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: 2 July 2008

Original: English

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: **2 July 2008**

PROSECUTOR

v.

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

PUBLIC

DECISION ON LUKIĆ MOTION FOR RECONSIDERATION OF TRIAL CHAMBER'S DECISION ON MOTION FOR ADMISSION OF DOCUMENTS FROM BAR TABLE AND DECISION ON DEFENCE REQUEST FOR EXTENSION OF TIME FOR FILING OF FINAL TRIAL BRIEFS

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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 seised of (1) "Sreten Lukić's Motion for Reconsideration of the Trial Chamber's Decision on the Lukić Defence Motion for Admission of Documents from Bar Table with Alternative Motion for Reopening the Defence Case and Request for Certification to Appeal," filed 16 June 2008 ("Motion" or "Motion for Reconsideration"), and (2) "Sreten Lukic's Motion to Enlarge Time for Filing of Final Brief," filed 25 June 2008, and a "Pavković Conditional Motion to Join the Lukic Request for Enlargement of Time to File the Final Brief," filed 25 June 2008 (collectively "Motions for Extension"), and hereby renders its decisions thereon.

I. Brief procedural background

1. On several occasions, the Trial Chamber, due to the large number of documents upon the Lukić Defence's Rule 65 *ter* exhibit list, raised with the Lukić Defence the matter of the most ideal timing of its motion for admission of documents from the bar table and encouraged the Lukić Defence to make filings throughout its case in stages, rather than waiting until the very end of the defence case.[1] Despite reassurances from the Lukić Defence that it would submit motions of this kind in stages,[2] on 6 May 2008, the Lukić Defence filed its "Motion for Admission of Documents from the Bar Table and Motion to Exceed Word Limit for Filing with Confidential Annex A" ("bar table motion").

2. Over the course of the next 27 days, the Lukić Defence filed a series of corrigenda, supplements, and additional motions in relation to the original bar table motion,[3] with the leave of the Chamber for several extensions of time.[4] In the bar table motion and associated filings, the Lukić Defence requested that a large number of documents be admitted into evidence from the bar table and set forth various arguments as to their relevance, probative value, and reliability, and

[1] *E.g.*, T. 21840 (7 February 2008).

[2] *E.g.*, T. 23662 (4 March 2008).

[3] Corrigendum to Sreten Lukic's Motion for Admission of Documents from the Bar Table and Motion to Exceed Word Limit for Filing with Confidential Annex A, 8 May 2008; partially confidential Motion of the Defence of the Accused Sreten Lukic Relative to Exhibit 6D614 – Portions Used with Defence Witnesses (With Confidential Annex A), 13 May 2008; partially confidential Motion to Enlarge Time and to File Supplement to Original Motion of the Defence of the Accused Sreten Lukic Relative to Exhibit 6D614 – Portions Used with Defence Witnesses (With Confidential Annex A), 20 May 2008; and partially confidential Sreten Lukić's Second Motion for Admission of Exhibits from the Bar Table (With Confidential Annex "A"), 2 June 2008.

[4] Decision on Lukić Defence (1) First, Second, Third, and Fourth Motions for Further Enlargement of Time in Relation to Motions for Admission of Documents from Bar Table and (2) Motion for Leave to File Replies, 2 June 2008; Decision on Lukić Defence Motion for Reconsideration of Denial of Extension of Time and Leave to File Replies, 10 June 2008.

organised them largely into categories. On 11 June 2008—nine days after the last filing in relation to the bar table motion—the Chamber rendered its "Decision on Lukić Defence Motions for Admission of Documents from Bar Table" ("Decision"), in which it admitted, rejected, or ordered further procedure in relation to the documents tendered by the Lukić Defence.

3. On 16 June 2008, the Lukić Defence responded to the Chamber's Decision by filing the present Motion, in which it asks the Chamber to reconsider its Decision, or in the alternative, to reopen the Defence case to allow for *viva voce* testimony and the presentation of a large number of exhibits to replace the excluded documents. The Lukić Defence also requests that the Chamber certify the matter for interlocutory appeal. The Chamber proceeds on the basis that the application for certification is presented in the alternative to the application for reconsideration.

4. The Prosecution has indicated that it does not intend to respond to this Motion. No other party responded. The Chamber will address each of the Lukić Defence's requests in turn below.

II. Applicable Law

5. 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.'"[5] The two matters will be discussed below in turn.

