavković, Dragoljub Ojdanić, Vladimir Lazarević, Sreten Lukić, and the Prosecution.⁵

3. In his motion, Šainović requests the admission as additional evidence on appeal of one document.⁶ The Prosecution responds that the Motion should be dismissed in its entirety because it

¹ Prosecution Opposition to Šainović’s Motion to Admit Additional Evidence, 11 December 2009 (confidential) (“Response”).

² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), vol. 3, paras 456-477, 1208.

³ *Ibid.*, vol. 3, para. 1208.

⁴ Defence Submission: Notice of Appeal, 27 May 2009; Defence Appeal Brief, 23 September 2009.

⁵ 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); 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); Sreten Lukic’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, paras 4, 16-17; Annex to Motion.

fails to comply with the requirements of Rule 115 of the Rules of Procedure and Evidence (“Rules”).⁷

II. APPLICABLE LAW

4. 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.⁸

5. 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.⁹ 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”.¹⁰ Counsel is therefore expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question.¹¹

6. The applicant must then show that the evidence is both relevant to a material issue and credible.¹² 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.¹³ Evidence is credible if it appears to be reasonably capable of belief or reliance.¹⁴

7. 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.¹⁵ 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.¹⁶

⁷ Response, para. 1.

⁸ Rule 115(A) of the Rules; Decision on Vladimir Lazarević’s Motion to Present Additional Evidence and on Prosecution’s Motion for Order Requiring Translations of Excerpts of Annex E of Lazarević’s Rule 115 Motion, 26 January 2010 (“Lazarević Rule 115 Decision”), para. 5 and references cited therein.

⁹ *Ibid.*, para. 6.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*, para. 8.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para. 9.

¹⁶ *Ibid.*

8. 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.¹⁷

9. 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.¹⁸ A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.¹⁹ In addition, the tendered material shall be translated into one of the official languages of the Tribunal.²⁰

10. 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.²¹

III. DISCUSSION

A. Arguments of the parties

11. Šainović requests the admission as additional evidence on appeal of a document entitled "Austrian MFA diplomatic correspondence re. HOLBROOKE and AFANASIEVSKY missions DEMAQI Talks" dated 7 July 1998.²² He submits that the tendered material was only made available to him as a result of the disclosure by the Prosecution pursuant to Rule 68 of the Rules on 24 July 2009.²³ Consequently, Šainović argues that it was unavailable to him at trial.²⁴ He moreover submits that the proposed evidence is credible, as it is official Austrian diplomatic correspondence.²⁵

12. Šainović further argues that the proposed evidence is relevant to the Trial Chamber's findings relating to Šainović's dealings with Democratic League of Kosovo Leader, Ibrahim Rugova.²⁶ In Šainović's submission, the tendered document contradicts the Trial Chamber's finding

¹⁷ *Ibid.*, para. 10.

¹⁸ *Ibid.*, para. 11.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*, para. 12.

²² Motion, paras 4, 16-17.

²³ *Ibid.*, paras 1, 15.

²⁴ *Ibid.* para. 15

²⁵ *Ibid.*, para. 15.

²⁶ *Ibid.*, paras 9-13, referring to Trial Judgement, vol. 3, paras 410-417.

that meetings between Šainović and Rugova were “not an attempt at negotiating a solution, but rather a campaign which involved threats to the personal safety of Rugova and his associates, designed to show that the FRY[Federal Republic of Yugoslavia]/Serbian authorities were meeting with Kosovo Albanians in the hope that this would lead to a cessation of the NATO campaign”.²⁷

13. Šainović argues that the proffered material could have affected the Trial Chamber’s finding that Šainović knowingly and wilfully participated in a campaign which was part of the common purpose of the JCE.²⁸ He contends that the proposed evidence demonstrates that Rugova was not under effective house arrest but that the police were offering him protection from a real threat presented by radical portions of the Kosovo Albanian population.²⁹ Šainović moreover submits that the proposed evidence shows that the FRY/Serbian authorities made very genuine attempts to negotiate with Rugova during 1998 and 1999 in search of a peaceful solution to the conflict.³⁰

