



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-98-34-A  
Date: 7 July 2005  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Mehmet Güney  
Judge Wolfgang Schomburg  
Judge Inés Mónica Weinberg de Roca

**Registrar:** Mr. Hans Holthuis

**Date:** 7 July 2005

**PROSECUTOR**

v.

Mladen NALETILIĆ, aka "TUTA"  
Vinko MARTINOVIĆ, aka "ŠTELA"

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**DECISION ON NALETILIĆ'S AMENDED SECOND RULE 115  
MOTION AND THIRD RULE 115 MOTION TO PRESENT  
ADDITIONAL EVIDENCE**

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**Office of the Prosecutor:**

Mr. Norman Farrell

**Counsel for the Appellants:**

Mr. Matthew Hennessy and Mr. Christopher Young Meek for Mladen Naletilić  
Mr. Želimir Par and Mr. Kurt Kerns for Vinko Martinović

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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 (“International Tribunal”) is seised of “Mladen Naletilić’s Amendment to his Second Motion to Present Additional Evidence Pursuant to Rule 115” (“Amendment to the Second Rule 115 Motion” or “Amendment”), filed on 18 February 2005, which amends “Mladen Naletilić’s Second Motion to Present Additional Evidence Pursuant to Rule 115” (“Second Rule 115 Motion”), filed confidentially on 26 July 2004, and “Mladen Naletilić’s Motion for Leave to File his Second Motion to Present Additional Evidence Pursuant to Rule 115” (“Motion for Leave”), filed on 8 September 2004 by Mladen Naletilić (“Appellant”) (collectively “Amended Second Rule 115 Motion”).

2. The Appeals Chamber is further seised of “Mladen Naletilić’s Third Motion to Present Additional Evidence Pursuant to Rule 115 and Incorporated Motion for Leave to File Same” (“Third Rule 115 Motion”), filed confidentially on 22 November 2004 by the Appellant.

## I. PROCEDURAL BACKGROUND

3. On 31 March 2003, Trial Chamber I rendered a judgement against the Appellant and Vinko Martinović (“Martinović”) finding them guilty of several crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva Conventions of 1949.<sup>1</sup> The Trial Chamber sentenced the Appellant and Martinović to 20 and 18 years of imprisonment, respectively.<sup>2</sup> The Appellant and Martinović filed their Notices of Appeal on 29 April 2003. The Prosecution filed its Notice of Appeal on 2 May 2003.

### A. Amended Second Rule 115 Motion

4. On 26 July 2004, the Appellant filed confidentially his Second Rule 115 Motion. The Pre-Appeal Judge, in a Status Conference held on 26 July 2004, observed that the Appellant had filed this motion out of time and ordered the Appellant to file a “detailed request seeking leave” to complement the motion.<sup>3</sup> On 29 July 2004, the Prosecution filed the “Prosecution’s Motion for Clarification and if Necessary for an Extension of Time to Respond to Mladen Naletilić’s Second Additional Evidence Motion.” On 8 September 2004, the Appellant filed his Motion for Leave and the Prosecution filed confidentially the “Prosecution’s Response to Mladen Naletilić’s Motion for

<sup>1</sup> *Prosecutor v. Naletilić and Martinović*, Case No.: IT-98-34-T, Judgement, 31 March 2003, (“Trial Chamber Judgement”), paras. 763-764; 767-768.

<sup>2</sup> *Id.* paras. 765, 769.

<sup>3</sup> Status Conference (Open Session), 26 July 2004, T. 16-23.

Leave to File Second Additional Evidence Motion” on 16 September 2004. In its decision of 27 January 2005, the Appeals Chamber denied the Appellant’s Motion for Leave and dismissed his Second Rule 115 Motion.<sup>4</sup> However, the Appeals Chamber invited the Appellant to file an amended Second Rule 115 Motion no later than 10 days from the issuance of its decision and ordered the Prosecution to file its response within 10 days of the filing of the amended Second Rule 115 Motion.<sup>5</sup> Following the Appellant’s request for an extension of the filing deadline, on 3 February 2005, the Appeals Chamber decided to grant the Appellant an extra 15 days for filing an amended Second Rule 115 Motion.<sup>6</sup>

5. On 18 February 2005, the Appellant filed his Amendment to the Second Rule 115 Motion wherein he amends his Second Rule 115 Motion and Motion for Leave and seeks admission into the record of the following fifteen documents (“Exhibits J-X”)<sup>7</sup> as additional evidence:<sup>8</sup>

- J. A copy of a report from the Republic of Bosnia and Herzegovina, Army of the Republic of BH, 44th Mountain Brigade-Command, Jablanica Municipal Staff, Number 07/379-12/93, dated 6 May 1993, delivered to the Security Sector of the 4th Corps Command and Igman OG (Operations Group), Bradina IKM (Forward Command Post);
- K. a copy of a report from the Chief of Staff of the 4th Corps of the ABiH dated 6 May 1993, sent to BH Army General Staff, Igman Operations Group, Bradina;
- L. a copy of an excerpt from the Order of the 4th Corps Commander, Army of the Republic of BH, dated 7 May 1993, signed by the Chief of the Brigade Staff;
- M. a copy of a report to three individuals personally, of the Igman Operations Group, Bradina (Forward Command Post), dated 26 April 1993, from the Deputy Commander of the Supreme Command Staff Special Detachment for Special Purposes, Jablanica, Republic of Bosnia Herzegovina Army;
- N. a copy of a regular combat report from a Commander of the BH Army Command, 44th Mountain Brigade, Jablanica, dated 4 May 1993, to Igman Operations Group, Bradina IKM (Forward Command Post), Bradina;
- O. a copy of a regular combat report from a Commander of the Army of the Republic of BH – 4th Corps, 44th Mountain Brigade Command, Jablanica, dated 9 May 1993, to Igman Operations Group, Bradina IKM (Forward Command Post), Bradina;
- P. a copy of a report dated 2 June 1993, to Igman Operations Group from the Chief of Staff, Army of the Republic of Bosnia and Herzegovina;
- Q. a copy of a typed and partly handwritten letter to the President of the Presidency of BH, Sarajevo, dated 20 February 1993, signed by members of the BH Party of Democratic Action, SDA, Regional Board for Herzegovina, Mostar;

<sup>4</sup> Decision on Naletilić’s Motion for Leave to File his Second Motion to Present Additional Evidence Pursuant to Rule 115, 27 January 2005, (“Decision on Motion for Leave”), p. 5.

<sup>5</sup> *Id.*

<sup>6</sup> Decision on Mladen Naletilić’s Motion for Extension of Time, 3 February 2005, p. 3.

<sup>7</sup> The Appeals Chamber notes that the Exhibits attached to the Appellant’s Second Rule 115 Motion are alphabetized beginning with the letter “J” because the Exhibits attached to Mladen Naletilić’s Consolidated Motion to Present Additional Evidence Pursuant to Rule 115, Incorporating the Previously-Filed Motion and Supplement filed on 8 September 2003 were labeled “A-I.”

<sup>8</sup> Second Rule 115 Motion, paras. 1-15; Amendment to Second Rule 115 Motion, paras. 1-15.

- R. a copy of the minutes of a meeting called by the 3rd Battalion of the HVO, Croatian Defence Council, Tihomir Mišić Battalion, Mostar, dated 26 March 1993;
- S. a copy of a regular combat report of the Army of the BH Republic, Command of the 44th Mountain Brigade, Jablanica, dated 2 May 1993, signed "for the Commander";
- T. a copy of a report to the Command, 44th Mountain Brigade and to two individuals personally, dated 5 May 1993, from the Chief of Staff, BH Army, 4th Corps Command;
- U. a copy of a regular combat report of the 44th Mountain Brigade Command, BH Army, Jablanica, dated 3 May 1993 and signed by the Commander to the Operations Group, Igman Bradina IKM (Forward Command Post), Bradina;
- V. a copy of a report dated 4 May 1993, to the Security Sector, 4th Corps Command, Operations Group Igman-Bradina IKM (Forward Command Post), from the Chief of Security, BH Army, 44th Mountain Brigade Command, Jablanica;
- W. a copy of a report dated 5 May 1993, to the Security Sector, 4th Corps Command, Igman Operations Group, Bradina IKM (Forward Command Post), from the Chief of Security, 44th Mountain Brigade and the Assistant Commander for Intelligence, of the BH Army, 44<sup>th</sup> Mountain Brigade, Jablanica; and
- X. a copy of a list of the members of the Jablanica Mijat Tomić Battalion who took part in the attack against Sovići village.

6. On 28 February 2005, the Prosecution filed its "Response to Mladen Naletilić's Second Motion to Present Additional Evidence Pursuant to Rule 115 and Mladen Naletilić's Amendment Thereto" ("Response to the Amended Second Rule 115 Motion"), in which it submits that the Appellant's re-filed Second Rule 115 Motion should be dismissed as failing to meet the admissibility criteria for additional evidence under Rule 115 and requests leave for filing the Response 12 pages beyond the page limit, which it claims is necessary for fully addressing "the Appellant's arguments in the Second Rule 115 Motion as well as all [*sic*] the Amendment to the Second Rule 115 Motion."<sup>9</sup> The Appellant did not file a reply to the Prosecution's Response.