6. The law relevant to the admission of documents from the bar table is set forth in the Decision and will not be repeated herein.

III. Request for reconsideration

7. In the Motion, the Lukić Defence does not cite the relevant language previously used by this Chamber and the Appeals Chamber in addressing motions for reconsideration, but rather cites four factors upon which it bases its request for reconsideration, namely the following:

> a. Its opposition to a new, more stringent standard applied to the documents requested in the Lukic Defence Bar Table Decision especially in light of the extra time for renewed motions possessed by the co-Accused; and
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> b. Its detrimental reliance on prior orders and instruction from the Trial Chambers [*sic*] to include documentary evidence in lieu of viva voce testimony to reduce courtroom time, including prior representations was a policy [*sic*] of accepting documents from the Bar Table if shown to be authentic, probative and translated.

[5] *See* Decision on Prosecution Motion for Reconsideration of Oral Decision Dated 24 April 2007 Regarding Evidence of Zoran Lilić, 27 April 2007, para. 4.

c. The Bar Table Decision is premised on a misconstrued reading of the Lukic Submissions.

d. Other matters affecting the fairness of the decision.[6]

8. Despite its failure to cite the pertinent language, the Lukić Defence submissions may be separated into the two elements used to determine reconsideration. Portions of paragraph 12 of the Motion pertain to exhibits where it believes the Chamber has erred in its reasoning. Each of these will be addressed within the categories used by the Lukić Defence in the original bar table motion. The remaining Lukić Defence arguments arguably fall under the second criterion. Through the course of the Motion for Reconsideration, the Lukić Defence complains of unfair treatment in relation to the other Accused, including a more rigid standard applied to the Lukić Defence for bar table submission,[7] a shorter time period than the other Accused to make bar table submissions and supplemental motions,[8] and stricter scrutiny of its bar table motion, which purportedly allowed for summary rejection of documents for reasons including insufficient detail or for not being analysed by a witness.[9] It further asserts that it formulated a strategy and constructed its list of witnesses based upon its reliance of its understanding of the Chamber's standards for admission of documentary evidence.[10] Finally, the Lukić Defence asseverates that it is "set apart from the other defence cases presented by the co-Accused in that it required a complete response to the police element of the individual charges and the alleged Joint Criminal Enterprise."[11]

A. *"Advantage of bringing up the rear" and Further complaints about lack of time*

9. The Lukić Defence argues, in general, that it has been prejudiced by the fact that it has presented its case last, and thus does not have as much time as the co-Accused to deal with outstanding issues in relation to documentary evidence.[12] The Chamber has dealt with this argument twice before,[13] and now rejects it a third time.

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[6] Motion, para. 3.

[7] Motion, paras. 3, 12(c), 12(d).

[8] Motion, para. 4

[9] Motion, para. 5

[10] Motion, paras. 6–9

[11] Motion, para. 10.

[12] Motion, paras. 3–5.

[13] Second Decision on Lukić Request for Reconsideration of the Trial Chamber's Admission into Evidence of His Interview with the Prosecution (Exhibit P948), 10 June 2008, para. 6; Decision on Lukić Defence (1) First, Second, Third, and Fourth Motions for Further Enlargement of Time in Relation to Motions for Admission of Documents from Bar Table and (2) Motion for Leave to File Replies, 2 June 2008, para. 11.

10. The Lukić Defence also complains about the "hectic pace" of the trial.[14] The Chamber has also dealt with such erroneous arguments in the past, and rejects them yet again.[15]

B. Documents not specifically related to issues in trial

11. The Lukić Defence argues, in relation to the documents denied admission in paragraphs 24, 33, 37, 47, 51, and 54, that the Chamber has held it to a higher burden of demonstrating the relevance and probative value of the documents, than it has other co-Accused in the case. In support of this contention, the Lukić Defence cites two decisions on motions from the bar table in relation to the Pavković and Lazarević Defences.[16] The Chamber does not subscribe to the Lukić Defence's incorrect and myopic view of how the Chamber has dealt with motions for admission of documents from the bar table of other parties in these proceedings:

12. On 10 October 2006—at the very beginning of these proceedings—the Chamber, in relation to the Prosecution's first bar table motion, articulated its approach to documents tendered from the bar table:

> 18. Given the depth and breadth of this case, the Trial Chamber is generally sympathetic to parties presenting documents from the bar table. However, if that is to be the case, the offering party must be able to demonstrate, with clarity and specificity, where and how each document fits into its case....
>
> 19. Whatever the number of documents the [party] seeks to have admitted through its Motion, it must satisfy the requirements of the rules governing the admission of evidence in relation to each one. The following decision seeks to strike a proper balance between ensuring a fair trial and not over-burdening the parties in regard to the admission of evidence.[17]

The Chamber then denied admission into evidence of *1,957 documents* tendered by the Prosecution from the bar table.

