



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

Case No.: IT-05-87-T
Date: 21 November 2007
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IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 21 November 2007

PROSECUTOR

v.

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

PUBLIC

DECISION ON ŠAINOVIĆ MOTIONS RE EXHIBIT P1468

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Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

THIS TRIAL 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 (“Tribunal”) is seized of (a) a “Defence Request Seeking that Exhibit P1468 be Removed from Evidence—or Alternatively—Seeking Grant to Present Additional Evidence,” filed confidentially by the Šainović Defence on 6 November 2007 (“First Request”), requesting that P1468 be removed from the official record of the proceedings; and (b) a “Defence Request Seeking Alteration of Title Entry in E-Court of Exhibit P1468,” filed by the Šainović Defence on 13 November 2007 (“Second Request”), requesting the title of P1468 be altered in eCourt, and hereby renders its decisions thereon.

Background

1. Due to the involved procedural history of P1468 and this history’s potential importance to the Trial Chamber’s disposition of the motions, the Trial Chamber finds it prudent to set forth the background below.

2. On 25 May 2006, the Prosecution filed its “Motion to Admit Documentary Evidence with Annexes,” in which it requested the Trial Chamber to admit 2,150 documents, including the “Minutes of the meetings of the Joint Command for Kosovo and Metohija” (“P1468”) listed in Annex A.¹ This document is a photocopy of what purports to be a handwritten record of meetings that took place in 1998. Pursuant to an order directing the Prosecution to address specific queries of the Trial Chamber in relation to this motion, the Prosecution submitted its response to the majority of these queries and requested an extension of time to provide transcript references from the *Milošević* trial for the documents listed in Annex A of its 25 May motion.² The Prosecution subsequently filed a submission specifying transcript references from the *Milošević* trial for each of the items listed in Annex A.³ Nonetheless, on 10 October 2006, the Chamber denied the admission of 1,957 of the documents into evidence, including P1468.⁴

3. On 29 January 2007, the Prosecution requested for a second time that P1468 be admitted into evidence.⁵ In addition to arguing the relevance of the document, the Prosecution asserted that it was given to the Prosecutor, Madame Carla Del Ponte, by the then Prime Minister of Serbia, the

¹ Prosecution’s Motion to Admit Documentary Evidence with Annexes, 25 May 2006, Annex A. Exhibit P1468 was listed in the Annex under its Rule 65 *ter* reference number, 5.501.

² Prosecution’s Submission with Annexes and Motion for Extension of Time to Respond in Response to 6 June 2006 Order, 12 June 2006.

³ Prosecution’s Second Submission with Annex in Response to 6 June 2006 Order on Prosecution’s Motion to Admit Documentary Evidence, 5 July 2006.

⁴ Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006.

late Zoran Đinđić, on behalf General Nebojša Pavković in July 2002. The Prosecution argued that, although the handwritten document contains neither a signature nor seal, such an omission should go to weight. To support the authenticity of the document, the Prosecution argued that its contents are consistent with known events established by other documents and witnesses.⁶

4. On 31 January 2007, the Šainović Defence responded, contesting the authenticity and reliability of the document by arguing, *inter alia*, that (a) the document does not possess the characteristics of minutes of meetings, (b) it is unknown who made the records and for what purpose, (c) it is unknown what was omitted from the record of the meetings and if so, why, (d) the location of the original is unknown, and (e) the chain of custody of the document is also unknown.⁷ On 15 February 2007, the Trial Chamber issued a decision denying admission of P1468 into evidence on the grounds that it found the document “lacking in sufficient indicia of reliability as to be deemed to have probative value.”⁸