### **B. Third Rule 115 Motion**

7. On 22 November 2004, the Appellant filed confidentially his Third Rule 115 Motion in which he moves for leave to file the motion and seeks admission of the following ten documents ("Exhibits Y-1 – DD")<sup>10</sup> into the record as additional evidence:<sup>11</sup>

<sup>9</sup> Response to the Amended Second Rule 115 Motion, paras. 2-6, 103. The Appeals Chamber reminds the Prosecution that a party must seek authorization *in advance* from the Appeals Chamber for an extension of the 10-page or 3,000-word limit of a motion providing an explanation for the exceptional circumstances requiring the extension. See Practice Direction on the Length of Briefs and Motions (IT/184/Rev. 1) ("Practice Direction"), paras. 5, 7. Nevertheless, because the Prosecution had to respond to the Appellant's Amendment incorporating arguments raised in his previously filed Motion for Leave and Second Rule 115 Motion and the total number of pages for those filings exceeds the allowed page limit for the filing of a motion, the Appeals Chamber finds that good cause exists to grant leave for the Response to the Amended Second Rule 115 Motion.

<sup>10</sup> Because the Exhibits attached to the Appellant's Second Rule 115 Motion were labeled "J-X," the Appellant begins the labeling of the Exhibits attached to his Third Rule 115 Motion with "Y-1."

- Y-1. A copy of an English translation of a cover page from the President of the High Court in Mostar dated 10 July 1998, enclosing documents concerning Case No. K.5/95 delivered to the Ministry of Civil Affairs and Communication in Sarajevo;
- Y-2. a copy of an English translation of the Summary of Case No. K.5/96 dated 10 July 1998 from the High Court in Mostar to the Prosecutor of the International Court for War Crimes in The Hague;
- Y-3. a copy of an English translation of the indictment, No. KT.10/94, dated 1 February 1996 filed with the High Court in Mostar and signed by the Deputy of the High Public Prosecutor's Office, Mostar;
- Z-1. a copy of the original BCS version of Exhibit Y-1;
- Z-2. a copy of the original, handwritten BCS version of Exhibit Y-2;
- Z-3. a copy of the original BCS version of Exhibit Y-3;
- AA. a copy of a letter from Senior Appeals Council, ICTY, dated 5 March 2004, with an attached receipt of materials for the *Prosecutor v. Naletilić and Martinović* (IT-98-34-T) case from the Office of the Prosecutor addressed to Krešimir Krsnik, but signed by Christopher Young Meek, Co-Counsel for Naletilić at trial and on appeal, on 29 May 2002. The receipt acknowledges that two binders containing the "Mostar Court File" were produced to the Defence;
- BB. a copy of an authorized English translation of an affidavit by Krešimir Krsnik, Lead Counsel for the Appellant at trial, dated 23 August 2004, and a copy of a letter dated 23 2004 from Krešimir Krsnik to Mr. Matt Hennessy, Counsel for the Appellant on appeal, enclosing said affidavit;
- CC. a copy of an affidavit by Christopher Young Meek, Co-Counsel for the Appellant at trial and on appeal dated 15 June 2004; and
- DD. a copy of an affidavit by Nika Pinter, Legal Assistant to the Appellant's Defence team at trial, dated 24 June 2004.

8. On 26 November 2004, the Prosecution filed a "Notice that the Appellant's Third Additional Evidence Motion is Incomplete and Notice of Time Frame for Filing of Prosecution's Response" ("Notice on Third Rule 115 Motion") in which it stated that it was unable to respond to the Appellant's Third Rule 115 Motion because some of the Exhibits referred to were out of order, not marked and appeared to be missing, and requested an extension of time for filing its response.<sup>12</sup> Consequently, on 30 November 2004, the Appellant re-filed confidentially his Exhibits to his Third Rule 115 Motion. On 1 December 2004, the Pre-Appeal Judge, noting that the Appellant's re-filed Exhibits appeared to be "in order, marked, and otherwise complete," ordered that the Prosecution file its response to the Appellant's Third Rule 115 Motion within ten days of the re-filing of the Appellant's Exhibits.<sup>13</sup>

<sup>11</sup> Third Rule 115 Motion, pp. 2-3.

<sup>12</sup> Notice on Third Rule 115 Motion, pp. 1-2.

<sup>13</sup> Scheduling Order, 1 December 2004.

9. On 10 December 2004, the Prosecution filed confidentially its “Response to Mladen Naletilić’s Third Motion to Present Additional Evidence Pursuant to Rule 115” (“Response to the Third Rule 115 Motion”), in which the Prosecution requests the Appeals Chamber to dismiss the Appellant’s Third Rule 115 Motion as failing to satisfy the test for admissibility of additional evidence on appeal under Rule 115.<sup>14</sup> In addition, the Prosecution seeks leave to file its Response to the Third Rule 115 Motion beyond the allowed length by six pages.<sup>15</sup> The Prosecution submits that there is good cause for its requested extension “due to the number of documents to which the Prosecution must respond, the need to set out in full the disclosure made at trial to address the availability of document Z2/Y2, and that the Prosecution must address the impact on the verdict.”<sup>16</sup> The Appellant did not file a reply to the Prosecution’s Response to the Third Rule 115 Motion.

## II. APPLICABLE LAW

### A. Timeline for Filing Rule 115 Motions

10. The Appeals Chamber recalls that under Rule 115(A) of the Rules, “[a] party may apply by motion to present additional evidence before the Appeals Chamber” and that said motion “must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay.” In order for a motion filed outside of the 75-day deadline to be considered as validly filed, “the good cause requirement [in Rule 115] obliges the moving party to demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in question as soon as possible after it became aware of the existence of the evidence sought to be admitted.”<sup>17</sup>

<sup>14</sup> Response to the Third Rule 115 Motion, para. 63.

<sup>15</sup> Response to the Third Rule 115 Motion, para. 5.

<sup>16</sup> *Id.* Again, the Appeals Chamber emphasises to the Prosecution that a party must seek authorization *in advance* from the Appeals Chamber for an extension of the 10-page or 3,000-word limit for a motion. *See supra* fn. 9. The Appeals Chamber does not find that the Prosecution’s argument that it needed extra pages to discuss the impact of the Exhibits on the verdict constitutes good cause; that discussion is the normal requirement for any response to a Rule 115 motion. However, given that the Prosecution had to address the additional issue of disclosure and that the Exhibits appended to the Appellant’s Third Rule 115 Motion exceeded the reasonable 30-page limit for an appendix to a motion by over 60 pages, the Appeals Chamber finds that good cause exists to grant leave for the Response to the Third Rule 115 Motion. *See Practice Direction*, para. 6.

<sup>17</sup> Decision on Motion for Leave, p. 3, quoting *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Prosecution’s Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 17 December 2004 (“*Kordić and Čerkez* Rule 115 Motion”), p. 2.

## B. Admissibility Requirements for Additional Evidence under Rule 115

11. The Appeals Chamber considers that for additional evidence to be found admissible under Rule 115 of the Rules, the moving party must satisfy a number of requirements.<sup>18</sup> At the outset, the applicant must demonstrate that the additional evidence presented on appeal was unavailable at trial and could not have been discovered in spite of the exercise of due diligence.<sup>19</sup> An applicant should detail what steps he or she took in the exercise of due diligence including 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.”<sup>20</sup> The applicant should also provide information demonstrating that he brought any difficulties in relation to obtaining evidence to the attention of the Trial Chamber.<sup>21</sup>

12. Where the additional evidence was not available at trial and could not have been discovered in spite of the exercise of due diligence, the applicant must show that the evidence is both relevant and credible, *i.e.*, reasonably capable of belief or reliance, and that it could have had an impact on the verdict.<sup>22</sup> In other words, in the case of an accused’s Rule 115 motion, the evidence must be such that it *could* demonstrate that the conviction was unsafe.<sup>23</sup>

13. If additional evidence that is relevant and credible was available at trial, it may still be admissible on appeal if the applicant can meet the burden of establishing that exclusion of the evidence would lead to a miscarriage of justice—that is, if it had been admitted at trial, it *would* have affected the verdict.<sup>24</sup> The Appeals Chamber has reasoned that “this heightened standard seeks to ensure the finality of judgements and the application of maximum effort by counsel at trial to obtain and present relevant evidence,” while at the same time, it does “not permit a factually erroneous conviction to stand, thereby safeguarding an equally important interest of accuracy in judgements.”<sup>25</sup>

<sup>18</sup> *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Decision on Naletilić’s Consolidated Motion to Present Additional Evidence, 20 October 2004 (“*Naletilić* First Rule 115 Decision”), para. 9.