13. On 30 August 2007, the Chamber denied *the entire bar table motion* of the Pavković Defence, stating as follows:

> The Chamber reiterates its encouragement to the parties to seek the admission of documents from the bar table as a means of expediting the proceedings and so as not to squander valuable time in-court with the tendering of documents susceptible to admission from the bar table. This Motion requests the admission into evidence from the bar table of a number of documents and offers extremely abridged descriptions of the documents. The manner in which Pavković has tendered these documents is thus too

[14] Motion, paras. 5–10.

[15] *See, e.g.*, Decision on Lukić Defence Objection to February 2008 Report on Use of Time, 16 April 2008; Decision on Lukić Motion for Alteration of Court Schedule, 20 February 2008.

[16] Motion, paras. 12(c)–(d).

[17] Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006.

> scant for the Chamber properly to discern their relevance, probative value, and reliability. During the trial, the Chamber has held the Prosecution to a certain standard in this respect, and the same standard applies to the Defence; therefore, Pavković must make a further attempt to relate each tendered document to pertinent issues in the trial and address issues of provenance where necessary and appropriate, as generally has been done by Šainović and Milutinović in their recent motions of a similar nature.[18]

14. On 4 September 2007, the Chamber admitted certain documents tendered from the bar table by the Šainović Defence, but only after supplementary information had been provided regarding their provenance, remarking that "there are limits to how much leeway there can be about documents ... about which questions might be asked."[19]

15. On 25 October 2007, the Chamber, despite the lack of Prosecution objection, rejected all the briefings to the Chief of Staff of the Supreme Command held between 24 March and 8 June 1999, which had been tendered from the bar table by the Ojdanić Defence. This denial was based upon the failure to relate the documents to specific issues in the trial.[20]

16. On 16 January 2008, the Chamber admitted many documents tendered by the Lazarević Defence, many of which were tendered in clearly-defined, and discernable groups.[21] The practice of tendering similar documents in groups is an acceptable practice, provided that the documents are of a piece and amenable to tender in this fashion. Where the Lukić Defence made such an effort, such groups of documents were, in general, admitted. However, tendering a document in a group does not relieve a party of its burden of relating it to issues in the trial.

17. The Chamber notes, as a final matter, that the vast majority of the documents tendered from the bar table by Lukić's co-Accused were not opposed by the Prosecution, whereas the Prosecution opposed admission of a large number of documents in the Lukić Defence's bar table motion on grounds of lack of relevance, probative value, and reliability.

18. As can be seen from the recitation above, the Chamber has followed a consistent practice in relation to the admission of documents from the bar table, over the course of this two-year trial. The Lukić Defence itself has stated that it has been able to present voluminous evidence during its case.[22] The Lukić Defence used more time and called more witnesses than any other co-Accused in this case. Hundreds of documents were admitted for the Lukić Defence through reference in Rule 92 *ter* statements and through the process of marking documents for identification and then

[18] Decision on Pavković First Motion for Admission of Document from Bar Table, 30 August 2007, para. 2 (footnotes omitted).
[19] Decision on Šainović Motion Requesting Admission of Documents from Bar Table, 4 September 2007, paras. 3–4.
[20] Decision on Ojdanić Motion for Admission of Documents from Bar Table, 25 October 2007, para. 2.
[21] Decision on Lazarević Motion for Admission of Documents from Bar Table, 16 January 2008.
[22] Sreten Lukic's Motion to Enlarge Time for Filing of Final Brief, 25 June 2008, para. 8.

allowing for later admission. The Lukić Defence was given much leniency in the entire, late bar table process and granted several extensions of time therefor. It is hard to believe that a serious argument is now being advanced by the Lukić Defence that it has received disparate treatment in relation to the procedures by which it has been able to tender evidence in this case. In view of the foregoing history, the Lukić Defence was well aware of the importance of making motions for admission of documents from the bar table at the earliest possible date, even in instalments, in accordance with the practice followed in this case from the pre-trial phase of the proceedings.

