



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-95-13/1-A
Date: 13 February 2009
Original: English

BEFORE THE APPEALS CHAMBER

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

Acting Registrar: Mr. John Hocking

Decision of: 13 February 2009

PROSECUTOR
v.
MILE MRKŠIĆ
VESELIN ŠLJIVANČANIN
PUBLIC

DECISION ON MILE MRKŠIĆ'S SECOND RULE 115 MOTION

The Office of the Prosecutor:

Ms. Helen Brady

Counsel for Mile Mrkšić:

Mr. Miroslav Vasić
Mr. Vladimir Domazet

Counsel for Veselin Šljivančanin:

Mr. Novak Lukić
Mr. Stéphane Bourgon

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 “International Tribunal”, respectively) is seized of a motion to admit additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), filed confidentially by Mile Mrkšić (“Mrkšić”) on 12 December 2008.¹ The Prosecution filed its confidential response opposing the Motion on 19 December 2008,² and Mrkšić filed his confidential reply on 29 December 2008.³ The status of the present decision is public given that no information or evidence of a confidential nature is referred to herein.⁴

A. Background

2. On 27 September 2007, Trial Chamber II (“Trial Chamber”) convicted Mrkšić of three counts: murder as a violation of the laws or customs of war, torture as a violation of the laws or customs of war, and cruel treatment as a violation of the laws and customs of war, and imposed a single sentence of twenty years of imprisonment on him.⁵ Mrkšić appealed his convictions and sentence.⁶ The Prosecution appealed Mrkšić’s acquittals for the counts charged under Article 5 of the Statute of the International Tribunal and the sentence imposed on him.⁷ The appeals hearing took place on 21 and 23 January 2009.⁸ Pending this decision, Counsel for Mrkšić were not allowed to rely upon the evidence proffered in the Motion.

3. Mrkšić seeks to introduce the evidence of two witnesses received from the Prosecution pursuant to its obligations under Rule 68 of the Rules,⁹ namely the testimonies of Milorad Vojnović (“Vojnović”) and Ljubisa Vukašinović (“Vukašinović”) in *Prosecutor v. Vojislav Šešelj*, Case No.

¹ Second Mile Mrkšić’s Rule 115 Motion (Confidential), 12 December 2008 (“Motion”).

² Prosecution’s Response to Mile Mrkšić’s Second Rule 115 Motion (Confidential), 19 December 2008 (“Response”).

³ Mile Mrkšić’s Reply to the Prosecution Response to Second Rule 115 Motion (Confidential), 29 December 2008 (“Reply”).

⁴ The Appeals Chamber recalls that under Rule 78 and 107 of the Rules, all proceedings before an Appeals Chamber, including the Chamber’s orders and decisions, shall be public unless there are exceptional reasons for keeping them confidential. See *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; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Order Withdrawing Confidential Status of Pre-Review Orders 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.

⁵ *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-T, Judgement, 27 September 2007 (“Trial Judgement”).

⁶ Mr. Mile Mrkšić’s Defence Notice of Appeal and Request for Leave to Exceed the Word Limit, 29 October 2007; Mile Mrkšić’s Defence Appeal Brief (Confidential), 22 July 2008 (Public Redacted Version filed on 15 September 2008).

⁷ Prosecution’s Notice of Appeal, 29 October 2007 (amended on 7 May 2008); Prosecution’s Appeal Brief (Confidential), 14 January 2008 (Public Redacted and Corrected Version filed 8 February 2008).

⁸ Decision on Šljivančanin and Mrkšić Motions Seeking Additional Time for the Presentation of Supplementary Submissions During the Appeals Hearing or an Alternative Remedy and Scheduling Order for Appeals Hearing, 25 November 2008.

⁹ Motion, para. 4.