<sup>19</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998 (“*Tadić* Rule 115 Decision”) paras. 35-45; *Prosecutor v. Kupreškić et. al.*, Case No.: IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškić* Appeal Judgement”), para. 50; *Prosecutor v. 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. 3; and *Prosecutor v. Blaškić*, Case No.: IT-95-14-A, Decision on Evidence, 31 October 2003 (“*Blaškić* Rule 115 Decision”), p. 3; *Naletilić* First Rule 115 Decision, para. 10.

<sup>20</sup> *Tadić* Rule 115 Decision, para. 47.

<sup>21</sup> *Id.*, para. 40.

<sup>22</sup> *Blaškić* Rule 115 Decision, p. 3; *Naletilić* First Rule 115 Decision, para. 11.

<sup>23</sup> *Id.*

<sup>24</sup> *Krstić* Rule 115 Decision, p. 4; *Blaškić* Rule 115 Decision, p. 3; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Reasons for the Decisions on Applications for Admission of Additional Evidence, 6 April 2004 (“*Krstić* Reasons”), para. 12; *Naletilić* First Rule 115 Decision, para. 12.

<sup>25</sup> *Krstić* Reasons, para. 12.

14. The Appeals Chamber recalls that when assessing the significance of the additional evidence submitted with a Rule 115 motion, whether under the “could” or the “would” standard, it will consider the additional evidence not in isolation, but in the context of the evidence which was already admitted at trial and on appeal.<sup>26</sup>

15. Finally, the Appeals Chamber emphasizes that an applicant seeking to admit additional evidence on appeal must, pursuant to the Practice Direction on Formal Requirements for Appeals from Judgement (“Practice Direction for Appeals from Judgement”),<sup>27</sup> identify each ground of appeal to which the additional evidence relates and clearly describe the relationship of the evidence to the respective ground of appeal.<sup>28</sup> Furthermore, the applicant is required to “identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed.”<sup>29</sup> Finally, the applicant is obliged to discuss the question of the availability of the additional evidence at trial and clearly demonstrate the impact of the additional evidence upon the Trial Chamber’s verdict.<sup>30</sup> If an applicant fails to follow these formal requirements for the filing of a motion under Rule 115, the applicant “runs the risk of the evidence being rejected without detailed consideration.”<sup>31</sup>

### III. ARGUMENTS OF THE PARTIES AND DISCUSSION

#### A. Amended Second Rule 115 Motion

##### 1. Whether the motion was validly filed

16. In the Amendment to the Second Rule 115 Motion, the Appellant requests the Appeals Chamber to reconsider its previous denial of his Motion for Leave to file his Second Rule 115 Motion and re-asserts all previous reasons provided in that motion as to why the Appeals Chamber should consider his Second Rule 115 Motion as validly filed. Furthermore, both Counsel for the Appellant add that any “delay attributable to counsel should not be held against the Appellant.”<sup>32</sup>

17. The Prosecution responds by noting that the Appellant has merely incorporated into his Amendment the same reasons provided in his original Motion for Leave in support of good cause,

<sup>26</sup> *Kupreškić* Appeal Judgement, paras. 66 and 75; *Krstić* Rule 115 Decision, p. 4; *Blaškić* Rule 115 Decision, p. 3.

<sup>27</sup> (IT/201), 7 March 2002.

<sup>28</sup> Practice Direction for Appeals from Judgement, para. 11(b); Decision on Motion for Leave, p. 4.

<sup>29</sup> Rule 115(A).

<sup>30</sup> *Kupreškić* Appeal Judgement, para. 69; *Naletilić* First Rule 115 Decision, para. 11.

<sup>31</sup> *Kupreškić* Appeal Judgement, para. 69; *Naletilić* First Rule 115 Decision, para. 12.

<sup>32</sup> Amendment, para. 16.



which were denied by the Appeals Chamber, and has failed to provide any further explanation for his filing of his Second Rule 115 Motion “way out of the time period” beyond general assertions relating to Counsel for the Appellant’s busy legal practices. Therefore, the Prosecution submits that leave for filing the Amended Second Rule 115 Motion should be denied.<sup>33</sup>

18. The Appeals Chamber recalls that in its previous Decision on Motion for Leave, it noted that the Appellant’s Second Rule 115 Motion was filed on 26 July 2004, or 346 days after the deadline of 15 August 2003 for filing Rule 115 motions in this case (“extended deadline”).<sup>34</sup> Therefore, it is obvious that the Appellant must establish good cause for the late filing. In that Decision, the Appeals Chamber found that the Appellant failed to do so and denied his Motion for Leave.<sup>35</sup> Nevertheless, the Appeals Chamber invited the Appellant, in the interests of justice, to file an amended Second Rule 115 Motion within 10 days from the issuance of the Decision “specifically establishing therein good cause for leave to file said amended motion.”<sup>36</sup>

19. The Appeals Chamber notes that in the Amendment filed subsequent to that Decision, the Appellant does not in fact amend the Motion for Leave but merely urges the Appeals Chamber to reconsider its denial of that motion and the reasons offered therein for the late filing of his Second Rule 115 Motion. The Appellant does not offer any new reasons in support of good cause except for his Counsel’s assertions that they have “active, if not overly burdened, case loads in the United States” and the Appellant “should not be prejudiced by his counsel’s inability to present his cause with as much speed as may be reasonably desired.”<sup>37</sup>

20. The Appeals Chamber endorses the position of the ICTR Appeals Chamber that “the Appeals Chamber ordinarily treats its prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those decisions” in order to “allow certain issues to be finally resolved before proceedings continue on other issues.”<sup>38</sup> The only exception to this principle is that the Appeals Chamber may “reconsider a previous interlocutory decision under its ‘inherent discretionary power’ to do so ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.’”<sup>39</sup> This exception allows the

<sup>33</sup> Response to the Amended Second Rule 115 Motion, paras. 7-12.

<sup>34</sup> Because the Trial Judgement in this case was rendered on 31 March 2003, any Rule 115 motions were due to be filed by the parties 75 days from that date pursuant to Rule 115(A). However, in the Decision on Mladen Naletilić’s Motions for Extension of Time of 25 June 2003, the Pre-Appeal Judge found that good cause had been established for extending the deadline because the Appellant’s Lead Counsel was replaced by order of the Registry on 23 June 2003 and a BCS translation of the Trial Judgement was not made available to the Appellant until 1 July 2003.

<sup>35</sup> Decision on Motion for Leave, pp. 3-5.

<sup>36</sup> *Id.*, p. 5.

<sup>37</sup> Amendment, pp. 6-7.

<sup>38</sup> *Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 202.

<sup>39</sup> *Ibid.*, para. 203 (internal citation omitted).

Appeals Chamber a “meaningful opportunity” to “correct any mistakes it has made.”<sup>40</sup> The Appeals Chamber finds that this same principle and exception are applicable to its pre-appeal decisions on motions filed before the Appeals Chamber prior to the appeals hearing.<sup>41</sup> Because the Appellant has failed to demonstrate in his Amendment that the Appeals Chamber made a clear error of reasoning in that Decision, the Appeals Chamber turns to assess whether its reconsideration is nevertheless necessary in order to prevent an injustice to the Appellant.

21. The Appeals Chamber recalls that the Appellant stated in his Motion for Leave that the 15 documents submitted as additional evidence with his Second Rule 115 Motion were only acquired by Counsel for the Appellant from an independent source in Sarajevo “after August 2003 but before the end of the year.” Furthermore, the Appellant submitted that the subsequent delay in filing his Second Rule 115 Motion was caused by: delay in obtaining full translations of the original BCS versions, which were submitted to the Translation Unit of the International Tribunal as soon as possible after their receipt but were not completed until late 2003 or early 2004; discovery of additional documents from an independent source in January 2004, which Counsel for the Appellant was investigating with the Prosecution to determine whether these new documents had been previously disclosed at trial and, if not, could be included in the Second Rule 115 Motion; and a crash of Co-Counsel’s computer in April 2004.<sup>42</sup>

22. Upon second review of the Appellant’s Motion for Leave, the Appeals Chamber notes that its Decision on that motion explicitly explained<sup>43</sup> that the good cause requirement for filing an untimely Rule 115 motion requires an applicant to show that it was unable to comply with the time limit set out in the Rule, or in this case, with the already extended deadline.<sup>44</sup> In the Motion for Leave, the Appellant provides no reasons whatsoever as to why his independent source in Sarajevo was unable to provide him with the fifteen documents between the time that the Trial Judgement was issued until sometime after August 2003,<sup>45</sup> or any steps that were taken in an effort to comply

<sup>40</sup> *Ibid.*

<sup>41</sup> *Cf. Nahimana et al.*, Case No. ICTR-99-52-A, Decision on Jean-Bosco Baryagwiza’s Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005 (denying the Appellant’s request for reconsideration of the Appeals Chamber’s pre-appeal decision on appointment of counsel). The Appeals Chamber notes that the Rules and Practice Directions of the International Tribunal distinguish between interlocutory appeal and pre-appeal decisions by the Appeals Chamber. Interlocutory appeals are generally filed before the Appeals Chamber under Rules 72 and 73 when a case is at trial against a Trial Chamber’s interlocutory decision prior to the issuance of the trial judgement. On the other hand, pre-appeal decisions are those made on motions, such as Rule 115 motions, filed before the Appeals Chamber when a case is already on appeal and pending before the Appeals Chamber. *See generally* Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal (IT/155 Rev. 2), 21 February 2005.