C. Documents not put to witnesses during their testimony

19. The Lukić Defence argues, incorrectly, that the Chamber rejected 30 documents in paragraph 23 of its Decision, on the basis that they were not put to witnesses during their testimony before the Chamber. The Chamber finds it appropriate to recall that, in its Decision, it noted that "[t]he availability of a witness through whom to tender the document is not determinative of its admissibility, but rather is *a factor* relevant to the Chamber's determination as to the indicia of reliability surrounding the hearsay statement." (Emphasis added.)[23]

20. Applying that consideration, in its exercise of discretion, the Chamber has determined that the failure to tender these 30 documents through a witness, rather than from the bar table, goes to the reliability surrounding the hearsay statements. Thus, the Chamber will not reconsider its Decision in relation to these documents because neither has a clear error of reasoning been demonstrated nor would its reconsideration go towards preventing injustice.

D. Documents relating to "local security" – Exhibit 6D458

21. In the bar table motion, the Lukić Defence tendered four documents—6D448, 6D458, 6D484, and 6D972—to show that non-Serbs were employed by the MUP in Đakovica/Gjakova and Kačanik/Kaçanik, and thus not discriminated against by the Serbian authorities.[24] The Prosecution objected to these documents as lacking probative value.[25] The Chamber admitted all except for 6D458, as it did not tend to show any sort of cooperation between non-Serbs of the local security and the MUP.

22. The Lukić Defence, in the Motion, asserted that the Chamber misconstrued the bar table motion, which argued as follows in relation to 6D458:

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[23] Decision, para. 22.
[24] Bar Table Motion, paras. 46–50.
[25] Prosecution Response, para. 10.

> 47. The relevance and probative value of these documents is to highlight and establish the structure and function of the local security organs, establishing that the same were employed by the Municipalities in question, were ethnically non-Serb, and were not part of the Ministry of Interior structures. Likewise these documents establish that non-Serbs who were not hostile to the state were welcomed by it and employed as state employees, thus contradicting the general allegations of the OTP.
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> * * *
>
> 49. 6D458 demonstrates the functioning and interactions between local security, regarding the detention of persons for criminal activities, and the hand over of the same to the MUP for processing.

In the Motion, the Lukić Defence now seems to argue that the document was tendered to show that there was *not* cooperation between non-Serbs of the local security and the MUP in Kosovo.[26] The Chamber held in the Decision that "6D458 does not tend to show any sort of cooperation between *non-Serbs* of the local security and the MUP and therefore declines to admit it into evidence." (Emphasis added.)

23. The Chamber has once more reviewed the submissions in relation to the document and the document itself as well, and considers that the Lukić Defence, in the bar table motion, tendered the document to show that non-Serbs of the local security were cooperating with the MUP and therefore were not discriminated against, despite its later apparent repudiation of this representation. The Chamber's analysis was therefore correct and reconsideration is not warranted.

E. Military documentation

24. The Lukić Defence tendered a variety of documents under this category, a total of 36.[27] For some of the documents, a measure of explanation for how they fit into the case was proffered, but in a truncated manner. The Pavković Defence set forth its objections to these documents being admitted into evidence; the Prosecution joined these objections and set forth additional ones of its own.

25. In the Motion, the Lukić Defence makes reference to paragraphs 76–91 of the Decision, which rejected several documents because, under Rule 90(H)(ii), the witnesses were not confronted with these documents.[28] The argument by the Lukić Defence in this instance is that similar exhibits presented by the co-Accused were not "summarily rejected for not being analyzed by a witness" as in the Decision. As stated in the Motion,

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[26] Motion, para. 12(a)(i).

[27] The Lukić Defence has tendered 38 documents, two of which are duplicated (6D753 and 6D724), leaving only 36 documents for the Chamber to consider.

[28] Motion, para. 5, note 2.

> Throughout cross-examination of co-accuseds' witnesses the Trial Chamber rushed along cross examination and urged that the defence would have an opportunity to present documents and evidence in its own case. If indeed the cases against these accused are joined only procedurally, and each case is independent of the others for purposes of determining liability, then whether or not a document is presented to a witness of a co-accused should not have the prevailing interest given by the Trial Chamber, as they are not opposing parties.[29]

The Chamber first notes that the Lukić Defence has erred in considering evidence introduced to be confined to the case for or against the party presenting it. Most evidence, including these documents if admitted, is evidence in the case for and against all six co-Accused.[30] The Chamber carried out a detailed review of each of these documents and, as a result of that review, admitted five documents in its Decision, namely, 6D1092, 6D710, 6D738, 6D1123 and 6D1466, of which two, 6D1123 and 6D1466, in fact, featured in the evidence of the author-witness, and three did not.