5. On 9 March 2007, the Prosecution filed a motion seeking the admission of documents from the bar table, including P1428, a decision dated 14 August 1998, issued by the Chief of Staff of the Priština Corps, intended, in part, to corroborate P1468.⁹ In its consideration of P1428, the Chamber also decided to reconsider its decision not to admit P1468 given the relationship between the two documents. The Trial Chamber reasoned that

what’s said in paragraphs 13 to 15 of the Prosecution motion of the 29th of January in combination with the relationship between this document and 1428 leads to the conclusion that it is necessary to admit the document in order to prevent injustice to the Prosecution. On closely examining 1468, the Trial Chamber is now satisfied that it bears the appearance of being an authentic rather than a forged document.¹⁰

Accordingly, P1468 was admitted into evidence pursuant to this oral ruling on 20 March 2007. The exhibit has subsequently been used by the Prosecution during the cross-examinations of Momir Bulatović, Zivadin Jovanović, Andreja Milosavljević, Zoran Anđelković, Dušan Matković, and the Accused Vladimir Lazarević, and by the Šainović Defence itself during the re-examinations of Zoran Anđelković and Dušan Matković.

⁵ Prosecution’s Request for Admission of Exhibits P-1000, P-1249, P-1418, P-1460, P-1468, P-1487, P-1503, P-1898, P-1966, P-1967, P-2031, P-2113, and P-2166, 29 January 2007.

⁶ *Ibid.*, para. 15.

⁷ Defence Response: “Prosecution’s Request for Admission of Exhibits P-1000, P-1249, P-1418, P-1460, P-1468, P-1487, P-1503, P-1898, P-1966, P-1967, P-2031, P-2113, and P-2166,” 31 January 2007, paras. 3–4.

⁸ Decision on the Admission of Exhibits P1000, P1249, P1418, P1460, P1468, P1503, P1898, P1966, P1967, P2031, P2113, and P2166, 15 February 2007, para. 3.

⁹ Request for Leave to Extend Word Limit – Prosecution’s Second Request for Admission of Exhibits from the Bar Table, 9 March 2007, para. 43.

Discussion

Reconsideration of admission of P1468 into evidence

6. In its First Request, the Šainović Defence seeks the removal of P1468 from evidence or, in the alternative, leave to present additional evidence in relation to it. In favour of removing this exhibit from evidence, the Šainović Defence proffers the same arguments as those provided in its 31 January 2007 response to the Prosecution's second request to introduce P1468 into evidence: in essence that the document is not authentic and lacks reliability.¹¹ In relation to the chain of custody, the Šainović Defence emphasises that it is only known that Mr. Đindić conveyed the document to Madame Del Ponte on behalf of Pavković, that there were no official decisions on the part of the Government to hand over the document, that the document was not verified by the Government, and that it remains unknown how the document was retrieved by Mr. Đindić and why it was given to Madame Del Ponte.¹² The Šainović Defence also informs the parties that, on 20 September 2007, it requested the original document from the Government, or, alternatively, that the Government inform the Šainović Defence that the document does not exist in the civil or military archives, but has yet to receive a response.¹³

7. In an attempt to further highlight the instances of “lack of logic and clarity” contained in the document, the Šainović Defence provides a detailed analysis of the document in a confidential annex to the First Request. In this analysis, the Šainović Defence has made numerous remarks upon the document, identifying cases of erroneous interpretation and/or translation, arbitrary translation, different handwriting, illegible text not translated, omitted text in the translation, illogical sentences, unknown abbreviations, words from the original not translated, spelling errors, and other miscellaneous observations.¹⁴ The Šainović Defence contends that their observations on the document militates in favour of removing this document from evidence.¹⁵

¹⁰ T. 12023 (20 March 2007).

¹¹ First Request, para. 8.

¹² First Request, para. 8.

¹³ First Request, para. 14.

¹⁴ See First Request, Annex A.