<sup>42</sup> Motion for Leave, paras. 2-5.

<sup>43</sup> Decision on Motion for Leave, p. 3.

<sup>44</sup> *Kordić and Čerkez* Rule 115 Motion, p. 2.

<sup>45</sup> The Appeals Chamber notes that the Appellant fails to provide a specific date for his receipt of the documents.

with the extended deadline. The Appellant also fails to provide any such explanation in his Amendment after being given a second chance to do so by the Appeals Chamber.

23. The Appeals Chamber further notes that, as explicitly provided in the Appeals Chamber's Decision on Motion for Leave,<sup>46</sup> the good cause requirement under Rule 115 requires an applicant to demonstrate that once it obtained the additional evidence, it submitted a Rule 115 motion *as soon as possible* after becoming aware of the existence of that evidence.<sup>47</sup> Again, the Appellant fails to provide convincing reasoning in his Motion for Leave that the Second Rule 115 Motion was filed in an expedient manner once the investigator in Sarajevo obtained the 15 documents at issue. The Appellant indicates that the translation of the documents from BCS to English was available to him sometime in "late 2003 or early 2004."<sup>48</sup> However, he did not file his Second Rule 115 Motion after the translations were made available until the end of July 2004, allegedly because of the discovery of more additional evidence in January 2004 and Co-Counsel's computer crash in April 2004.<sup>49</sup> The Appeals Chamber notes that the documents discovered in January 2004 relate to a Mostar court case and were not essential for seeking admission of the 15 documents discovered after August 2003.<sup>50</sup> Therefore, the Appellant did not need to wait until the end of July 2004 to do so and risk having his Second Rule 115 Motion found to be untimely filed. The Appeals Chamber further notes that approximately three to four months elapsed between the dates when the translations of the 15 documents were available and when Co-Counsel's computer with "critical information" for the filing of the Second Rule 115 Motion allegedly crashed. In addition, depending on when the computer was fixed, it is likely that at least another month, possibly two, passed before the Second Rule 115 Motion was finally filed. The Appellant fails to provide any reasons as to why the Second Rule 115 Motion could not have been filed sooner before or after the computer crash. Again, the Appellant does not provide any additional explanation in his Amendment after being given a second chance to do so by the Appeals Chamber.

24. Furthermore, the Appeals Chamber finds that the busy work schedules of Counsel for the Appellant as alluded to in the Appellant's Amendment do not provide additional support for a finding of good cause for the late filing of the Second Rule 115 Motion.<sup>51</sup> The Appellant fails to

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<sup>46</sup> Decision on Motion for Leave, p. 3.

<sup>47</sup> *Kordić and Čerkez* Rule 115 Motion, p. 2.

<sup>48</sup> The Appellant fails to provide a specific date when the translations were available.

<sup>49</sup> No specific date is provided by the Appellant for the computer crash or for the date when the computer was fixed.

<sup>50</sup> The Appellant states in his Motion for Leave that after being unable to determine by August 2004 whether the Mostar court documents had already been disclosed by the Prosecution at trial, he decided to file the Second Rule 115 Motion without them anticipating that he would file a third motion pursuant to Rule 115 as to the Mostar court documents upon the completion of his investigation.

<sup>51</sup> See Decision on Mladen Naletilić's Motion for Extension of Time, 3 February 2005, p. 2 (holding that Counsel's "substantial caseload" that they hold in their respective jurisdictions did not constitute good cause for an extension of the deadline for filing an amended Second Rule 115 Motion).

specifically demonstrate how Counsel's over-burdened case loads in the United States impeded the filing of his Second Rule 115 Motion in a timely fashion. The Appeals Chamber notes that in exceptional cases, such an argument may be found helpful. However, considering that the Second Rule 115 Motion was filed 346 days beyond the extended deadline, it carries little weight here. In this context, the Appeals Chamber notes "that a defence counsel, when accepting assignment as lead counsel in a case before the International Tribunal, is under an obligation to give absolute priority to observe the time limits foreseen in the Rules."<sup>52</sup>

25. On the basis of the foregoing, the Appeals Chamber affirms its Decision denying the Appellant's Motion for Leave and finds that the Appellant has failed to provide further reasons in his Amendment in support of a finding of good cause.

2. Whether the proffered additional evidence is admissible

26. The Appeals Chamber notes that even if it did find that the Appellant's Second Rule 115 Motion was validly filed, none of the 15 Exhibits submitted with that motion are admissible on the merits under Rule 115.

27. With regard to the availability of the Exhibits at trial, the Appellant argues that they were retrieved from the archive of the Army of Bosnia and Herzegovina ("ABiH") in Sarajevo after trial concluded. He argues that all reasonable steps were taken at trial to acquire the documents including orally advising the Trial Chamber of the problems encountered in attempting to gain access to the archive; filing a motion to inspect the ABiH documents in the possession of the Prosecutor; and moving the Trial Chamber to issue a subpoena pursuant to Rule 54 of the Rules, which was denied.<sup>53</sup> The Prosecution accepts that the Appellant made efforts at trial to obtain the 15 Exhibits he now seeks to be admitted under Rule 115, noting that the Trial Chamber indeed did not issue a subpoena following the Appellant's request on 25 September 2002.<sup>54</sup>

28. Because the issue of availability of the Exhibits at trial is not contested by the parties, and it appears that the Appellant took reasonable steps at trial in the exercise of due diligence to gain access to the ABiH archive in Sarajevo, the Appeals Chamber finds that the 15 Exhibits were unavailable to the Appellant at trial. Consequently, the Appeals Chamber will determine whether had they been admitted at trial, they could have impacted the Appellant's convictions.

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<sup>52</sup> *Emmanuel Ndingabizi v. The Prosecutor*, ICTR-01-71-A, Decision on "Requête urgente aux fins de prorogation de délai pour le dépôt du mémoire en appel," 5 April 2005, p. 3.

<sup>53</sup> Second 115 Motion, paras. 18-20.

<sup>54</sup> Response to the Amended Second Rule 115 Motion, paras. 19-23.

29. The Appellant argues that the Exhibits proffered with his Second Rule 115 Motion rebut the Trial Chamber's finding, largely based on evidence he submits constitutes uncorroborated hearsay, that the Appellant bore command responsibility with regard to acts committed in Sovići, Doljani and Mostar. The Appellant notes that "none of the exhibits refer to Appellant as being in the chain of command given responsibility for the execution of the decisions and policies of commanders." Thus, the Appellant claims that the Exhibits provide objective evidence that the Appellant was "not in the chain of command or in the decision or policy-making process" with regard to the "attack on Sovići, the 'evacuation' of the population of Sovići and Doljani to Jablanica, and the 'cleansing of Mostar.'"<sup>55</sup>

30. The Prosecution responds that none of the proffered Exhibits in the Appellant's Second Rule 115 Motion could have affected the Trial Chamber's findings leading to convictions of the Appellant where the Appellant was found to have held the position of a commander. The Prosecution points out that the Trial Chamber found that the Convicts Battalion ("KB") was outside of the chain of command of the regular HVO units, was put into action for on-the-ground special combat purposes for HVO operations against both military and civilian targets, and that the Appellant was the highest level commander of the KB in 1993 and 1994. Thus, the Prosecution submits that the 15 Exhibits at issue, demonstrating that the Appellant was not involved in high level negotiations or decisions of the regular HVO command, are consistent with the Trial Chamber's findings as to the Appellant's role and are irrelevant.<sup>56</sup>

(a) Exhibits J-Q and S-X

31. The Appellant argues in his Amendment to the Second Rule 115 Motion that the majority of the proffered Exhibits, namely Exhibits J-Q and S-X, impact the Trial Chamber's findings with regard to his role as commander of the events that took place in Sovići and Doljani from 17 April 1993 and the following days.<sup>57</sup> Specifically, the Appellant alleges that these Exhibits challenge the Trial Chamber's findings that the Appellant "played the central command role in the Sovići/Doljani operation, which was part of the larger operation to take Jablanica;"<sup>58</sup> that the Appellant, in his

<sup>55</sup> Second Rule 115 Motion, paras. 16-17, 21.

<sup>56</sup> Response to the Amended Second Rule 115 Motion, paras. 24-28.

<sup>57</sup> The Appellant asserts that these documents impact the following portions of the Trial Chamber Judgement: paras. 120, 123, 127, 128, 130, 132, 241, 242, 523 (footnote 1366), 529, 531 and 532. See Amendment to Second Rule 115 Motion, paras. 1-8, 11-15. The Appeals Chamber notes that Exhibit Q is provided for purposes of "context and completeness" rather than for challenging any particular finding of the Trial Chamber. Exhibit Q, a letter dated 20 February 1993 from the BH Party of Democratic Action to the President of BH, provides an update on the "Neretva valley project" aimed at strengthening a Muslim political and military front. The Appeals Chamber finds that because this document is not inconsistent with the Trial Judgement in this case and is not proffered by the Appellant to challenge any of the findings material to his convictions, it could not have affected the Trial Chamber's verdict against the Appellant.