26. Second, the Chamber recalls that Rule 90(H)(ii) only requires that the *case* or *substance* be put to the witness, not the *actual document*.[31] This formed part of the Chamber's exercise of discretion in admitting document 6D1466 [32] and 6D1123.[33] Although the prior jurisprudence of the Tribunal on Rule 90(H)(ii) does not discuss the specific situation in which an author of a document actually gives evidence during the trial, the Chamber, in its Decision, stated at paragraph 77 that

> Rule 90(H)(ii) does not create a per se bar to admission of documents from the bar table that could have been put to a witness during his or her examination. Where a document has been objected to specifically on this basis, the Chamber will exercise its discretion, on a case-by-case basis, regarding its admission: for a document that was authored by a witness on the stand, the burden of demonstrating the document's relevance, probative value, and reliability will be higher than for a document that simply *could* have been put to a non-author witness.

Due to the fact that the Trial Chamber considers the foregoing to be an accurate statement of the law, and because it considered each document in detail as the original Decision demonstrates, the Chamber does not consider that either criterion for reconsideration has been established. As such, the Chamber refuses to reconsider the Decision in relation to these documents. It also bears

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[29] Motion, para. 5.

[30] *See* Decision on Use of Prosecution Interviews of Accused, 20 March 2008; Decision on Pavković Motion for Partial Severance, 27 September 2007, para. 12 (citing *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Decision on the "Request to the Trial Chamber to Issue a Decision on Use of Rule 90H", 11 January 2001, pp. 2–3; *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on Defence Motion to Sever Defendants and Counts, 15 March 1999, p. 3; *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, paras. 29, 32).

[31] *See Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put Its Case to Witnesses Pursuant to Rule 90(H)(ii), 17 January 2006, pp. 1–2; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Decision on "Motion to Declare Rule 90(H)(ii) Void to the Extent It is in Violation of Article 21 of the Statute of the International Tribunal" by the Accused Radoslav Brđanin and on "Rule 90(H)(ii) Submissions" by the Accused Momir Talić, 22 March 2002, paras. 13–14.

[32] Krsman Jelić, T. 18991–18999 (26 November 2007).

[33] Dragan Živanović, T. 20475–20485 (17 January 2008).

mentioning that Pavković and Lazarević specifically objected to the documents denied admission by the Chamber.

F. Exhibit 6D614 – police logs

27. The Lukić Defence moves for reconsideration of the Chamber's denial into evidence of exhibit 6D614, a 789-page document said to be an overview of registered criminal offences and measures undertaken on the territory of Kosovo between 1 July 1998 and 20 June 1999.[34]

28. The Lukić Defence makes much of the designation by the Chamber of the document as "police logs." The Chamber's designation of this document by the short title "police logs" was done solely for the convenience of not restating the lengthy title thereof and played no role in its determination of its admission; the strenuous protest—in bold, capital letters, and underlining—of the Lukić Defence is therefore unnecessary.

29. The Chamber finds the arguments advanced in support of reconsideration of the police logs unpersuasive. The Chamber will address one in particular, namely that the Chamber led the Lukić Defence into the false expectation that the police logs would be admitted into evidence. Quite the contrary, shortly after the Chamber had admitted portions of the logs into evidence, it reversed its decision and stated that all portions used in court—whether they were translated or not—would be marked for identification and dealt with later in the trial, all together.[35] It further stated that, at that time, the Prosecution could lodge comprehensive objections to the exhibit or portions thereof.[36] Far from misleading the Lukić Defence into a belief that the document would be admitted, this course of action expressly placed it upon notice that the document may or may not be admitted, based upon developments in the evidentiary proceedings in the case. The Chamber will therefore

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[34] Motion, para. 12(e).

[35] T. 23218–23219 (26 February 2008):

> JUDGE BONOMY: Mr. Lukic, this is the document where I indicated before that we would admit portions of it, and you indicated that there are still translations ongoing in relation to parts of it.
> MR. LUKIC: Yes, Your Honour.
> JUDGE BONOMY: On reflection, the best plan I think is to simply mark for identification each passage as it comes and deal with the thing in one all-encompassing order in due course to keep things under control and there will be no doubt in anybody's mind about what has been admitted, rather than that piecemeal suggestion I made. So --
> MR. LUKIC: Have one witness at the end --
> JUDGE BONOMY: Yes.
> MR. LUKIC: -- who took part in this --
> JUDGE BONOMY: And that's yet another reason why we should leave the final disposition of any part of this until that stage.
> MR. LUKIC: Thank you, Your Honour.
> JUDGE BONOMY: And for the avoidance of doubt in the transcript, that comment refers to 6D614 and not to the exhibit you're now calling up.