IT-03-67-T (“*Šešelj* case”). He submits that this evidence was not available at trial and contains relevant and credible facts which could impact the decision reached by the Trial Chamber.¹⁰ Mrkšić also seeks an oral hearing before determination on the merits of the Motion by the Appeals Chamber.¹¹

4. The Prosecution responds that all the evidence sought to be admitted by Mrkšić either already forms part of the trial record or was readily available at trial through the exercise of due diligence.¹² Additionally, the Prosecution submits that Mrkšić fails to show (1) that the proffered evidence could have been a decisive factor in reaching the decision at trial¹³ or, (2) in the case of Vukašinović’s evidence, and parts of Vojnović’s evidence, which specific findings of the Trial Chamber the additional evidence is directed at challenging.¹⁴

5. Mrkšić replies that the evidence he seeks to introduce is new because it originates from the *Šešelj* case which started after the *Mrkšić et al.* case.¹⁵ In particular, he argues that the portions of Vojnović’s statement in the *Šešelj* case relied upon in the Motion are completely different from his testimony in the *Mrkšić et al.* case and contain new facts that were not available during cross-examination,¹⁶ which are decisive as to what happened in Ovčara.¹⁷ With regard to Vukašinović’s evidence, Mrkšić submits that it is relevant to the role of the Security Organs and the Security Administration in Ovčara.¹⁸ He thus concludes that the Motion should be granted.¹⁹

B. Applicable Law

6. Pursuant to Rule 115 of the Rules, a party may submit a request to present additional evidence before the Appeals Chamber. For additional evidence to be admissible under Rule 115 of the Rules, the applicant must first establish 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.²⁰ The applicant’s duty to act with reasonable diligence includes making “appropriate use of all

¹⁰ Motion, paras 2, 6-10; Reply, paras 6-26.

¹¹ Motion, para. 3.

¹² Response, paras 1, 8, 12-13, 17-18, 20-21, 24,25, 27, 30, 32, 36, 45, 48, 49.

¹³ Response, paras 1, 13-14, 17, 20, 22-23, 26-27, 29, 31-32, 34-35, 38-39, 41-42, 44, 48, 49.

¹⁴ Response, paras 1, 19, 24, 26, 46, 48.

¹⁵ Reply, para. 7.

¹⁶ Reply, para. 8. *See also* para. 18.

¹⁷ Reply, paras 10-17.

¹⁸ Reply, para. 26.

¹⁹ Reply, para. 27.

²⁰ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Dragomir Milošević’s Motion to Present Additional Evidence, 20 January 2009 (“*Milošević* Rule 115 Decision”), para. 6; *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”), 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, 26 June 2008 (“*Stanišić* Rule 115 Decision”), para. 6.

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.”²¹ The Appeals Chamber recalls that whether the evidence proffered as additional evidence on appeal was available at trial is not merely a question of whether the document(s) in question were “available” in a literal sense²²: “[t]he question for the Appeals Chamber is, however, whether the [applicant] could, by exercising due diligence, have obtained the information contained in them at an earlier date.”²³

7. The applicant must then show that the evidence is both relevant to a material issue and credible.²⁴ 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.²⁵ Evidence is credible if it appears to be reasonably capable of belief or reliance.²⁶ A finding that evidence is credible demonstrates nothing about the weight to be accorded to such evidence.²⁷

8. Next, the applicant must demonstrate that the evidence *could* have had an impact on the verdict, in other words, the evidence must be such that, considered in the context of the evidence given at trial, in the case that an application under Rule 115 of the Rules is made by a defendant, it could demonstrate that the conviction was unsafe.²⁸ A party seeking to admit additional evidence must also identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed²⁹ and bears the burden of specifying with sufficient clarity the

²¹ *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, para. 47. See also *Milošević* Rule 115 Decision, para. 6; *Krajišnik* Rule 115 Decision, 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.

²² Cf. *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj’s Request to Present Additional Evidence under Rule 115, 3 March 2006 (“*Haradinaj et al. Rule 115 Decision of 3 March 2006*”) para. 16.

²³ *Haradinaj et al. Rule 115 Decision of 3 March 2006*, para. 16.

²⁴ *Milošević* Rule 115 Decision, para. 7; *Krajišnik* Rule 115 Decision, para. 5; *Stanišić* Rule 115 Decision, para. 6.

²⁵ *Kupreškić et al. Appeal Judgement*, para. 62. See also *Krajišnik* Rule 115 Decision, para. 5; *Stanišić* Rule 115 Decision, para. 7.

