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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-98-29-A

Date: 15 November 2006

Original: English

IN THE APPEALS CHAMBER

Before:
Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **15 November 2006**

PROSECUTOR

v.

STANISLAV GALIĆ

DECISION ON DEFENCE MOTION TO PRESENT ADDITIONAL EVIDENCE

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Michelle Jarvis
Ms. Shelagh McCall

Counsel for the Defence:

Ms. Mara Pilipović
Mr. Stephane Piletta-Zanin

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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 Appeals against the Judgement rendered by the Trial Chamber on 5 December 2003 ("Trial Judgement"). The Appeals Chamber is also presently seized of the "Defence Motion to Present Before the Appeals Chamber Additional Evidence" ("Defence Motion"), filed on 8 September 2006 by Stanislav Galić.

I. BACKGROUND

2. The Defence Motion seeks to have "at least 64 documents"[1] admitted as additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules"). The Defence claims to have obtained these documents recently from the archives of the Ministry of Defence of the Republic of Bosnia and Herzegovina ("BiH").[2] The Defence sought to have these documents admitted in a prior Rule 115 motion, which this Chamber dismissed as failing to "'identify with precision the specific finding[s] of fact made by the Trial Chamber to which' the different pieces of proposed additional evidence are directed."[3]

3. On 29 September 2006, the "Prosecution's Response to 6th Defence Motion to Present Additional Evidence" ("Prosecution Response") was filed. The Prosecution offers various reasons why the Defence Motion should be denied, including that the motion was untimely, that the documents could have been obtained earlier through due diligence, that some of these documents are cumulative with documents available to the Defence at trial, and that in any event the documents would not have affected the verdict. The Defence has not filed a reply to the Prosecution Response.

4. There have been two other recent filings on this issue. On 28 September 2006, the Defence filed "Observation complementaires à la 'Defence motion to present before the appeals chamber additional evidence' du 7 septembre 2006, article 115 RPP" ("Additional Observations"). These Additional Observations provide further arguments as to why the documents at issue should be admitted under Rule 115. The Defence justifies its filing of these Additional Observations on the ground that the co-counsel had not been able to meet in person with lead counsel to help draft the original Defence Motion.[4] On 29 September 2006, the Prosecution filed the "Prosecution Motion to

[1] Defence Motion, p. 2. It is unclear how the Defence obtains this number. In Annex I to the Motion, the Defence provides a list of documents D1-D72 (although there is no D29, D30, D50, or D59).
[2] *Ibid.*, p. 1.
[3] Decision on Defence Motion to Present Additional Evidence, 28 August 2006, para. 5, *quoting* Rule 115.
[4] Additional Observations, p. 2.

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Strike Defence Additional Observations to the 6th Defence Motion to Present Additional Evidence" ("Motion to Strike"). The Motion to Strike states that the Defence has no good justification for its failure to coordinate its original Defence Motion; that the Rules and the relevant Practice Direction do not authorize the filing of "Additional Observations"; and that this Chamber should strike the Additional Observations. The Defence has not filed a response to the Motion to Strike.

II. DISCUSSION

5. As a preliminary matter, the Appeals Chamber grants the Motion to Strike. The Prosecution correctly points out that the Rules and the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal do not authorize the filing of "Additional Observations."[5] Even assuming the Appeals Chamber might sometimes permit additional filings given good cause, there is no suitable reason for their admission here. Absent exceptional circumstances, lead counsel and co-counsel should coordinate their efforts. Here, as the Prosecution points out, the Defence has had the documents in its possession for several months.[6] The Appeals Chamber also notes that the *Galić* Appeals Hearing, which both lead counsel and co-counsel attended, took place on 29 August 2006, just days before the filing of the Defence Motion. In light of these points, the Appeals Chamber can identify no good cause that might justify its consideration of a filing not authorized by the Rules or the relevant Practice Direction.

6. Rule 115 governs the admissibility of additional evidence on appeal. Rule 115(A) requires that where a party does not file the motion until after the appeal hearing, "cogent reasons" must be shown for the delay. Rule 115(B) states that if "the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial." If the applicant can demonstrate that the additional evidence was "not available to him at trial in any form, or discoverable through the exercise of due diligence", then the evidence can come in if the applicant further shows that "the evidence is both relevant to a material issue and credible, and that it *could* have had an impact on the verdict."[7] If, however, the "evidence was available at trial," then the applicant must show that

[5] Rule 115 does permit parties to "file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material." *See also* IT/155/Rev.3, 16 September 2005, para. 15. The Defence does not suggest that this clause justifies its filing of the Additional Observations. In any event, for this clause to apply, time limits must be set for the filing of rebuttal material, and no such limits have been set in this case. *Cf., e.g., Prosecutor v. Krstić*, No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, p. 4 (suggesting that the time for offering rebuttal evidence occurs after a Rule 115 motion is granted).