14. The Prosecution asserts that Šainović has not identified any findings material to his convictions that would or could have been affected by the admission of the proposed evidence at trial.³¹ In the Prosecution’s view, whether Rugova was under house arrest and the nature of Šainović’s dealings with him were not relevant to the Trial Chamber’s conclusions on Šainović’s individual criminal responsibility.³²

15. The Prosecution responds that, contrary to Šainović’s assertion, the proposed evidence was disclosed to him in 2005, pursuant to Rule 66(A)(ii) of the Rules.³³ The Prosecution submits that Šainović must therefore demonstrate that the admission of the proposed evidence *would* have affected the verdict.³⁴

16. The Prosecution further argues that even if the proposed evidence were relevant to findings crucial to Šainović’s convictions, it is inadmissible because he has not explained how the proffered material would have affected those findings.³⁵ In this regard, the Prosecution claims that Šainović mischaracterizes the proposed evidence. According to the Prosecution, the proposed evidence does not show that Rugova’s life was in danger,³⁶ nor does it show that he was “public enemy No. 2 after

²⁷ *Ibid.*, para. 9, citing Trial Judgement, vol. 3, para. 417.

²⁸ *Ibid.*, para. 14, referring to Trial Judgement, vol. 3, para. 417.

²⁹ *Ibid.*, paras 11-13, referring to Trial Judgement, vol. 3, paras 412, 413, 417.

³⁰ *Ibid.*, para. 14, referring to Trial Judgement, vol. 3, para. 417.

³¹ Response, para. 4.

³² *Ibid.*, para. 5, referring to Trial Judgement, vol. 3, paras 458-477.

³³ *Ibid.*, para. 2, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT, Prosecution’s Ninth Report Concerning Disclosure, 14 January 2005 (confidential), Annex B (“Ninth Disclosure List”).

³⁴ *Ibid.*, para. 3, referring to *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/I-A, Decision on Dragomir Milošević’s Motion to Present Additional Evidence, 20 January 2009, para. 10.

³⁵ *Ibid.*, para. 6.

³⁶ *Ibid.*, para. 7, citing Motion, para. 13.

Milošević”.³⁷ Conversely, the Prosecution submits that it merely serves to highlight the political rather than violent nature of the disagreement.³⁸

17. Moreover, the Prosecution asserts that even if the tendered document does show that Rugova was in physical danger in July 1998, it makes no mention of FRY or Serbian police offering Rugova protection from such violence, “keeping him under house arrest for that purpose, or the nature of Šainović’s dealings with Rugova”.³⁹ The Prosecution also submits that the Trial Chamber considered direct evidence of witnesses Rugova and Merovci regarding Rugova’s house arrest in April-May 1999 in making its findings in this regard.⁴⁰ Therefore, the Prosecution argues that the proposed evidence would not have affected the Trial Chamber’s findings on Rugova’s house arrest, or its findings on Šainović’s contacts with Rugova.⁴¹

18. Finally, the Prosecution contests the significance of the proposed evidence in light of other evidence already considered by the Trial Chamber and suggests that it does not bring to light any new facts which would have affected the Trial Chamber’s findings.⁴² In particular, the Prosecution draws attention to evidence regarding differences between Rugova and the Kosovo Liberation Army (“KLA”), in addition to allegations that some Kosovo Albanians had threatened Rugova with violence.⁴³ The Prosecution also argues that the Trial Chamber heard evidence relating to the “fractious” nature of the Kosovo Albanian delegation at Rambouillet, which included Rugova and KLA leaders.⁴⁴ In the Prosecution’s view, the evidence of witness Joksić suggested that KLA members refused to attend Rambouillet and that Rugova did not want KLA members to be equal to him in the negotiating and decision-making process.⁴⁵

B. Analysis

1. Confidentiality

19. The Appeals Chamber finds that the parties have not submitted any arguments as to why the proposed evidence and the relevant submissions should remain confidential. Moreover, the Appeals Chamber cannot discern any such reasons. Recalling that under Rules 78 and 107 of the Rules, all proceedings before the Appeals Chamber, including the Appeals Chamber’s orders and decisions,

³⁷ *Ibid.*, para. 8, citing Motion, para. 11.

³⁸ *Ibid.*, para. 7.

³⁹ *Ibid.*, para. 9.