¹⁵ The Defence also argues that the failure of the Pavković Defence to call all the witnesses on its Rule 65 *ter* list denies the Šainović Defence an opportunity to clarify issues pertaining to the chain of custody and authenticity of the document and that this lends support to its request to remove P1468 from the record of the proceedings. The Trial Chamber, however, construes this line of argumentation to better fall under the Defence's request to present additional evidence, discussed below. It should also be noted that, in its discussion of witnesses called by the Pavković Defence, the Defence contends that one witness, Velimir Obradović, claimed that he never attended a Joint Command meeting and that this evidence supports the Defence's argument regarding the document's lack of reliability. First Request, para. 11. The Chamber (a) does not consider this argument to fulfil the standard for

8. The Prosecution opposes the request, pointing out that the issue of admissibility was litigated during the Prosecution case and that there has been no change in circumstances to support the removal of the exhibit from evidence.¹⁶ The Prosecution recalls the Trial Chamber's oral ruling admitting the document into evidence, arguing that the Šainović Defence provides no reason to depart from the Chamber's decision. The Prosecution asserts that the Šainović Defence merely repeats submissions made in earlier filings and therefore fails to address the reasons given by the Chamber in the reconsideration of its earlier decision not to admit the exhibit into evidence.¹⁷

9. In addressing the Šainović Defence's detailed analysis of P1468, the Prosecution submits that all the issues raised should go to the weight to be attached to the document.¹⁸ The Prosecution also suggests that these matters should be addressed in the Šainović Defence's closing submissions and not at this stage in the trial. Furthermore, the Prosecution argues that removing this exhibit from the Trial Record would not serve the interests of justice.¹⁹ The Prosecution asserts that both the Prosecution and the Šainović Defence have put this exhibit to witnesses, that several of these witnesses have commented upon passages of this document during their testimony, and that their evidence must be examined together with this document.²⁰

10. Although the Šainović Defence fashions its First Request as a motion to remove the document from the official record of the proceedings, it is in fact a motion for reconsideration of the Trial Chamber's decision to reconsider its initial two decisions not to admit the document into evidence. The legal standard for reconsideration is as follows, "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice'."²¹ The Trial Chamber considers that the Šainović Defence has failed to demonstrate the clear error of reasoning in the Trial Chamber's decision to admit P1468 into evidence. In its oral ruling, the Trial Chamber evoked the Prosecution's arguments relating to relevance and authenticity in conjunction with a corroborative document, P1428, when making the determination that P1468 passes the admissibility threshold. In reiterating its arguments contesting the authenticity of P1468 from its 31 January 2007 response—submissions made before the admission of the document into evidence—the Šainović Defence makes no attempt to specify where the error of reasoning for

reconsideration of its decision to admit the document into evidence and (b) will take the evidence of Obradović into account when deciding what weight to accord to the document.

¹⁶ Prosecution's Response to Šainović Defence's Motion re Exhibit P1468 ("Response"), 15 November 2007, para. 2.

¹⁷ Response, para. 4.

¹⁸ Response, para. 5.

¹⁹ Response, para. 6.

²⁰ Response, para. 6.

admitting this document lies. The annexed remarks regarding the “logic and clarity” of the document similarly fail to address any error in the Trial Chamber’s admissibility decision. The Trial Chamber therefore finds that the Šainović Defence’s submissions go to the weight to be attached to the exhibit, rather than its admissibility.

11. Nothing in the Šainović Defence’s submissions demonstrates that it is necessary to remove the document from evidence to prevent injustice. This document has been used during the examination and cross-examination of several witnesses, and to remove this document from evidence at this point would unnecessarily disrupt the record. The Trial Chamber is alert to the need in relation to this document to give careful consideration to the weight to be accorded to it in its final deliberations. The parties may make submissions regarding the issues with the translation of the document into English in due course. The Trial Chamber considers that it is in the interests of justice for the exhibit to remain part of the record and invites the parties to explore the document with the witnesses called to give evidence (as the Šainović Defence has done already) and address the weight to be attached to it in closing submissions.