[6] Motion to Strike, p. 6; *see also* Defence Motion, p. 1 (stating that the Defence received the documents on 26 July 2006).

[7] *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* Decision"), para. 12 (footnote omitted).

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"exclusion of the evidence would lead to a miscarriage of justice, in that ... it *would* have affected the verdict."[8] The Appeals Chamber notes that the conditions set out in Rule 115(A) and Rule 115(B) of the Rules are cumulative. It is at the Appeals Chamber's sole discretion in which order it will assess whether these prerequisites are met. In this case, the Appeals Chamber will first consider whether the Defence satisfies the requirements of Rule 115(B).

7. In considering the 115(B) inquiry, the Appeals Chamber must first assess whether the Defence has shown that the evidence was neither available at trial nor discoverable at that time through reasonable diligence. The Defence Motion states that the Defence conducted its research and found the documents after it was informed by the Prosecution on 19 June 2006 "that the Ministry of Defence of the Republic of BiH granted inspection of documents of the [Vojska Republike Srpske ("VRS")] and the [Army of Bosnia and Herzegovina ("ABiH")] in their Archives."[9] The Defence further states that it "is evident that the Defence couldn't inspect those documents earlier", but does not explain why this is the case.[10]

8. The Appeals Chamber finds that the Defence has failed to show that the documents were unavailable or were unobtainable through reasonable diligence at the time of trial. To begin with, the Prosecution's communication of 19 June 2006 did not relate to the documents at issue in this Rule 115 Motion. The Prosecution's communication related to "military records concerning the VRS Main Staff and the Republika Srpska units" that had been placed in an archive in Banja Luka.[11] The documents at issue in this Rule 115 motion, however, come from the ABiH archive in Sarajevo.[12] The Prosecution states that this Sarajevo archive has been "available throughout the pre-trial, trial and appellate phases of this case" and specifically that it has been "accessible since 1997 with approval from the Federal Ministry of Defence".[13] The Defence neither contests this statement nor represents that it ever unsuccessfully sought approval to access the ABiH archive earlier. Accordingly, the Defence has failed to meet its burden of showing that the documents were unavailable at trial or that it could not have discovered them through the exercise of due diligence during the pre-trial or trial phases.

9. The Appeals Chamber will thus deny the Rule 115 Motion unless the Defence can show that the documents "*would* have affected the verdict" if introduced at trial.[14] Although the Defence

[8] *Ibid.*, para. 13.
[9] Defence Motion, p. 1.
[10] *Ibid.*, p. 10.
[11] Prosecution Response, Annex 1.
[12] *See ibid.*, para. 2.
[13] *Ibid.*, paras 12-13. The Prosecution also notes that it specifically drew the Defence's attention to this archive in a letter of 19 December 2002, *see ibid.*, Annex 5.
[14] *Simić* Decision, para. 13.

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does not analyze the effect of the documents under this standard, the Defence does make various arguments as to why these documents would be relevant. The Appeals Chamber will consider these arguments in turn.

10. First, according to the Defence, many of these documents show that the ABiH made extensive use of civilian buildings in Sarajevo.[15] "When examined from a global perspective ... these documents clearly prove that Sarajevo ... was literally covered of such objectives, which had thus been transformed into military targets. Attacking them became not only legal but would represent, for any attacking party, an obvious military gain from a military point of view."[16] The Prosecution responds that there was "extensive evidence at trial concerning the use of civilian buildings by the ABiH" and that the Defence draws no specific links between the buildings identified in the Rule 115 documents and the unlawful attacks found by the Trial Chamber.[17]

11. While the Rule 115 documents do suggest that the ABiH made substantial use of certain civilian buildings, including some schools and factories, the Appeals Chamber finds that the Defence has not shown that these documents would have affected the verdict. The Defence does not show that any of the sites identified by these documents were targeted or otherwise at issue in the sniping and shelling incidents found by the Trial Chamber. In the circumstances of this case, the fact that the ABiH made use of certain civilian buildings does not provide the Defence with a legitimate justification for Sarajevo Romanija Corps ("SRK") attacks on other civilian buildings or on civilians in the streets.