<sup>58</sup> See Trial Judgement, paras. 117-132.

function as commander, “participated in a widespread and systematic attack against the BH Muslim civilian population,” “wilfully pursued the goals of the attack,” and “knew that his acts fit into the pattern of the attack” in Sovići and Doljani;<sup>59</sup> and that the Appellant had command responsibility over the unlawful transfer of civilian Muslims from Sovići between 4 and 5 May 1993 to Gornji Vakuf.<sup>60</sup>

32. The Appellant submits the majority of Exhibits J-Q and S-X as explicit or corroborating evidence that the transfer of Muslim civilians on 4 and 5 May 1993 from Sovići was pursuant to an agreement on “evacuation” of soldiers and civilians between the Chief of the Main Staff of the HVO, Milivoj Petković, and the ABiH commander Sefer Halilović. According to the Appellant, this additional evidence undermines the Trial Chamber’s statement that there was no evidence that an official agreement existed as to said transfer.<sup>61</sup> Also, the Appellant alleges that these documents provide evidence that the transfer was being orchestrated and ordered at a higher level than professional units such as the KB and that, because no mention is made therein to him being involved in the negotiations or ordering of the transfer or to the KB in carrying out the transfer, the Trial Chamber erred in holding him responsible for commanding the unlawful transfer of civilians from Sovići to Gornji Vakuf.<sup>62</sup>

33. The Appeals Chamber agrees with the Appellant that many of these Exhibits could provide persuasive evidence that efforts were made toward an official agreement between the two chief military commanders from the HVO and the ABiH on the “evacuation” of civilians from Sovići. However, the Appeals Chamber does not find that they could have impacted the Trial Chamber’s findings that the Appellant commanded and planned an *unlawful* transfer. The Appeals Chamber notes that the Trial Chamber, although finding that it was “not satisfied that any such agreement on exchange [of civilians] was negotiated,” further stated that it was of the view that, in any event, such an agreement “does not have any implications on the circumstances under which a transfer is *lawful*” because “[m]ilitary commanders or political leaders cannot consent on behalf of the individual.”<sup>63</sup> Furthermore, the Trial Chamber found that the circumstances of the transfer demonstrated that it was not a “lawful evacuation” because, *inter alia*, the civilians were forced by

<sup>59</sup> See Trial Judgement, paras. 241-242.

<sup>60</sup> See Trial Judgement, paras. 522-532. The Appeals Chamber notes that throughout the Appellant’s Second Rule 115 Motion and Amendment, he largely contests the Trial Chamber’s findings with respect to his command responsibility for the events at Sovići/Doljani. See *e.g.* Second Rule 115 Motion, para. 16; Amendment, paras. 1,4, 15. However, while the Appellant is correct that the Trial Chamber did find the Appellant responsible under the theory of command responsibility, it ultimately only convicted him for individual criminal responsibility pursuant to Article 7(1) of the Statute concluding that his responsibility was most accurately described as a commander who *planned* the operation in Sovići and Doljani. See Trial Judgement, para. 532.

<sup>61</sup> See Trial Judgement, para. 523.

<sup>62</sup> See generally Second Rule 115 Motion, paras. 21-36; Amendment, paras. 1-15.

<sup>63</sup> Trial Judgement, para. 523 (emphasis added).

soldiers to leave their houses, many of which were then torched; were detained in crowded housing under armed guard; and were then deliberately transferred during the night to an area outside of the occupied territory, all in the absence of imperative military reasons.<sup>64</sup> The Exhibits proffered by the Appellant are consistent with the findings by the Trial Chamber regarding the conditions of the “evacuation” leading to the conclusion that it was in fact an unlawful transfer.<sup>65</sup>

34. The Appeals Chamber does not agree with the Appellant that simply because they fail to mention the Appellant or the KB these Exhibits are evidence that could impact the Trial Chamber’s findings that he played a central command role in the Sovići/Doljani attack on 17 April 1993 and unlawful transfer of civilian Muslims from Sovići in May 1993. The Appeals Chamber recalls that the Trial Chamber found, relying upon several witnesses’ statements and documents on the record, that:

[t]he HVO chain of command in 1993 consisted of a political figure at the top as supreme commander . . . . The Defence Department of the HZ H-B was headed by the Minister of Defence Bruno Stojić, who was subordinate to the supreme commander. Under the Defence Department was the HVO Main Staff, commanded by the Chief of the HVO Main Staff and for some time in 1993 also by a commander. During different periods in 1993, Žarko Tole, *Milivoj Petković*, Slobodan Praljak and Ante Roso headed or commanded the HVO Main Staff. . . . There were two chains of command. The general chain of command was brigade commander, battalion commander, company commander, and commander of a unit. The other chain of command was related to the frontlines, where it was the HVO Main Staff, operative zone commander, commander of a particular area at the frontline and units that were subordinated to the area commander. These units mostly consisted of shifts provided by the Brigades. . . .

*Outside the chain of command* of the HVO regular units, there were professional units and units for special assignments. These units were attached to the HVO Main Staff through the Defence Department. There were four professional units: the Convicts’ Battalion (“KB”) . . . . The normal chain of command for these units was that the HVO Main Staff called on them when needed. . . . When the professional . . . units arrived at the frontline the commander of the particular area at the frontline told them what their specific tasks were . . . . The professional units attached themselves to the area commander but stayed under the direct command of the HVO Main Staff. The execution of the task assigned to the professional units *was within the discretion of their commanders.* (emphasis added).<sup>66</sup>

35. First, the Appeals Chamber considers that the majority of Exhibits J-Q and S-X consist of official combat reports and excerpts of orders from the ABiH. As such, they rarely make specific reference to *any* regular HVO units or their commanders in the chain of command, let alone to professional HVO units such as the KB or their commanders with regard to the events at Sovići/Doljani. Instead, they refer generally to the “HVO and HV forces” or the “Croatian Defence Council” or the “Ustašas.” Thus, they are largely irrelevant for impacting the Trial Chamber’s convictions of the Appellant as a commander over certain HVO units for the events at Sovići/Doljani.

<sup>64</sup> *Id.*, para. 526.

<sup>65</sup> *See, e.g.*, Exhibits J, N, O, S, T, V.

<sup>66</sup> Trial Judgement, paras. 82, 84 (internal citations omitted).

36. That being said, the Appeals Chamber notes that two of the Exhibits do make reference to specific HVO units, Exhibits P and X, and do not mention the Appellant or the KB. Exhibit P is an ABiH review of the execution of combat operations within specific areas of responsibility of the ABiH Igman Operations Group. It is not clear *prima facie* from this document that it pertains to all of the events or HVO units involved in Sovići and Doljani as it does not explicitly mention either village. The Appellant does not provide any information linking Exhibit P to the HVO operations in Sovići and Doljani in April and May 1993.

37. Furthermore, even if it were clear that Exhibit P relates to these specific operations, the fact that neither the Appellant nor the KB are mentioned carries little weight with regard to the Trial Chamber's findings on the Appellant's command role there. First, with regard to Exhibit P's failure to mention the KB, the Appeals Chamber recalls that, at trial, the Appellant did not dispute that the KB Široki Brijeg and the Baja Kraljević ATG were engaged in the Sovići/Doljani operation in April 1993.<sup>67</sup> Furthermore, Exhibit P's failure to mention the KB or the ATG as HVO units is consistent with the Trial Chamber's finding that they operated outside of the regular chain of command for regular HVO units. Second, it appears to the Appeals Chamber that this is not an exhaustive listing of all of the HVO units involved. Exhibit P is consistent with the Trial Chamber's finding that two of the regular HVO units were involved in the events at Sovići/Doljani--the HVO Brigade Herceg Stjepan and the HVO Brigade Kralj Tomislav.<sup>68</sup> However, no mention is made of which battalions of these brigades were involved, such as the Mijat Tomić Battalion, which the Appellant claims was involved in his submission of Exhibit X<sup>69</sup> and was also found by the Trial Chamber in the Trial Judgement.<sup>70</sup> Second, with regard to Exhibit P's failure to mention the Appellant as commander of the KB, the Appeals Chamber notes that Exhibit P makes no reference generally as to who commanded the HVO units listed therein. In sum, the Appeals Chamber finds that even if it were clear that Exhibit P relates to the events at Sovići/Doljani, the absence of reference to the Appellant or to the KB is not evidence that could challenge the Trial Chamber's findings as to his command role in the April and May 1993 operations.