²⁶ *Milošević* Rule 115 Decision, para. 7; *Krajišnik* Rule 115 Decision, 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 *Prosecutor v. André Ntagerura et al.* Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 22.

²⁷ *Milošević* Rule 115 Decision, para. 7; *Krajišnik* Rule 115 Decision, para. 5; *Stanišić* Rule 115 Decision, para. 7; *Haradinaj et al. Rule 115 Decision of 10 March 2006*, para. 16.

²⁸ *Milošević* Rule 115 Decision, para. 8; *Krajišnik* Rule 115 Decision, para. 6; *Stanišić* Rule 115 Decision, para. 7.

²⁹ Rule 115(A); See also *Milošević* Rule 115 Decision, para. 8; *Stanišić* Rule 115 Decision, para. 6; *Haradinaj et al. Rule 115 Decision of 10 March 2006*, paras 13-14.

impact the additional evidence could have on the Trial Chamber's decision.³⁰ A party that fails to do so runs the risk that the evidence will be rejected without detailed consideration.³¹

9. If it cannot be established that the evidence was unavailable at trial, the Appeals Chamber may still admit the evidence if the applicant shows that the exclusion of the additional evidence *would* lead to a miscarriage of justice, in that if it had been available at trial, it *would* have affected the verdict.³²

10. Whether the evidence was available at trial or not, the Appeals Chamber has recognised that the significance and potential impact of the evidence shall not be assessed in isolation, but in the context of the evidence given at trial.³³

C. Discussion

1. Request for an oral hearing

11. Concerning Mrkšić's request for an oral hearing, the Appeals Chamber recalls that, pursuant to Rule 115(C) of the Rules, the Appeals Chamber may decide a motion for leave to present additional evidence on appeal "with or without an oral hearing". The granting of an oral hearing is a matter for the discretion of a Chamber and an oral hearing may legitimately be regarded as unnecessary when, as in the present case, the information before the Appeals Chamber is sufficient to enable the Appeals Chamber to reach an informed decision.³⁴ The Appeals Chamber finds that it does not need to hold an oral hearing and will thus decide the Motion based on the Parties' written submissions.

2. Vojnović

12. Mrkšić seeks to have admitted into evidence Vojnović's 11 September 2008 written statement made under Rule 92ter of the Rules ("Rule 92ter Statement") and his testimony given in

³⁰ *Krajišnik* Rule 115 Decision, para. 7; *Stanišić* Rule 115 Decision, para. 6; *Kupreškić et al.* Appeal Judgement, para. 69.

³¹ *Milošević* Rule 115 Decision, para. 8; *Krajišnik* Rule 115 Decision, para. 7; *Stanišić* Rule 115 Decision, para. 6; *Kupreškić et al.* Appeal Judgement, para. 69.

³² *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; *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. See also *Stanišić* Rule 115 Decision, para. 8.

³³ See *Milošević* Rule 115 Decision, para. 9; *Krajišnik* Rule 115 Decision, 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.

³⁴ See *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-AR65.2, Decision on Haradin Bala's Request for Provisional Release, 31 October 2003, para. 33. See also *Ferdinand Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006 ("*Nahimana et al.* Rule 115 Decision of 5 May 2006"), para. 9.

the *Šešelj* case on 5 and 6 November 2008 (“Vojnović’s Testimony”).³⁵ The Rule 92ter Statement was provided to Mrkšić by the Prosecution on 25 September 2008³⁶ and his testimony in the *Šešelj* case was provided to him on 19 November 2008.³⁷

(a) Rule 92ter Statement

13. The Appeals Chamber recalls that a party seeking the admission of additional evidence under Rule 115 of the Rules in connection with an appeal against judgement must do so within 30 days from the filing of the brief in reply, unless good cause is shown for a delay.³⁸ The Appeals Chamber notes that Mrkšić filed his brief in reply on 15 September 2008³⁹ and that the Rule 92ter Statement was disclosed to him on 25 September 2008,⁴⁰ well before the expiry of the 30 day time limit.⁴¹ Accordingly, with respect to the Rule 92ter Statement, the Motion was filed out of time and the Appeals Chamber finds that no good cause has been shown for the delay. Furthermore, the Appeals Chamber recalls that a party seeking the admission of additional evidence on appeal must provide the Appeals Chamber with the evidence sought to be admitted.⁴² Mrkšić failed to file the Rule 92ter Statement with the Motion. Therefore, the Appeals Chamber will not consider the Rule 92ter Statement for admission under Rule 115 of the Rules.