⁴⁰ *Ibid.*, referring to Trial Judgement, vol. 2, para. 826, fn. 2043 and references cited therein.

⁴¹ *Ibid.*

⁴² *Ibid.*, paras 10-12.

⁴³ *Ibid.*, para. 10, referring to Motion, para. 14; Trial Judgement, vol. 3, para. 220.

⁴⁴ *Ibid.*, para. 11, referring to Trial Judgement, vol. 1, para. 360.

shall be public unless there are exceptional reasons for keeping them confidential,⁴⁶ the Appeals Chamber renders the present decision publicly.

2. Availability of the proposed evidence

20. The Appeals Chamber notes that Šainović's sole argument as to why the proposed evidence was unavailable to him until now is that it was only recently disclosed to him by the Prosecution, whereas the Prosecution asserts that this was done in 2005.⁴⁷ The Appeals Chamber further observes that a document bearing the same title and ERN number indeed appears on the Ninth Disclosure List dated 14 January 2005. Given that Šainović did not file a reply, the Appeals Chamber considers that he is not disputing the Prosecution's submission that the proffered material was disclosed to him at that stage.⁴⁸ Consequently, for the purposes of Rule 115 of the Rules, the Appeals Chamber finds that the proposed evidence was available to Šainović at trial or could have been obtained through the exercise of due diligence. Therefore, it can only be admitted as additional evidence on appeal if Šainović demonstrates that the proposed evidence is credible, relevant and *would* have had an impact on the verdict.⁴⁹

21. The Appeals Chamber finds that the proffered material satisfies the *prima facie* credibility requirement of Rule 115 of the Rules. As to its relevance, the tendered document appears to be directed at the Trial Chamber's finding that Šainović "knowingly and willingly" participated in a campaign designed to give the impression "that the FRY/Serbian authorities were meeting with Kosovo Albanians in the hope that this would lead to cessation of the NATO campaign".⁵⁰ For reasons explained below, the Appeals Chamber is not convinced that the proposed evidence substantially adds to what has already been presented at trial and that had it been before the Trial Chamber,⁵¹ it would have affected the verdict.

22. In this regard, the Appeals Chamber first notes that the relevant finding forms such a minor part of the Trial Chamber's overall conclusions on Šainović's individual criminal responsibility that, even if contradicted, it would not have affected the verdict. While the document is relevant to the Trial Chamber's findings on Rugova's house arrest and dealings with Šainović,⁵² it does not reveal any new information that would have affected its conclusion on Šainović's *mens rea* as a

⁴⁵ *Ibid.* and fn. 25, referring to Wolfgang Petritsch, 28 Feb 2007, T. 10734-10735 (describing the split between Rugova and the KLA); Exhibit 1D206, pp. 5-6 (describing the divisions amongst Kosovo Albanians); Exhibit P2588, paras 28-29.

⁴⁶ *Lazarević* Rule 115 Decision, para. 14, and references cited therein.

⁴⁷ See *supra*, paras 11, 15.

⁴⁸ Cf. *Lazarević* Rule 115 Decision, para. 21.

⁴⁹ See *supra*, para. 8.

⁵⁰ Trial Judgement, vol. 3, para. 417.

⁵¹ *Ibid.*, vol. 3, paras 410-417, and references cited therein.

participant in the JCE. Nor does it demonstrate that Rugova was under house arrest only for his own protection. Indeed, the proffered document does not indicate that he was in any physical danger or that members of the FRY/Serbian forces were taking action to protect him from such a threat.

23. Second, the Appeals Chamber does not consider that the proffered evidence would have affected the Trial Chamber's overall findings on events in Kosovo. In this regard and without pronouncing on the merits of the pending appeals, the Appeals Chamber notes the extensive evidence considered by the Trial Chamber on this matter and finds that Šainović has failed to demonstrate that the tendered evidence is capable of casting any doubt over its conclusions.⁵³

24. Šainović's request for the admission of the proffered material as additional evidence on appeal is therefore dismissed.

IV. DISPOSITION

25. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion in its entirety.

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

Done this 28th day of January 2010,

At The Hague,
The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]

⁵² *Ibid.*, vol. 3, para. 417.

⁵³ *Cf.*, Trial Judgement, vol. 1, paras 312-412, and references cited therein.