38. With regard to Exhibit X, which purports to list all of the members of the Mijat Tomić Battalion who took part in the attack against Sovići village, the Appeals Chamber finds that the non-inclusion of the Appellant in that list could not impact the Trial Chamber's finding that *for the purpose of the Sovići/Doljani operation*, "the 3<sup>rd</sup> Mijat Tomić Battalion of the HVO Brigade Herceg

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<sup>67</sup> See Trial Judgement, para. 118 referring to the testimonies of Defence Witnesses NR and NM.

<sup>68</sup> See Trial Judgement, para. 127.

<sup>69</sup> Second Rule 115 Motion, para. 36, Amendment, para. 15.

<sup>70</sup> See Trial Judgement, para. 127.



Stjepan, commanded by Stipe Pole,” was one of the regular HVO units acting in concert under the Appellant’s command.<sup>71</sup> The Trial Chamber did not find that the Appellant became a member of this battalion or that he permanently took over Stipe Pole’s post as regular commander of the battalion such that his name should be listed in Exhibit X. Furthermore, Exhibit X is consistent with the Trial Chamber’s finding that “other troops” were involved in the operation beyond the KB Široki Brijeg as a professional unit or the Baja Kraljević ATG as a unit tasked with special assignments.<sup>72</sup>

39. Second, the Appeals Chamber considers that a large number of Exhibits J-Q and S-X do make reference to an agreement or negotiations with high-level HVO commanders such as Milivoj Petković of the HVO Main Staff with regard to Sovići/Doljani.<sup>73</sup> Again, the Appeals Chamber finds that the lack of reference to the Appellant is not evidence that could impact the Trial Chamber’s findings convicting him of responsibility for commanding the operations in Sovići and Doljani. Rather, these Exhibits may be interpreted as consistent with the findings of the Trial Chamber that the Appellant was outside of the official HVO chain of command interacting with the ABiH military chain of command as the commander of a separate professional HVO unit.<sup>74</sup> As such, he discreetly planned and commanded operations on the ground and would not necessarily be involved in high level negotiations.

40. Third, the Appeals Chamber notes that the Appellant submits Exhibits J-Q and S-X as impacting the Trial Chamber’s findings with regard to his *command responsibility* under Article 7(3) of the International Tribunal’s Statute; however, in fact, the Trial Chamber only convicted him for individual responsibility under Article 7(1) *as a commander* who played a central role in planning and implementing the operations at Sovići/Doljani.<sup>75</sup> Although the Appellant primarily focuses his arguments on these Exhibits as demonstrating that the Trial Chamber erred in finding that he held a central command role, the Appeals Chamber turns to consider whether Exhibits J-Q and S-X, in referring to the existence of negotiations and an official agreement among higher levels of the HVO with regard to the unlawful transfer of civilians from Sovići/Doljani, could have had an impact on the Trial Chamber’s finding that the Appellant played a central role in *planning* the unlawful transfer.

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<sup>71</sup> *Id.*

<sup>72</sup> *See e.g.* Trial Judgement, para. 120.

<sup>73</sup> Trial Judgement, paras. 82.

<sup>74</sup> Trial Judgement, para. 84.

<sup>75</sup> *See supra* fn. 59.

41. The Appeals Chamber recalls that the Trial Chamber found that the Appellant was the “highest level commander of the KB in 1993 and 1994” and, as such, he was the overall commander of the Sovići/Doljani operation on the ground, not only heading the KB Široki Brijeg and the Baja Kraljević ATG, but other troops as well, as part of a larger operation to take Jablanica.<sup>76</sup> As such, the Trial Chamber found that “the documentary evidence considered in its entirety proves that Mladen Naletilić strategically planned and conducted the attack on Sovići/Doljani.”<sup>77</sup> The Trial Chamber concluded that the evidence indicated that the Appellant collaborated in planning with the HVO commanders of the Southeast and Northwest Herzegovina operative zones who were in charge of the whole operation to take Jablanica. All three were directly subordinate to the HVO Main Staff. However, with regard to the Sovići/Doljani operation specifically, although all three men planned the operation, it was only the Appellant who made the final decisions on the ground for carrying it out.<sup>78</sup>

42. In light of these findings and the evidence relied upon by the Trial Chamber, the Appeals Chamber finds that Exhibits J-Q and S-X could not have impacted the Trial Chamber’s conviction against the Appellant for planning the Sovići/Doljani operations. The fact that the Appellant is not mentioned with regard to the highest level HVO and ABiH official negotiations on the unlawful transfer of civilians from Sovići/Doljani is not evidence that could preclude the Trial Chamber from concluding that the Appellant planned the details of the unlawful transfer on the ground. Rather, the absence of the Appellant’s name in these negotiations is again consistent with the Trial Chamber’s findings that the Appellant, as a commander of a professional unit, operated outside of the regular HVO chain of command; that the professional units were tasked with specific operations on the ground on the front lines; and that the practical execution of the task was often implemented at the discretion of the commanders of the professional units.<sup>79</sup>

(b) Exhibits M and R

43. The Appellant states in his Amendment to the Second Rule 115 Motion that Exhibits M and R are relevant for challenging the Trial Chamber’s findings with regard to events at Mostar. Specifically, the Appellant contends that Exhibit M<sup>80</sup> rebuts the Trial Chamber’s conviction of the Appellant as a commander under Article 7(3) of the Statute for plunder of BH Muslim apartments

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<sup>76</sup> See Trial Judgement, paras. 89-94; 117-120.

<sup>77</sup> See Trial Judgement, paras. 127-132.

<sup>78</sup> *Id.*

<sup>79</sup> See generally Trial Judgement, para. 84.

<sup>80</sup> The Appeals Chamber notes that the Appellant submitted Exhibit M to challenge the Trial Chamber’s findings both with regard to Mostar and Sovići/Doljani.

and houses in Mostar following the attack of 9 May 1993.<sup>81</sup> The Appellant argues that Exhibit M shows that the Trial Chamber erred in its reliance on Exhibits PP 456.1 and 465.2 for this finding, which were two reports by different officers at the Command of the HVO 1<sup>st</sup> Military Police Battalion in Mostar alleging that the soldiers participating in the looting were “Tuta’s men” acting on “Tuta’s orders.”<sup>82</sup> The Appellant points out that Exhibit M, an ABiH military report on a meeting in Jablanica on 26 April 1993, states that “there was a lot of looting and setting of fires,” that “Zuka’s soldiers were falsely accused of it,” and that Zuka’s soldiers “absolutely were not there.” The Appellant argues that the context and timing of the report suggests that “Zuka” was a mistaken reference to “Tuta” and that Exhibit M is evidence that individuals falsely claimed to be Tuta’s men while committing plunder as was stated by the Appellant’s Witness NO at trial. Thus, Exhibit M impacts the Trial Chamber’s findings regarding the Appellant’s conviction for command responsibility for plunder committed by the KB in Mostar.<sup>83</sup>

44. The Appeals Chamber does not agree. First, it is unlikely that the reference to “Zuka” in the ABiH military report refers to the Appellant and acts of looting by the KB at Mostar. Exhibit M explicitly reports on looting at Radešine and Jablanica, not Mostar, prior to 9 May 1993. Furthermore, the report is an ABiH report, and the Deputy Commander of the Supreme Command Staff, Special Detachment for Special Purposes, demands therein the issuance of a warning to all units in the area of Konjić and their commanders not to say that they are Zuka’s men when they are looting or otherwise “I will turn all Zuka’s soldiers against them and forget about the operations against the aggressor.” The Appeals Chamber finds that it would be illogical that the ABiH Deputy Commander would have the authority over the Appellant and the KB such that he could set the KB loose against ABiH units as retaliation for false representation of identity while looting. At best, Exhibit M is evidence that such false representation took place on both sides when property was plundered during the conflict in Bosnia-Herzegovina. However, the Trial Chamber acknowledged similar evidence specifically with regard to the plunder at Mostar, stating that “there is evidence that property was apprehended not only by HVO soldiers but also by civilians acting as gangs and trying to shift the blame on other persons” and nevertheless concluding that this fact did not preclude that the Appellant and the KB were involved as well in the plunder.<sup>84</sup> Thus, the Appeals Chamber does not find that Exhibit M could have had an impact on the Trial Chamber’s conviction of the Appellant for plunder at Mostar under Article 7(3).

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<sup>81</sup> See Trial Judgement, paras. 618-631.

<sup>82</sup> Trial Judgement, para. 630, n. 1559.

<sup>83</sup> Second Rule 115 Motion, para. 25; Amendment, para. 4.

<sup>84</sup> Trial Judgement, para. 626.