(b) Vojnović’s Testimony

14. Mrkšić submits that the following elements of Vojnović’s Testimony could have had an impact on the verdict and therefore should be admitted as additional evidence.⁴³ Mrkšić submits that Vojnović testified that: (i) he met with the chief of the Security Administration in 2008 which, according to Mrkšić, demonstrates that it was the Security Administration that was in charge of the evacuation of the Vukovar hospital in contradiction to paragraphs 285, 321 and 626 to 631 of the Trial Judgement;⁴⁴ (ii) the Operational Diary and the War Diary of 80 Motorized Brigade were properly maintained while the War Diary of the Guards of the Motorized Brigade was not which, according to Mrkšić, undermines the conclusions in paragraphs 286, 321, 329 and 624 to 631 of the

³⁵ Vojnović, in the *Šešelj* case, T. 11439-11508.

³⁶ Motion, paras 6-7.

³⁷ Motion, para. 8.

³⁸ Rule 115(A) of the Rules.

³⁹ Mile Mrkšić’s Brief in Reply to Prosecutions Response Brief, 15 September 2008 (Public Redacted Version filed on 6 October 2008).

⁴⁰ Motion, para. 6.

⁴¹ Mile Mrkšić’s Brief in Reply to Prosecutions Response Brief was filed confidentially on 15 September 2008. A public redacted version was filed on 6 October 2008.

⁴² *Nahimana et al.* Rule 115 Decision of 5 May 2006, para. 18; *Ferdinand Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Hassan Ngeze’s Motion for Leave to Present Additional Evidence, 14 February 2005, p. 3.

⁴³ Motion, para. 8.

⁴⁴ Motion, para. 24. See also Reply, para. 19.

Trial Judgement;⁴⁵ (iii) during the Vukovar operation, it was customary for security officers to report up the security chain rather than to the commander of the unit indicating that the security organ bypassed the command;⁴⁶ (iv) he saw a colonel in a car at Ovčara watching the situation outside the hangar who left when Vojnović asked him for help;⁴⁷ (v) he restored order in the hangar with the result, according to Mrkšić, that there was no situation for him to report to his superior officer, in contradiction to paragraphs 312 to 322 and 621 to 631 of the Trial Judgement;⁴⁸ (vi) he did not have a means of communication at Ovčara and his officers and units were not in the hangar, which Mrkšić submits undermines Vojnović's credibility;⁴⁹ and (vii) at the meeting Mrkšić stated that authorities were coming from Belgrade to investigate the Ovčara event which, according to Mrkšić, undermines the Trial Chamber's findings on the timing of the meeting.⁵⁰

15. Vojnović did not testify in the *Šešelj* case until after the Trial Judgement had been rendered; however, in determining whether the information was available at trial, the Appeals Chamber must also consider whether any of the information sought to be admitted was available in any other form during trial or could be obtained through due diligence. The Appeals Chamber considers that unless Vojnović specified in his testimony in the *Šešelj* case that he learned about new information after his testimony in the *Mrkšić et al.* case, it may be presumed that all the information adduced in his testimony in the *Šešelj* case was also available at the time of his testimony in the *Mrkšić et al.* case. Apart from Vojnović's testimony that he met the chief of the Security Administration in 2008, it has not been shown that any of the information contained in Vojnović's testimony became available to Mrkšić after the closure of his case and is therefore found to have been available at trial. However, to the extent that evidence sought to be admitted relates to Vojnović's credibility, the Appeals Chamber considers that, while at trial Mrkšić had the opportunity to cross-examine Vojnović on all relevant points, any statements or testimony given by Vojnović after the closure of the *Mrkšić et al.* case that allegedly contradict his testimony at trial were *prima facie* not available for the purposes of testing his credibility. As a result if Vojnović's testimony in *Šešelj* did undermine the credibility of his evidence in *Mrkšić et al.*, it will be considered to be new evidence. The Appeals Chamber will consider below whether Mrkšić has demonstrated that the evidence he seeks to have admitted *would* have affected the verdict, with the exception of Vojnović's testimony regarding his meeting with the Chief of the Security Administration in 2008 and his submissions regarding Vojnović's