See also, e.g., T. 22253–22254 (13 February 2008).

[36] T. 25510–25511 (16 April 2008).

deny the request for reconsideration in relation to the police logs on the basis provided by the Lukić Defence.

30. However, despite the fact that the Chamber fully adheres to its ruling that 6D614, as a free-standing document, lacks sufficient indicia of reliability for admission into evidence from the bar table as a piece of documentary hearsay evidence, the Chamber has reflected further on its ruling on this document and considers that it should have pursued the Prosecution suggestion that "[i]f any of it is to be admitted, it should be limited to those entries about which we have heard evidence from persons with knowledge adequate to at least partly corroborate this document."[37] As with other hearsay documents with limited indicia of reliability that were put to witnesses on the stand, those portions of the police logs that were put to witnesses who were able to give *viva voce* evidence relating to the contents of 6D614 will be admitted into evidence, and the Chamber will modify its decision to this effect in the Disposition below.

31. As stated in the Decision, the testimony of the witnesses to whom portions of the police logs were put will be taken into account by the Chamber in its final deliberations. In addition, the Chamber will decide what weight (if any) to accord the admitted portions of the police logs.

IV. Request to reopen case

32. In the alternative to the Chamber reconsidering the Decision to deny admission of documents from the bar table, the Lukić Defence moves the Chamber to reopen its case to enable it to call witnesses "that would have otherwise been called if the excluded documents had been admitted, specifically as to the matters contained in 6D614." The Lukić Defence asserts that the document contains several specific pieces of evidence that the Chamber requested and is critical in responding to the Indictment. Finally, the Lukić Defence argues that it relied on the belief that 6D614 would be admitted into evidence.[38]

33. There are generally two situations where the Defence may seek to introduce further evidence after the close of its case. First, it may seek to introduce evidence in rejoinder. Evidence presented in rejoinder is distinct from fresh evidence, and Rule 85(iv) allows the Defence to present evidence in rejoinder. That situation does not apply here, as the Prosecution has not presented any rebuttal evidence.

[37] Prosecution Response to Sreten Lukić's Motion for Admission of Documents from the Bar Table, 21 May 2008 ("Prosecution Response"), para. 18.
[38] Motion, paras. 13, 18, 20

34. Second, the Defence may seek to introduce fresh evidence by reopening its case. The Appeals Chamber has held that the "primary consideration in determining an application for reopening 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."[39] Additionally, the burden of demonstrating that reasonable diligence could not have led to the discovery of the evidence at an earlier stage "rests squarely" on the moving party.[40]

35. Even where a failure to discover evidence cannot be attributed to the moving party's lack of reasonable diligence and the subsequently-discovered evidence therefore qualifies as fresh and admissible, a chamber must exercise its discretion and determine whether the evidence should be admitted.[41] The Appeals Chamber has noted that this discretion should be exercised "by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings" and that these factors fall under the general discretion reflected in Rule 89(D).[42] Pursuant to Rule 89(D), a chamber may exclude relevant evidence where the probative value of the evidence is substantially outweighed by the need to ensure a fair trial.

36. With respect to this weighing exercise, the Tribunal's jurisprudence establishes that "it is only in exceptional circumstances where the justice of the case so demands" that a chamber should exercise its discretion to reopen a case.[43] In such a determination, the following factors are relevant: (a) the advanced stage of the trial; (b) the delay likely to be caused by a reopening of the case and the suitability of an adjournment in the overall context of the trial; (c) the effect of bringing evidence against one accused on the fairness of the trial of another accused in a multi-defendant case; and (d) the probative value of the evidence to be presented.[44] With regard to the first factor, following the *Čelebići* Trial Chamber's lead, subsequent decisions on motions to

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[39] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 283.

[40] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998 ("*Čelebići* Trial Decision"), para. 26; *see also Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92*bis* in Its Case on Rebuttal and to Re-open Its Case for a Limited Purpose, 13 September 2004 ("*Blagojević* Trial Decision"), para. 9.