45. With regard to Exhibit R, the Appellant submits that this document rebuts the Trial Chamber's finding that he is responsible as a commander under Article 7(3) for the unlawful transfer of BH Muslim civilians to the Eastern Side of Mostar on 13 and 14 June 1993.<sup>85</sup> Exhibit R is the minutes of a meeting called by the 3<sup>rd</sup> Mijat Tomić Battalion of the HVO on 26 March 1993 in Mostar addressing the problem of housing for families of combatants and the need to cleanse the city of BH Muslim refugees. The Appellant argues that because this was a meeting of "all commanders in Mostar" at the time, the fact that the minutes do not mention the Appellant's presence at all demonstrates that the Trial Chamber erred in finding that he bore any responsibility for the transfer of civilians within Mostar.<sup>86</sup>

46. The Appeals Chamber does not agree. The Appeals Chamber notes that this meeting was not a meeting of *all* HVO commanders in Mostar but rather, a meeting of the "leading men of the HVO Battalions," specifically the 1<sup>st</sup> through 5<sup>th</sup> HVO Battalions in Mostar. This is confirmed by Exhibit R wherein at the end of the meeting, the Battalion commanders present agreed to arrange a further meeting where leading officials of the HVO and other Commanders of the Brigades and Battalions would be invited. There does not appear to be any reason why the Appellant would be expected to have attended the March 1993 meeting as he was not a commander of a regular HVO Battalion. Furthermore, the Appeals Chamber notes that this meeting was held at the end of March 1993; it is not a foregone conclusion that the Appellant would have been present at such a meeting when he was only found by the Trial Chamber to have begun instructing special HVO units under his command, such as ATG units, as early as 9 May 1993<sup>87</sup> that they would be carrying out evictions and transfers, and was only convicted for command responsibility for unlawful transfers as early as 13 and 14 June 1993.<sup>88</sup> Finally, the Appeals Chamber finds that Exhibit R could not have had an impact on the Trial Chamber's conviction of the Appellant for unlawful transfer in Mostar on 13 and 14 June 1993 because these minutes were of a meeting of commanders operating in the HVO regular chain of command. As mentioned previously with regard to other Exhibits, the absence of the Appellant's name from the minutes of the meeting is consistent with the Trial Chamber's finding that the Appellant and the KB operated outside of that chain of command.

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<sup>85</sup> Trial Judgement, paras. 549, 551, 556, and 558.

<sup>86</sup> Second Rule 115 Motion, para. 30; Amendment, para. 9.

<sup>87</sup> Trial Judgement, para. 557.

<sup>88</sup> Trial Judgement, paras. 556, 558.

## **B. Third Rule 115 Motion**

### 1. Whether the motion was validly filed

47. In the Appellant's Third Rule 115 Motion, Lead Counsel for the Appellant requests leave from the Appeals Chamber to file the motion out of time. Lead Counsel states that he first received Exhibits Y-1 through Y-3/Z-1 through Z-3 attached thereto in January 2004 from the Appellant. Lead Counsel further claims that he was informed at the time of receipt of these Exhibits that no one from the Defence trial team had ever seen Exhibits Y-2/Z-2.<sup>89</sup> However, Lead Counsel then requested members of the Defence trial team to review all materials produced by the Prosecution before and during trial and any records and notes generated by the Defence to confirm whether any member of the Defence trial team had ever seen the Exhibits at issue. The Defence trial team confirmed that they had never seen Exhibits Y-2/Z-2.<sup>90</sup>

48. On 2 March 2004, Lead Counsel contacted the Prosecution to inquire whether they had ever disclosed the Exhibits that the Appellant gave to him in January 2004.<sup>91</sup> On 5 March 2004, the Prosecution responded that Exhibits Z-1 through Z-3, the BCS versions of Y-1 through Y-3, had in fact been disclosed to the Defence team at trial on 29 May 2002, in particular, to former Lead Counsel.<sup>92</sup> In support of this claim, the Prosecution produced a copy of a receipt signed by the Defence team and dated 29 May 2002 for two binders containing the "Mostar Court File," which the Prosecution stated contained Exhibits Z-1 through Z-3 as well as a record of documents identified by ERN ranges that should have been in the disclosed binders.<sup>93</sup> In an "over-abundance of caution," Lead Counsel hesitated to file a Rule 115 motion requesting admission of the Exhibits "until a thorough investigation had been completed by the defence trial team." Lead Counsel decided to acquire affidavits from each member of the Defence trial team as further confirmation that they had never seen Exhibits Y-2/Z-2 and stated that the last affidavit was not acquired until 24 August 2004.<sup>94</sup> "Still not satisfied, counsel asked the members of the defense trial team to review

<sup>89</sup> The Appeals Chamber notes that Exhibits Y-2/Z-2 are the same Mostar High Court document; Exhibit Y-2 is the English version and Exhibit Z-2 is the BCS version of the document.

<sup>90</sup> Third Rule 115 Motion, paras. 11-12.

<sup>91</sup> *Id.*, para. 13.

<sup>92</sup> *Id.*, Exhibit AA. The Appeals Chamber notes that Lead Counsel for the Appellant stated in the Third Rule 115 Motion that the Prosecution indicated that they had disclosed the Exhibits to the Defence trial team on 29 May 2004; however, the Appeals Chamber considers that Lead Counsel actually meant 29 May 2002 as indicated in the email correspondence from the Prosecution attached to the Third Rule 115 Motion as Exhibit AA and given that the trial was terminated with the issuance of the Trial Judgement on 31 March 2003.

<sup>93</sup> *Id.*

<sup>94</sup> Three affidavits are attached to the Third Rule 115 Motion as Exhibits BB-DD. The affidavit of Co-Counsel, Mr. Christopher Young Meek is signed 15 June 2004 (Exhibit CC); the affidavit of Ms. Nika Pinter, former legal assistant

their records again.” Finally, the Third Rule 115 Motion was filed before the Appeals Chamber on 22 November 2004. Lead Counsel argues that the delay for filing the Rule 115 Motion “was based, for the most part, on respect for the Prosecution’s representations that Exhibit Z-2 had been produced.”<sup>95</sup>

49. The Prosecution responds that although it acknowledges the diligent efforts made by Lead Counsel to ascertain whether the Defence team had Exhibits Y-2/Z-2 at trial, Prosecution records indicate that the Defence did in fact have the Exhibits in question. The Prosecution concludes by stating that the signed receipt by Defence Counsel at trial as to the two disclosed binders containing the Mostar Court file, the Prosecution disclosure log and the Prosecution copies of the disclosed binders all indicate that the Defence trial team was in possession of Exhibits Y-2/Z-2 and, therefore, the request for leave to file the Third Rule 115 Motion out of time should be denied.<sup>96</sup>

50. The Appeals Chamber recalls that the Appellant’s extended deadline for filing Rule 115 motions was 15 August 2003.<sup>97</sup> The Appeals Chamber notes that the Appellant’s Third Rule 115 Motion was filed on 22 November 2004; therefore, it was filed 464 days outside of the extended deadline and the Appellant must demonstrate good cause for the late filing pursuant to Rule 115(A) of the Rules.

51. The Appeals Chamber finds that the Appellant has failed to do so. The Appeals Chamber considers that Lead Counsel has failed to explain why the Appellant was only able to hand over the Exhibits proffered for admission to Lead Counsel in January 2004, nine months after the close of trial. Lead Counsel merely states that prior to the hand-over, the Appellant acquired the Exhibits directly from the “liaison officer for Croatian prisoners in the United Nations Detention Unit (UNDU)” without explaining when this happened and why there was delay in handing the documents over to Lead Counsel until that date. Furthermore, the Appeals Chamber considers that it took the Appellant another approximate 11 months to file the Third Rule 115 Motion once the Exhibits were obtained by Lead Counsel. While the Appeals Chamber is sympathetic to Lead Counsel’s need to ascertain whether or not these Exhibits had been available at trial prior to filing the motion, the amount of time taken to do so constitutes undue delay, especially in light of the Prosecution’s prompt cooperation with Lead Counsel for determining whether or not the Exhibits had been disclosed to the Defence trial team.

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for the Appellant’s Defence trial team, is signed 24 June 2004 (Exhibit DD); and the affidavit of Mr. Krešimir Krsnik, former Lead Counsel for the Appellant, is signed 23 August 2004.

<sup>95</sup> Third Rule 115 Motion, paras. 14-17.

<sup>96</sup> Response to Rule 115 Motion, para. 21.

<sup>97</sup> See *supra* para. 18 and fn. 34.

2. Whether the proffered additional evidence is admissible

52. The Appeals Chamber notes that even if it did find that the Appellant had established good cause such that his Third Rule 115 Motion could be considered as validly filed, none of the Exhibits attached thereto are admissible under Rule 115. Because Exhibits AA through DD are submitted merely as support for the Appellant's arguments in the motion with regard to the availability of Exhibits Y-1 through Y-3/Z-1 through Z-2 at trial under the Rule 115 test, the Appeals Chamber will only consider them with regard to that question and not on the merits for their admissibility under Rule 115.