12. Second, the Defence points out that D9, D64, D69, and D70 refer to ABiH snipers.[18] The Prosecution responds that the existence of ABiH snipers would not affect the verdict.[19] The Appeals Chamber agrees with the Prosecution. These documents do not show that SRK snipers permissibly

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[15] Defence Motion, p. 4 (referencing D2, D3, D5-D8, D10-D14, D16, D39, D40, D45-D47, D54, D55, D63, D66, and D67); *see also* p. 6 (referencing D1, D23-D25, D27, D28, D32, D33, D38, D49, D59, D61, D62, and D68; stating that these documents show a heavy ABiH concentration around the airport and the Dobrinje area; and claiming that these documents thus reinforce the conclusion that civilian buildings were legitimate targets); pp. 7-8 (referencing D1 and D58-D60 in claiming that there were legitimate military targets throughout the city); p. 9 (referencing D12 once again for the proposition that civilian structures were used to help the ABiH).

[16] *Ibid.*, p. 5.

[17] Prosecution Response, paras 41-42; *see generally ibid.*, paras 40-45; 57-58, 77-80. The Prosecution makes other arguments specific to certain documents. *E.g., ibid.*, para. 57 (stating that the Defence had D1 in its possession during trial); *ibid.*, para. 80 (noting that while D12 shows that a civilian building was used for a clothes drive for the military, the Defence has not shown that the building or its occupants thus lost their civilian status under humanitarian law). The Appeals Chamber will not address these arguments, as the Appeals Chamber agrees with the Prosecution's principal argument.

[18] Defence Motion, p. 7.

[19] Prosecution Response, para. 46. The Prosecution also claims that evidence regarding ABiH snipers was presented at trial, *ibid.*, para. 47, and that the Prosecution had disclosed documents very similar to these ones to the Defence during the pre-trial or trial proceedings, *ibid.*, para. 48. The Appeals Chamber will not address these arguments, as the Appeals Chamber agrees with the Prosecution's principal argument.

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mistook civilians for ABiH snipers; they only establish that the ABiH did in fact have some snipers. This fact does not justify the SRK's use of snipers to attack civilians.

13. Third, the Defence claims that D9, D15, D26, and D42 "manifest[] that crossing over the airport runway was exclusively allowed for military troops" and contradict the finding in the Trial Judgement at paragraph 743.[20] In this paragraph, the Trial Chamber concluded that "a number of civilians trying to cross the airport tarmac were targeted [by the SRK] in full awareness of their civilian status or in the reckless disregard of the possibility that they were civilians." If only military troops crossed the runway, however, then the SRK could not have targeted civilians on the runway. The Prosecution responds that the documents cited by the Defence do not show that runway crossings were *exclusively* done by the military.[21]

14. The Appeals Chamber cannot conclude that these documents would have affected the verdict. Although these documents make reference both to the ABiH and runway crossings,[22] none suggests that only the military made such crossings. D15 does suggest that the ABiH sought to control the runway crossings, but nowhere indicates that these crossings were limited to the military. There is no inconsistency between its contents and the Trial Chamber's finding – to the contrary, the point that the ABiH sought to control runway crossings is consistent with the Trial Chamber's finding that BiH issued permits to civilians to cross the runway.[23]

15. Fourth, the Defence argues that D57-D59 undermine the Trial Chamber's findings with regard to the scheduled shelling incident 2 in the Dobrinjia area.[24] This shelling incident occurred on 12 July 1993 at a well used by civilians. The Defence argued that this shell was not fired by the SRK, but the Trial Chamber rejected this argument.[25] The Defence argued in the alternative that if this shell was fired by the SRK, then it was aimed at a military target, such as an ABiH trench in the vicinity.[26] This trench led to the Butmir-Dobrinja tunnel. The Trial Chamber rejected this argument as well, noting that the trench would have been 120 meters from the well and further observing that the evidence suggested that the tunnel was not operational and that the trench had not yet been built.[27]

[20] Defence Motion, p. 7.
[21] Prosecution Response, paras 49-54. The Prosecution makes additional arguments, *see ibid.*, paras 54-56, which the Appeals Chamber does not address in light of its agreement with the Prosecution's principal argument.
[22] *See* D9 ("inform units that until further notice crossing the runway is prohibited); D15 (discussing need for checkpoint "for the reception and escort of designated people across the runway"); D26 (noting that a soldier was killed in a runway crossing); D42 (ordering that "at all costs" the ABiH should not fire on the airport).
[23] *See* Trial Judgement, para. 412.
[24] Defence Motion, pp. 8-9.
[25] Trial Judgement, paras 390-394.
[26] *See ibid.*, para. 395.
[27] *Ibid.*, para. 395 & fns. 1347-1348.