[41] *Čelebići* Appeal Judgement, para. 283.

[42] *Ibid.*

[43] *Čelebići* Trial Decision, para. 27 (quoted with approval in *Čelebići* Appeal Judgement, para. 288).

[44] *See, e.g., Blagojević* Trial Decision, paras. 10–11; *see also Prosecutor v. Slobodan Milošević*, Decision on Application for a Limited Re-opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, 13 December 2005, para. 13; *Čelebići* Appeal Judgement, paras. 280 (referencing *Čelebići* Trial Decision, para. 27), 290.

reopen have paraphrased or clarified "the advanced stage of the trial" as meaning "the later in the trial that the application is made the less likely the Trial Chamber is to accede to the request."[45]

37. To support its motion to reopen its case, the Lukić Defence provides a lengthy discussion of the Chamber's denial of admission of 6D614. It argues that the decision to rest the Lukić Defence case "was contingent upon resolution of the use and admissibility of this document."[46] The Lukić Defence asserts that 6D614 is a summary of MUP activities in investigating crimes, crimes against civilians, and terrorist acts in Kosovo.[47] The Lukić Defence further asserts that without this document, it would have had to "call multiple viva voce witnesses to introduce the necessary information."[48] As the Lukić Defence notes:

> The critical information contained within the document and integral to a full understanding of the Serbian MUP within the relevant time period, was presented in 6D614 in an effort to condense testimony times and keep to the tight time frames allotted for presentation of the Defence case. The Defence, to the detriment of the Accused's Defence, relied on the belief that there would be no need to duplicate the information contained in 6D614.
>
> Further, the Defence based reliance on admission of similar documents brought by the co-Accused in relation to the military that were permitted as overviews of the criminal cases they brought against their own to show that they did not have intent to commit or perpetrate crimes. To not allow a similar overview, such as Exhibit 6D614 creates disparate treatment for police defendants and military defendants tried together.[49]

38. The Chamber notes that the Lukić Defence provides no examples of "similar documents brought by the co-Accused" that were admitted by the Chamber and which would speak to the "disparate treatment" that the Lukić Defence describes. Further, the Lukić Defence makes no attempt to correlate its argument with the criteria established in the *Čelebići* decision. There is no indication whether it classifies 6D614 or other documents as rejoinder evidence or fresh evidence. No explanation is provided as to what specific evidence of other Accused the Lukić Defence wishes to rebut. Nor does 6D614, known to the Lukić Defence throughout its case, qualify as "fresh evidence."

39. Even if the Chamber were to allow the Lukić Defence to present new evidence based on one of the two above criteria, the Lukić Defence has made no effort to demonstrate why the Chamber should exercise its discretion and reopen the case. While it has provided some discussion as to the probative value of 6D614, there is no indication by the Lukić Defence as to why such an

[45] *Prosecutor v. Slobodan Milošević*, Decision on Application for a Limited Re-opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, 13 December 2005, para. 13.
[46] Motion, para. 14.
[47] Motion, para. 15.
[48] Motion, para. 14.
[49] Motion, paras. 19–20.

extraordinary move of reopening the case should be taken, given both the late stage of the trial, as well as the promise of the Lukić Defence to effect a significant delay on the proceedings by calling "hundreds of witnesses." A review of the history of the Tribunal indicates that no accused has made such a request at this phase of the trial. Further, such a request would demand a more rigorous approach than the one the Lukić Defence offers here, with a much better explanation of why "hundreds of witnesses" are necessary to summarise a single proposed exhibit, or why the Lukić Defence called none of them when it did not use all of its allotted time in presenting its case in the first place.

40. Finally, the Chamber notes that the Lukić Defence contends that its case is not closed yet,[50] while at the same time moving the Chamber to reopen its case. These are contradictory positions; moreover, the Lukić Defence's seeming contention that its case is not closed until the admissibility of 6D614 is dealt with to its satisfaction is without merit and strains perceptions of reality. Because of the extraordinary nature of the Lukić Defence's request to reopen the case, and the lack of justification as to why such a move should be taken at this phase of the trial, the Chamber denies this part of the Motion. Moreover, in light of the decision to admit 6D614 in large part, the Chamber considers it unnecessary to grant the Lukić Defence motion to reopen its case.