⁴⁵ Motion, paras 25-29. See Exhibits D371, "Operational Diary of the 80th mtbr/Motorized Brigade"; D375, "War Diary of the 80th Motorized Brigade"; P401, "War Diary of the Guards of the Motorized Brigade". See also Reply, para. 20.

⁴⁶ Motion, para. 30. See also Reply, paras 21-22.

⁴⁷ Motion, para. 31. See also Reply, para. 23.

⁴⁸ Motion, paras 32-33.

⁴⁹ Motion, para. 34.

⁵⁰ Motion, para. 35. See also Reply, para. 24.

credibility, for which Mrkšić must demonstrate that the evidence he seeks to have admitted *could* have affected the verdict.

16. The Appeals Chamber considers that Vojnović's Testimony is relevant given that the portions of evidence in question touch upon the same issues as those about which he testified in the *Mrkšić et al.* case. Furthermore, it finds his testimony to be reasonably capable of belief or reliance and therefore satisfies the *prima facie* requirement of Rule 115 of the Rules.

(i) Meeting with the chief of the Security Administration in 2008

17. In Vojnović's Testimony, he mentioned in passing that he met with the chief of the Security Administration in 2008.⁵¹ It appears from the context of the question and response that Vojnović was in fact referring to meeting a staff member of the International Tribunal rather than a member of the Yugoslav People's Army ("JNA"). However, even if he was referring to the JNA chief of the Security Administration, in his testimony he did not expand on what was discussed during that encounter and Mrkšić failed to demonstrate how a mere encounter which took place seventeen years after the relevant events occurred shows that the Vukovar hospital evacuation was under the responsibility of the Security Administration. Accordingly, Mrkšić has failed to demonstrate how this piece of information could have had an impact on the verdict and the Appeals Chamber dismisses his request to admit this portion of Vojnović's Testimony as additional evidence.

(ii) War Diary of the Guards of the Motorized Brigade

18. In Vojnović's Testimony he indicated that in his unit the war diary "was kept regularly with indication of time, date."⁵² Mrkšić submits that this demonstrates the accuracy of the times and dates in the Operational Diary of the 80th Motorized Brigade (Exhibit D371) and the War Diary of the 80th Motorized Brigade (Exhibit D375) thereby undermining the findings of the Trial Chamber regarding the timing of the events.⁵³ The Appeals Chamber recalls that the Trial Chamber found the entries unreliable as to the time when taken in the context of the evidence as a whole.⁵⁴ As a result Vojnović's assertion alone does not undermine the Trial Chamber's analysis. Furthermore, while in his testimony in the *Šešelj* case, Vojnović referred to the War Diary of the Guards of the Motorized Brigade (Exhibit P401), it was only to state that it did not originate from his unit and therefore he could not testify as to its authenticity which has no implications for the reliability of the document.⁵⁵ Mrkšić has failed to demonstrate how this information would have had an impact on

⁵¹ Vojnović, in the *Šešelj* case, T. 11445.

⁵² Vojnović, in the *Šešelj* case, T. 11450.

⁵³ Motion, paras 25-28.

⁵⁴ Trial Judgement, para. 286. See also paras 275, 276, 322.

⁵⁵ Vojnović, in the *Šešelj* case, T. 11449.

the verdict and the Appeals Chamber dismisses his request to admit this portion of Vojnović's Testimony as additional evidence.