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16. The Defence now argues that D57-D59 support its alternative argument and show that there was a legitimate military target close to the well.[28] Of these documents, however, only D58 is relevant.[29] D58 is a letter dated 13 July 1993 from an ABiH commander to the BiH President. The President had apparently expressed concern that the Butmir-Dobrinja tunnel was at risk. The letter responded that "a false entrance to the tunnel was built 200 m east of the actual entrance to the tunnel" and that "an anti-tank trench, 4 m wide and 180 m long, was built 400 m west of the entrance."

17. The Prosecution responds that the trench mentioned in this letter "appears to be a different trench from the one discussed at trial" and that in any event "according to the measurements set out in D58, the false entrance and the anti-tank trench must be further away from the well than the tunnel entrance and the trench considered at trial, not closer to it."[30]

18. The Appeals Chamber finds that the Defence has not shown that, if introduced at trial, D58 would have affected the verdict. In particular, the Defence Motion does not demonstrate that either the false tunnel entrance or the trench referenced in D58 was within 120 meters of the well. Absent such a showing, this evidence cannot aid the Defence, since the Trial Chamber rejected the claim that other military sites 120 meters distant from the well could have been viewed as "immediate military objectives near the well."[31]

19. Fourth, the Defence claims that certain documents make it "evident that combat took place every day," and thus that it is "quite obvious that SRK forces on [the] Sarajevo battlefield took actions towards legitimate military targets."[32] The Defence suggests that these documents undermine the Trial Judgement at paragraphs 216-222 and 582-594, where the Trial Chamber concludes there was a general pattern of civilian targeting by the SRK.[33] In the Defence's view, the documents show that "the comabt [*sic*] actions were acted exclusivley [*sic*] toward military targets."[34] The Prosecution responds that these documents do not undermine any particular

[28] *See* Defence Motion, pp. 8-9.
[29] D57 is simply a list of SRK truce violations identified by the ABiH as occurring on 12 July 1993, including the shelling of the well. There is no D59.
[30] Prosecution Response, para. 64. The Prosecution makes other arguments, including that 1) even assuming a legitimate military target in the area, the Defence would still need to satisfy the principles of distinction and proportionality, which would be difficult since there is no evidence that the Defence knew of the tunnel's location or of the existence of the trench; and 2) other evidence suggests that the shell was targeted at civilians, including the fact that the shelling took place in violation of a truce, that the mortar used was of a sort typically meant for killing individuals or preventing the use of open ground rather than destroying fortifications, and that the use of only one shell suggests it was not a ranging shot. *Ibid.*, paras 66-68. The Appeals Chamber does not address these arguments in light of its agreement with the Prosecution's principal argument.
[31] *See* Trial Judgement, paras 395-396.
[32] Defence Motion, p. 9 (referencing D17-D20, D22-D24, D26, D31, D51, D52, and D71).
[33] *See ibid.*, pp. 9-10.
[34] *Ibid.*, p. 10.

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incidents found by the Trial Chamber.[35] Furthermore, to the extent that the Defence claims that the presence of ABiH forces undermine the conclusion that the SRK could be firing at civilians, the Trial Chamber already had "plenty [of] evidence" before it "that the ABiH carried out military operations" and yet found deliberate targeting of civilians by the SRK.[36]

20. The Appeals Chamber finds that the Defence has not shown that the documents would have affected the verdict. These documents do suggest that the ABiH was active militarily. But the Trial Chamber never found otherwise; rather, it found that the ABiH had significant troops and set up confrontation lines.[37] The general fact that the ABiH was active militarily cannot serve as license for SRK forces to treat all targets as legitimate, and the Defence has not otherwise shown how these documents undermine specific findings of the Trial Chamber.