53. With regard to the availability of Exhibits Y-1 through Y-3/Z-1 through Z-3, the Appeals Chamber recalls that Exhibits Y-1 through Y-3/Z-1 through Z-3 constitute the cover page, case summary, and indictment in both English and BCS of a particular criminal court case before the High Court in Mostar against 24 individuals charged with committing genocide and war crimes against the civilian population in Sovići/Doljani in April and May 1993.<sup>98</sup> The Appellant concedes that it is Exhibits Y-2/Z-2 ("Summary") that is new to him; that it is this document which is the focus of his pleading; and that "the remaining documents are provided for context, completeness and convenience."<sup>99</sup>

54. Turning to the question of the availability of Exhibits Y-2/Z-2, the Appellant claims that no member of the Defence trial team had seen the document prior to January 2004. The Appellant produces three signed and sworn affidavits from each member of the Defence trial team stating that they have never seen the document, and that it was not in the binders disclosed to them during trial by the Prosecution.<sup>100</sup> The Appellant admits that at trial, the Defence did know of the allegations made against certain individuals in connection with the events at Sovići/Doljani in April and May 1993 by the prosecutor in Mostar,<sup>101</sup> that an indictment had been issued against them (Exhibit Y-3/Z-3),<sup>102</sup> and that proceedings were being conducted before the court in Mostar.<sup>103</sup> Former Lead Counsel for the Appellant states that he and Co-Counsel at trial took steps to obtain the Mostar High Court file including conducting a personal investigation at the Mostar High Court and speaking with the Chief Justice and Prosecutor. However, he alleges that his search was fruitless because the Chief Justice informed him that the requested court file had already been handed over

<sup>98</sup> See *supra* para. 7.

<sup>99</sup> See Third Rule 115 Motion, p. 2, paras. 19, 21, 23, Exhibit CC, paras. 8-9 (wherein Co-Counsel states that the Defence trial team had a copy of the Mostar High Court indictment), and Exhibit DD.

<sup>100</sup> Exhibits BB-DD.

<sup>101</sup> Third Rule 115 Motion, para. 19.

<sup>102</sup> Exhibit CC, paras. 8-9.

<sup>103</sup> Third Rule 115 Motion, para. 21, Exhibit BB, para. 1.

to the Prosecution.<sup>104</sup> While the Appellant does not claim that the “Prosecution wilfully withheld Exhibit Z-2,” he contends that he never received Exhibit Y-2/Z-2 contrary to the Prosecution’s records and that it must have “somehow been excluded from the binders produced” by the Prosecution.<sup>105</sup>

55. The Prosecution responds that it does not question the “good faith effort of the Appellant’s Counsel on Appeal,” but according to its disclosure log, which indicates the documents disclosed to the Defence trial team on 29 May 2002 by ERN number or the specific page reference number of each document, the English translation of Exhibit Z-2 (or Exhibit Y-2) was included in two separate places in the second binder disclosed to the Defence. Furthermore, a BCS version of Exhibit Y-2 (or Exhibit Z-2) was disclosed in these binders. The disclosure log matches the Prosecution’s own copies of the contents of the two binders at issue. The Prosecution further argues that reference to the Summary is also found in a list of all of the material contained in the two binders that accompanied the binders when they were disclosed to the Defence at trial. Finally, the Prosecution points to the copy of the signed receipt by Defence Counsel at trial acknowledging that they received the two binders in question on 29 May 2002. The Prosecution submits as annexes to its Response copies of the relevant pages of its disclosure log, the English translation of the Summary contained in the disclosed binders referenced as ERN RR042994-RR042998, a BCS version of the Summary contained in the disclosed binders referenced as ERN RR042989-RR042993, and an index of all of the documents contained in the disclosed binders by corresponding ERN number.<sup>106</sup>

56. The Appeals Chamber considers that it need not determine the availability of Exhibits Y-1 through Y-3/Z-1 through Z-3 at trial because it finds that, even assuming that they were unavailable to the Appellant, the Appellant fails to demonstrate under the less stringent test for admissibility under Rule 115 that they could have had an impact on the verdict against him. The Appellant generally argues that these Exhibits challenge all of the Trial Chamber’s findings leading to a conclusion that he bore command responsibility for crimes committed in Sovići/Doljani in April and May 1993.<sup>107</sup> He claims that these findings were largely based upon “uncorroborated hearsay from witnesses who claimed to have heard that Appellant was in charge of the individuals who committed atrocious acts in Sovići and Doljani.”<sup>108</sup> The Appellant contends that Exhibits Y-2/Z-2 is a Summary of the disposition of the indictment against certain individuals before the High Court in Mostar. While the Appellant had knowledge of the indictment against these individuals at trial, he

<sup>104</sup> Third Rule 115 Motion, para. 21, Exhibit BB, paras. 2-3.

<sup>105</sup> Third Rule 115 Motion, paras. 14, 25.

<sup>106</sup> Response to Third Rule 115 Motion, paras. 16-21.

<sup>107</sup> Third Rule 115 Motion, para. 18 referring to the Trial Judgement, paras. 117-159. As noted above, the Appeals Chamber points out that the Appellant was actually convicted by the Trial Chamber as bearing individual responsibility under Article 7(1) for planning the crimes committed at Sovići and Doljani. *See supra* fn. 59.



claims that if he had also received the Summary at trial, “the defense would have timely learned that there had been a trial of the allegations in the Indictment . . . by 10 July 1998 . . . result[ing] in multiple convictions of defendants who were tried *in absentia*.”<sup>109</sup>

57. The Appellant further argues that the Summary sets out the witnesses who actually testified against these defendants and while the indictment, of which the Appellant had a copy at trial, listed these witnesses, it gave no identifiers beyond the witnesses’ names, which would have allowed the Appellant to locate the witnesses during trial. The Appellant states that “if the defense trial team had seen Exhibit Z-2 (Exhibit Y-2) before or during trial, perhaps the defense presentation would have been different” and “reasonable, focused efforts could have been mounted to recover the minutes of the trial testimony of each of those witnesses.”<sup>110</sup> The Appellant “speculates” that such testimony could have been exculpatory for him given that he was not referenced in the indictment before the Mostar High Court, which charges the same crimes committed in the same geographical location during the same time period for which the Appellant was charged before this International Tribunal. He claims that “the exhibits attached hereto suggest that Appellant’s responsibility for events there may not have been what it seemed to the Trial Chamber.” Again, the Appellant “admits that his claims are speculative” but concludes by stating that the “purpose of this Request” is to demonstrate that, at trial, he did not have fair notice of and was denied a substantial lead to potentially exculpatory evidence before or during trial. He requests that the Appeals Chamber take this into consideration when assessing the fairness of the proceedings and the sentence returned against him.<sup>111</sup>

58. The Appeals Chamber does not agree. First, the Appeals Chamber notes that a plain reading of the Summary indicates that it is merely a summary of the disposition of the *indictment* in this particular case before the High Court in Mostar, a copy of which the Appellant admits to having had at trial. The Summary does not indicate that the trial against these individuals had been concluded, but that the investigation against them in preparing for the indictment had been carried out *in absentia*. The witnesses listed in the Summary from whom factual statements were taken in support of the indictment are also listed in the indictment and, as in the indictment, are only identified by name. The Appellant fails to indicate any steps he took in the exercise of due diligence to locate these witnesses or their statements. Furthermore, the Appeals Chamber does note that the Summary indicates that the statements had been translated into English and that the Protocols of the witnesses with accurate addresses were enclosed and these are not attached to the Summary as part

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*, para. 19.

<sup>110</sup> *Id.*, paras. 19, 22-23, 26.


<sup>111</sup> *Id.* paras. 23-26.

of Exhibit Y-2/Z-2. However, in its Response to the Third Rule 115 Motion, the Prosecution contends that the witness statements of all of these witnesses except one were included in the binders disclosed to the Defence at trial and attaches an index to the binders as an appendix indicating the same.<sup>112</sup> The Appellant does not contest the Prosecution's claim. Thus, the Appeals Chamber is not convinced by the Appellant's allegation that he was denied important leads to potentially exculpatory materials by not having a copy of the Summary at trial, given that it appears that the Appellant had access to all of the information at trial contained in the Summary.

59. Second, and most importantly, the Appeals Chamber does not find that the absence of the Appellant's name from the indictment before the Mostar High Court and Summary of the investigations could impact the Trial Chamber's findings related to the Appellant's command role in the events at Sovići and Doljani. The Appellant fails to identify with any specificity which findings by the Trial Chamber could be impacted. Furthermore, as the Appellant concedes, it is speculative to conclude that simply because the prosecutor in Mostar failed to list the Appellant as one of the defendants in the case before the Mostar High Court, these Exhibits could have impacted the Trial Chamber's conviction of the Appellant. There are various factors that play into a prosecutor's decision as to whom to indict in building a case. At best, as the Prosecution in this case states, "the Mostar Indictment suggests merely that individuals *additional to the [A]ppellant* may also be culpable for similar crimes."<sup>113</sup>

On the basis of the foregoing, the Appeals Chamber **DISMISSES** the Appellant's Amended Second Rule 115 Motion and the Third Rule 115 Motion in their entirety.

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



Judge Fausto Pocar,

Presiding Judge

Done this 7th day of July 2005

At The Hague, The Netherlands.

**[Seal of the Tribunal]**

<sup>112</sup> Response to Third Rule 115 Motion, paras. 2, 44-45, Appendix 5.

<sup>113</sup> *Id.*, para. 57 (emphasis in the original).