Re-opening of Šainović Defence case

12. In support of its alternative request, seeking leave to present additional evidence, the Šainović Defence argues the failure of the Pavković Defence to call some of the witnesses on its Rule 65 *ter* list denied the Šainović Defence an opportunity to adduce evidence that could have potentially resolved the issue of authenticity of the document in question.²² Based on Pavković’s Rule 65 *ter* witness list, the Šainović Defence anticipated the testimony of at least two witnesses, namely Pavković, who could have answered the question of whether he provided Đindić with a copy of P1468, and Milan Đaković, through whom the Šainović Defence was hoping “to learn a bit more about P1468.”²³ In lieu of the testimony of these witnesses, the Šainović Defence proposes that it call an expert in criminology and graphology to analyse the characteristics of the document to show that P1468 is not authentic or reliable and has no probative value.²⁴ The Šainović Defence emphasises that this evidence was not offered earlier due to the expectation that the reliability and authenticity of the document would be clarified during the presentation of the Pavković defence.

²¹ Decision on Prosecution Motion for Reconsideration of Decision on Fifth Prosecution Motion For Protective Measures, 21 June 2006 para. 6; Decision on Prosecution Motion for Reconsideration of Decision on Prosecution Motion for Additional Trial-Related Protective Measure for Witness K56, 9 November 2006, para. 2.

²² First Request, paras. 9–10.

²³ First Request, para. 10.

²⁴ First Request, para. 16.

13. The Prosecution responds that the Šainović Defence could have led expert evidence during the course of its case, but chose not to do so.²⁵ The Prosecution contends that the fact that the Šainović Defence chose to rely on two witnesses, notwithstanding that there was no certainty these witnesses would be called by the Pavković Defence, is not a sufficient basis upon which to grant the request to present additional evidence.²⁶ In addition, the Prosecution suggests that, should the Trial Chamber find it necessary to hear supplemental evidence on P1468, Milan Đaković be called as Chamber witness.²⁷

14. The standard for re-opening a case was addressed in the *Milošević* case in relation to the Trial Chamber's determination of whether or not to re-open the Prosecution's case for a limited purpose. The *Milošević* Chamber stated that "the primary consideration in determining an application for re-opening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application."²⁸ The *Milošević* Chamber also noted that this burden "rests squarely" on the party seeking to adduce the evidence.²⁹

15. This Trial Chamber considers that the Šainović Defence's request to re-open its case in order to lead evidence from the proposed expert witness does not amount to "fresh evidence" that would warrant the re-opening its case.³⁰ Under the present circumstances, the Šainović Defence's decision not to lead such evidence during the presentation of its case constitutes a tactical decision, rather than a circumstance (such as the discovery of fresh evidence) that could warrant the re-opening of an already closed case. Although the Šainović Defence argues that it expected many of the issues relating to P1468 to be resolved through witnesses to be called by the Pavković Defence, the Trial Chamber does not consider that the Šainović Defence was entitled to rely upon Pavković's Rule 65 *ter* witness list when deciding which witnesses to call in its own case.

²⁵ Response, para. 7.

²⁶ Response, para. 7.

²⁷ Response, para. 9.

²⁸ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecutor's Case with Confidential Annex, 13 December 2005, para. 11 (citing *Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 283).

²⁹ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecutor's Case with Confidential Annex, 13 December 2005, para. 11 (relying on *Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998, para. 26).

³⁰ *Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998, para. 26. (defining fresh evidence "not merely as evidence that was not in fact in the possession of the Prosecution at the time of the conclusion of its case, but as evidence which by the exercise of all reasonable diligence could not have been obtained by the Prosecution at that time").