21. Fifth, the Defence claims that D49 and D51 undermine the Trial Chamber's finding as to scheduled sniping incident 4 – an incident in which a civilian, Witness G, was wounded by sniper fire on 25 June 1993.[38] The Trial Chamber found that the bullet came from SRK-controlled territory.[39] The Trial Chamber rejected the Defence's argument that the victim might have been "shot by a stray bullet during an exchange of fire".[40] Specifically, the Trial Chamber noted that there was

> no evidence of ongoing military activity at the time and day of the incident, which could have justified a bullet being fired in the direction of Witness G's property. The Defence's argument is particularly untenable in view of the account of the incident by Witnesses G and K. Witness K recounted how, while Witness G was being taken to cover by a neighbour and herself – both also dressed in civilian clothing – the three of them were repeatedly shot at, one or more perpetrators waiting for them to stand up and run several meters before shooting again. The Trial Chamber is satisfied beyond reasonable doubt that in view of Witness K's account of the incident, one or more perpetrators were deliberately targeting civilians.[41]

The Defence now claims that D49 and D51 show that the SRK was attacking ABiH lines that day, and that with that evidence before it the Trial Chamber could not have found beyond a reasonable doubt that Witness G was deliberately targeted rather than hit by a stray bullet.[42] The Prosecution responds that D51 does show that there was military activity on the day of the scheduled shooting but that it would not have affected the verdict given the weight the Trial Chamber placed on

[35] Prosecution Response, para. 83.
[36] *Ibid.*, paras 82, 84-85.
[37] Trial Judgement, paras 204-205.
[38] *See* Defence Motion, p. 10.
[39] Trial Judgement, para. 550.
[40] *Ibid.*, para. 551.
[41] *Ibid.*
[42] Defence Motion, p. 12.

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Witness K's testimony.[43] The Prosecution also states that D49 is irrelevant because it is a daily combat report from 25 August 1993, two months after the scheduled shooting.[44]

22. The Appeals Chamber finds that D49 is irrelevant to this incident for the reasons given by the Prosecution. D51 has some relevance. It is a combat report from 25 June 1993 and states that the SRK fired on ABiH forces and the ABiH was not active. Accordingly, D51 undermines the Trial Chamber's conclusion that there was "no evidence of ongoing military activity at the time and day of the incident".[45] Nonetheless, the Appeals Chamber cannot conclude that such evidence would have changed the verdict. Even accepting that military activity occurred that day, the stray-bullet theory is not sustainable if credit is given to Witness K's testimony that she and the others were deliberately fired on each time they stood up to run back to the house. Since the Trial Chamber found Witness K's testimony credible, D51 would not have affected the verdict.

23. Sixth, the Defence makes some general arguments relating to how the documents would have been useful at trial had they been available: (1) the evidence they contain of widespread use of civilian buildings by the ABiH would have enabled the Defence to successfully cross-examine witnesses who claimed that areas were exclusively civilian; (2) they would have supported the Eva Tabeau report's finding that the ABiH was hit proportionally more than Sarajevo civilians; and (3) particularly in conjunction with a site visit, they would have shown how difficult it was to target the ABiH without risking collateral damages.[46] The Prosecution responds that such general allegations are untenable; that the Defence has failed to identify any specific cross-examinations that would have gone differently; that the Defence fails to explain the connection between the documents and the Tabeau report; and that the Defence fails to show how these documents would have either affected the Trial Chamber's decision whether to make a site visit or, assuming there was a site visit, how these documents would have led to different findings of fact.

24. The Appeals Chamber finds that the Defence's general assertions do not show how the verdict would have been different had the documents been introduced at trial. The Defence fails to identify how specific documents might have been used in cross-examining particular witnesses, how the documents are relevant to the findings of the Tabeau report, how the documents would have affected the decision about whether to take a site visit, and how specific documents would have led the Trial Chamber to conclude that various shelling and sniping incidents were permissible collateral damage. Without such showings, the Defence's arguments cannot succeed.

[43] Prosecution Response, paras 71-75.
[44] *Ibid.*, para. 70.
[45] *See* Trial Judgement, para. 551.
[46] Defence Motion, pp. 11-12.

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25. Since the Defence has failed to satisfy the requirements of Rule 115(B), the Appeals Chamber need not consider whether the Defence has satisfied the requirements of Rule 115(A).

III. CONCLUSION

26. For the foregoing reasons, the Motion to Strike is **GRANTED**, and the Defence Motion is **DENIED**.

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

Dated this 15th day of November 2006,
At The Hague,
The Netherlands.

Judge Fausto Pocar,
Presiding

[Seal of the International Tribunal]

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