(iii) Reporting of security officers in the Vukovar operation

19. Contrary to Mrkšić's submission that Vojnović testified that during "the Vukovar operation [it] was custom that Security officers inform their superior command in the Security chain without knowledge of the commander of the unit",⁵⁶ he did not testify that this was the customary procedure, but rather responded to questions about one specific incident of reporting.⁵⁷ Mrkšić has failed to demonstrate how this single incident of reporting would have had an impact on the Trial Chamber's findings on the chain of command. The Appeals Chamber dismisses his request to admit this portion of Vojnović's Testimony as additional evidence.

(iv) A colonel's presence at Ovčara

20. In Vojnović's Testimony, he stated that he saw a colonel at Ovčara who got in his car and left when Vojnović asked him for assistance with the situation in the hangar.⁵⁸ Mrkšić submits that this evidence supports the testimony of Bogdan Vujić regarding the security colonels present at Ovčara on 20 November 1991.⁵⁹ However, Mrkšić fails to provide references to Vujić's testimony or specify how this supports Vujić's testimony. The Appeals Chamber finds that Mrkšić's submissions are too vague to establish that, had this information been before the Trial Chamber, it would have reached different findings in paragraphs 312 to 322 and 621 to 631, as submitted by Mrkšić in reply,⁶⁰ particularly in light of the fact that the Trial Chamber found that there were security organ officers present at Ovčara including Captain Vukosavljević and Major Vukašinović.⁶¹ Accordingly, it dismisses his request to admit this portion of Vojnović's Testimony as additional evidence.

(v) Vojnović's restoration of order in the Ovčara hangar and his report to Mrkšić

21. In Vojnović's Testimony, he stated that while he was at Ovčara order was restored in the hangar at which point he returned to the command post and reported what he had witnessed.⁶² Mrkšić submits that it must be inferred from this that he reported that the situation was under

⁵⁶ Motion, para. 30.

⁵⁷ Vojnović, in the *Šešelj* case, T. 11452.

⁵⁸ Vojnović, in the *Šešelj* case, T. 11495.

⁵⁹ Motion, para. 31.

⁶⁰ Reply, paras 22-23.

⁶¹ Trial Judgement, paras 255, 269.

⁶² Vojnović, in the *Šešelj* case, T. 11498-11499.

control and points to the fact that he did not mention the order to withdraw.⁶³ The Appeals Chamber finds that Vojnović's testimony in the *Šešelj* case and the *Mrkšić et al.* case is essentially the same on this point.⁶⁴ Accordingly it dismisses Mrkšić's request to admit this portion of Vojnović's Testimony as additional evidence.

(vi) Meeting with Mrkšić regarding investigators from Belgrade

22. Vojnović testified in the *Šešelj* case that at a meeting with Mrkšić he heard that authorities from Belgrade were coming to investigate the events in Vukovar.⁶⁵ Mrkšić submits that this demonstrates that prosecution organs were familiar with this event, but that "this meeting" could not have taken place before the afternoon of 22 November 1991 because Mrkšić was in Belgrade.⁶⁶ The Appeals Chamber notes that Vojnović makes no reference to the timing of the "meeting" he refers to⁶⁷, and it is therefore unable to draw any conclusions in this respect. Furthermore, Mrkšić has failed to specify what findings of the Trial Chamber would be undermined by this portion of Vojnović's testimony in the *Šešelj* case, and how it would render his conviction unsafe. Accordingly, the Appeals Chamber dismisses the request to admit this portion of Vojnović's Testimony as additional evidence.

(vii) Effect of discrepancies in Vojnović's evidence on his credibility

23. Mrkšić submits that Vojnović's credibility is undermined by contradictions between his testimony in the *Šešelj* case and the *Mrkšić et al.* case to the effect that he did not have a means of communication at Ovčara and his officers and units were not in the hangar. Additionally, he submits that Vojnović's testimony that the command post at the "yellow house" was 800 metres from the hangar is contradicted by Witness P014's testimony in the *Mrkšić et al.* case.⁶⁸

24. In his testimony in the *Mrkšić et al.* case, Vojnović testified that he could not recall if he telephoned or someone went to the command post to relay news of the events at Ovčara,⁶⁹ while in his testimony in the *Šešelj* case he stated that he did not have a means of communication with the command post "at that time".⁷⁰ While Vojnović appeared more certain of his position in the *Šešelj* case, these two statements are not contradictory given that in his testimony in the *Mrkšić et al.* case, he acknowledged that the message may not have been relayed by telephone but rather by someone

⁶³ Motion, para. 33.