16. The Šainović Defence has been placed upon notice that it was under an obligation to place all the witnesses it intended to call upon its Rule 65 *ter* list. In the “Order on Close of Prosecution Case-in-Chief, Rule 98 *bis* Proceedings, and Defence Rule 65 *ter* Filings,” issued 5 March 2007, the Trial Chamber admonished the Defence to “place upon its Rule 65 *ter* witness lists all the names of the witnesses they intend to call during their cases and ... not rely upon the Chamber calling any witnesses pursuant to Rule 98 or the success of any motion to amend their Rule 65 *ter* witness lists” and ordered that “[e]ach Accused should, to the greatest extent possible, identify upon his Rule 65 *ter* list the witnesses and exhibits he has in common with each of the other Accused.”³¹ For example, if the Šainović Defence had intended to adduce evidence from Đaković, he should have been placed upon the Šainović Defence’s Rule 65 *ter* witness list. This is not to say that the Trial Chamber would never decide to re-open an Accused’s case, but in the present circumstances the Šainović Defence has failed to satisfy the Trial Chamber that the standard for re-opening has been met.

Alteration of P1468’s title in eCourt

17. In its Second Request, the Šainović Defence submits that the title of P1468—“Minutes of meetings of the Joint Command for Kosovo and Metohija”—in eCourt is erroneous and potentially highly prejudicial. The Šainović Defence avers that the Prosecution “purposefully decorated” the title entry and that the addition of the word “Minutes” in the title is an attempt to attribute undue weight and importance to this document.³² The Šainović Defence argues that nowhere in the actual handwritten text appears the word “minutes” and thus a more accurate description of P1468’s contents would be

a notebook containing the handwritten notes of unknown authors bearing the typed title “Meetings of the Joint Command for Kosovo and Metohija”.³³

The Šainović Defence therefore requests that P1468 have the word “Minutes” removed from its title in eCourt.³⁴

18. In response, the Prosecution asserts that, contrary to the Šainović Defence’s claims, it did not “purposefully decorate” the title in eCourt to give the exhibit undue weight and importance.³⁵

³¹ Order on Close of Prosecution Case-in-Chief, Rule 98 *bis* Proceedings, and Defence Rule 65 *ter* Filings, 5 March 2007, paras. 7, 8(f).

³² Second Request, para. 6.

³³ Second Request, para. 6.

³⁴ Second Request, para. 8.

³⁵ Response, para. 8.

In addition, the Prosecution points out that the title of the document in eCourt has no impact upon the weight or probative value of the exhibit.³⁶

19. The Trial Chamber considers it unnecessary to change the title of P1468 in eCourt. The titles of evidence in eCourt bear no influence upon the weight or probative value that the Trial Chamber will eventually attribute each exhibit.

Confidentiality status of First Request

20. The Trial Chamber notes, as a final matter, that First Request was filed confidentially “due to the fact that reference herein is made to certain confidential submissions.”³⁷ However, the Trial Chamber can discern no confidential information in the First Request and considers that the Šainović Defence is referring to the version of P1468 annexed to the Request, which contains its observations upon the document. The Trial Chamber will therefore instruct the Registry to alter the status of the First Request from confidential to public, unless adequate reasons are given for withholding its contents from the public, but will maintain the confidentiality of the annex in an abundance of caution.

Disposition

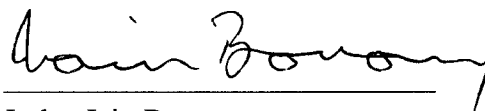
21. For all the foregoing reasons, the Trial Chamber, pursuant to Rules 54, 85, and 89 of the Rules of Procedure and Evidence of the Tribunal, hereby DENIES the Šainović Defence’s First and Second Requests in all respects.

³⁶ Response, para. 8.

³⁷ First Request, p. 2, note 1.

22. The Trial Chamber, pursuant to Rules 54 and 78, hereby INSTRUCTS the Registry to alter the status of the First Request from confidential to public, leaving the annex to remain confidential, unless a motion is filed within seven days of the date of this Decision requesting that the First Request remain confidential.

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



Judge Iain Bonomy
Presiding

Dated this twenty-first day of November 2007
At The Hague
The Netherlands

[Seal of the Tribunal]