V. Request for certification of interlocutory appeal

41. In addition to its request to reopen the case, the Lukić Defence also requests certification for leave to file appeal on the admissibility of the documents rejected by the Trial Chamber.[51] It argues that immediate resolution by the Appeals Chamber is necessary to address this matter, which is "integral to the final submissions and ultimate outcome of the trial."[52]

42. Rule 73(B) requires that two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: (a) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.[53] Furthermore, this Trial Chamber has previously held that "even when an important

[50] Motion, para. 14.

[51] Motion, para. 21.

[52] Motion, para. 23.

[53] *Prosecutor v. Milutinović et. al.*, Case No. IT-05-87-PT, Decision on Prosecution's Request for Certification for Appeal of Decision on Vladimir Lazarević and Sreten Lukić's Preliminary Motions on Form of the Indictment, 19 August 2005, p. 3; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005 ("*Milošević* Decision"), para. 2; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment", 12 January 2005 ("*Halilović* Decision"), p. 1.

point of law is raised ..., the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied."[54] A request for certification is therefore "not concerned with whether a decision was correctly reasoned or not. That is a matter for appeal, be it an interlocutory appeal or one after final Judgement has been rendered. Rule 73(B) concerns the fulfilment of two criteria, after which the Trial Chamber may decide to certify an interlocutory appeal."[55] That is particularly true of evidentiary rulings.

43. The Lukić Defence has not set out any basis upon which the Chamber could conclude that the legal standard for certification of an interlocutory appeal has been satisfied.

VI. Requests for extension of time

44. On 25 June 2008, the Lukić Defence moved the Chamber to enlarge the time for the filing of its final trial brief by a month, reciting a litany of complaints about the manner in which the Chamber has conducted the pre-trial phase of the proceedings and the trial over the last two years.[56] Included in these complaints are arguments that have been rejected by the Chamber on numerous occasions,[57] irrelevant and untrue assertions, and unsubstantiated accusations. The Chamber expresses its surprise at the contents of the filing, rejects all the arguments therein, and need not discuss them in further detail.

45. On 25 June 2008, the Pavković Defence joined the above motion, in the event that the Chamber granted the relief requested in the Lukić Defence's Motion for Reconsideration, thus enlarging the body of evidence in the trial. The Chamber considers that the effect of its present decision is simply to admit portions of 6D614 which were put to witnesses in court during their *viva voce* testimony. As such, there is a negligible "increase" in the amount of evidentiary material with which the Pavković Defence needs to deal, and an extension of time on this basis is not warranted.

[54] *Halilović* Decision, p. 1.

[55] *Milošević* Decision, para. 4.

[56] The Prosecution has indicated that it does not intend to respond to the request for an extension of time.

[57] The employment of argument by repetition fails to persuade the Chamber. The logical fallacy of argument by repetition is also know as argument *ad nauseam*.

VII. Disposition

46. Accordingly, the Trial Chamber, pursuant to Rules 54, 89, and 90 of the Rules of Procedure and Evidence of the Tribunal, hereby DENIES the Motion in its entirety and ORDERS *ex proprio motu* that the following portions of 6D614 shall be admitted into evidence (page/paragraph):[58]

Damjanac, Petar (5 March 2008)

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51/58
634/303
6/7

Debeljković, Branislav (13 March 2008)

146/89
137/45
138/46
22/34
15/3
23/35
152/10
16/8
314/789
20/23
293/676
296/693
300/717
302/729
316/795
316/796
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316/798
316/799
316/800
319/812
334/889
376/1149
103/264
111/295
112/301
112/303
138/49
140/55

[58] Underlined portions indicate those used with more than one witness.

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140/59
141/63
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576/31
582/56
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644/351
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725/701
610/188
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619/233
620/235
650/374
727/706
736/751

Filić, Božidar (10 March 2008)

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690/540
691/547
142/68

Gavranić, Dušan (18–19 February 2008)

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342/933
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Paponjak, Radovan (19 March 2008)

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Vojnović, Miloš (12 March 2008)

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Bogunović, Nebojša (10 April 2008)

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598/135
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Zlatković Radovan (14 April 2008)

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47. The Trial Chamber, pursuant to Rules 54, 86, and 127 of the Rules of Procedure and Evidence of the Tribunal, hereby DENIES the Motions for Extension and will continue to monitor the situation and review it in light of all the circumstances, if necessary and appropriate.[59]

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

Judge Iain Bonomy
Presiding

Dated this second day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

[59] *See* Order, 25 June 2008 (affirming schedule for final trial briefs and closing arguments).