⁶⁴ See Vojnović, in the *Mrkšić et al.* case, T. 8976.

⁶⁵ Vojnović, in the *Šešelj* case, T. 11490.

⁶⁶ Motion, para. 35.

⁶⁷ See Motion, para. 35; Reply, para. 24.

⁶⁸ Motion, para. 34.

⁶⁹ Vojnović, in the *Mrkšić et al.* case, T. 8954.

⁷⁰ Vojnović, in the *Šešelj* case, T. 11480.

going to the command post which could be consistent with not having had a telephone. In this respect the Appeals Chamber recalls that the presence of small inconsistencies cannot suffice to render an entire testimony unreliable.⁷¹ Accordingly, the Appeals Chamber does not consider that this slight discrepancy in his evidence is sufficient to undermine his credibility.

25. The Appeals Chamber notes that Mrkšić has failed to provide references to where in Vojnović's testimony in the *Šešelj* case he testified that his officers and units were not in the hangar.⁷² Similarly, with regard to Witness P014's allegedly contradictory testimony regarding the distance between the hangar and the command post at the "yellow house", the Appeals Chamber notes that Mrkšić has failed to provide any references indicating which part of Witness P014's testimony in the *Mrkšić et al.* case he is referring to. The Appeals Chamber is therefore unable to consider these points further. Accordingly, the Appeals Chamber finds that Mrkšić has failed to show any contradictions in Vojnović's testimony that could undermine the Trial Chamber's reliance on his evidence and therefore dismisses the request to have these portions of his testimony admitted as additional evidence.

3. Vukašinović

26. Mrkšić seeks to have admitted into evidence the testimony of Vukašinović given in the *Šešelj* case on 27 November 2008 ("Vukašinović's Testimony").⁷³ This testimony was provided to Mrkšić by the Prosecution on 19 November 2008.⁷⁴

27. Vukašinović's Testimony is relevant to the *Mrkšić et al.* case in that it concerns the events at Ovčara and appears to be reasonably capable of belief or reliance and therefore sufficiently credible to be admitted. However, the Appeals Chamber finds that Mrkšić has failed to demonstrate why the evidence was unavailable at trial and how, had it been available at trial, it would have affected the verdict such that its exclusion would lead to a miscarriage of justice. While Vukašinović did not testify in the *Šešelj* case until after the Trial Judgement had been rendered, Mrkšić has provided no explanation as to why the information contained in Vukašinović's later testimony could not have emerged in the course of his earlier testimony in the *Mrkšić et al.* case. Furthermore, the only explanation Mrkšić provides as to how the admission of Vukašinović's Testimony would affect the verdict is to state "[t]his indicates that in the events [at] Ovčara were involved muc[h] higher structures than Mrkšić and Šljivančanin, and that[']s the place for looking for a[n] explanation [of]

⁷¹ See *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 498.

⁷² Motion, para. 34.

⁷³ Vukašinović, in the *Šešelj* case, T. 12282-12398.

⁷⁴ Motion, para. 9.

what [really] happen[ed].”⁷⁵ This is insufficient to demonstrate that the exclusion of this evidence would lead to a miscarriage of justice, in that if it had been available at trial it would have affected the verdict. Accordingly the Appeals Chamber dismisses the request to admit Vukašinić’s Testimony as additional evidence.

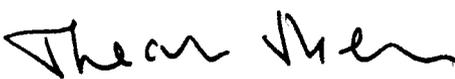
D. Disposition

For the foregoing reasons, the Appeals Chamber

DISMISSES the Motion in its entirety.

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

Dated this thirteenth day of February 2009
At The Hague
The Netherlands



Judge Theodor Meron
Presiding

[Seal of the International Tribunal]

⁷⁵ Motion, para. 52. See also Reply, para. 26.