



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

IT-05-87-A
A11752 - A11746
22 March 2011

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Case No. IT-05-87-A

Date: 22 March 2011

Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Decision: 22 March 2011

PROSECUTOR

v.

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

PUBLIC

**DECISION ON NIKOLA ŠAINOVIĆ'S MOTIONS FOR LEAVE
TO VARY HIS GROUNDS OF APPEAL FOLLOWING THE
TRANSLATION OF THE TRIAL JUDGEMENT AND FOR
ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Defence:

Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson 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

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 “Tribunal”, respectively);

NOTING the Judgement rendered in the case *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, by Trial Chamber III on 26 February 2009 (“Trial Judgement”);

NOTING that six appeals have been lodged by the parties against the Trial Judgement;¹

NOTING that following the translation of the Trial Judgement into Bosnian/Croatian/Serbian (“B/C/S”), the Pre-Appeal Judge reminded the Defence that they may seek a variation of their grounds of appeal, provided that they show good cause under Rule 108 of the Tribunal’s Rules of Procedure and Evidence (“Rules”);²

BEING SEISED OF “Šainović Motion for Leave to File Variation of Appeal after Delivery of the Judgement in BCS and Motion for Leave to Present Additional Evidence Pursuant to Rule 115” filed by Counsel for Šainović on 11 January 2011 (“Motion”),³ in which Šainović requests the Appeals Chamber to:

(1) grant him leave to amend his Notice of Appeal and his Appeal Brief⁴ pursuant to Rule 108 of the Rules (“First Request”);⁵ and

¹ See *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Defence Submission Notice of Appeal, 27 May 2009 (“Notice of Appeal”) (filed by Counsel for Nikola Šainović); General Ojdanić’s [sic] Second Amended Notice of Appeal, 16 October 2009 (filed as Annex C to General Ojdanić’s [sic] Motion to Amend his Amended Notice of Appeal of 29 July 2009, 16 October 2009); Notice of Appeal from the Judgement of 26 February 2009, 29 September 2009 (filed by Counsel for Nebojša Pavković as Annex A to General Pavković Submission of his Amended Notice of Appeal, 29 September 2009); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Vladimir Lazarević’s [sic] Defence Notice of Appeal, 27 May 2009 (confidential); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Defence Submission: Lifting Confidential Status of the Notice of Appeal, 29 May 2009 (filed by Counsel for Vladimir Lazarević); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Sreten Lukic’s [sic] Notice of Appeal from Judgment and Request for Leave to Exceed the Page Limit, 27 May 2009; Prosecution Notice of Appeal, 27 May 2009. Nikola Šainović (“Šainović”), Dragoljub Ojdanić, Nebojša Pavković (“Pavković”), Vladimir Lazarević and Sreten Lukić are herein referred to collectively as the “Defence”.

² See Status Conference, 14 Sep 2010, AT. 78; Decision on the Prosecution’s Motion Seeking Clarification and an Order Regarding the Time-Limit for the Defence to File Potential Motions to Vary Grounds of Appeal, 22 September 2010, p. 1.

³ The Motion was originally filed confidentially. On 21 January 2011, Šainović filed a notice requesting the Registry to change the status of the Motion to public (Šainović Notice of Change of Status of “Motion for Leave to File Variation of Appeal after Delivery of the Judgement in BCS and Motion for Leave to Present Additional Evidence Pursuant to Rule 115”, 21 January 2011; see also Status Conference, 18 Jan 2011, AT. 99).

⁴ The Appeals Chamber notes that Šainović requests “to file amendments to the appeal briefs dated 27 May 2009 and 23 September 2009” (Motion, para. 83). Considering the dates of the filings, the Appeals Chamber understands the reference to be to Šainović’s Notice of Appeal and Appeal Brief, respectively (see Defence Appeal Brief, 23 September 2009).

⁵ Motion, para. 83; see also Motion, paras 5 (p. 3), 7 (p. 4), 35, 70, 78. Noting the irregular numbering of some paragraphs in the Motion, the Appeals Chamber also refers to the page numbers where necessary.

(2) admit documents 5D294, P473 (p. 99), P1674 and P1747 as additional evidence on appeal pursuant to Rule 115 of the Rules ("Second Request");⁶

NOTING the response filed by the Office of the Prosecutor ("Prosecution") on 21 January 2011,⁷ in which the Prosecution submits that the First Request should be dismissed, as Šainović fails (i) to explain precisely what amendments he seeks to make and (ii) to show that each of the proposed amendments meets the good cause requirement of Rule 108 of the Rules, or that its exclusion would lead to a miscarriage of justice;⁸

NOTING FURTHER that with respect to the Second Request, the Prosecution argues that document 5D294 is part of the trial record, and that documents P473 (p. 99), P1674 and P1747 were available to Šainović at trial and that they would not have affected the verdict had they been admitted into evidence;⁹

CONSIDERING, with regard to the First Request, that, pursuant to Rule 108 of the Rules, a party seeking to vary its grounds of appeal must show good cause, save for exceptional circumstances where the requested variation is of substantial importance to the success of an appeal, such as to lead to a miscarriage of justice if denied;¹⁰

CONSIDERING that "good cause" encompasses both good reason for including the new or amended grounds of appeal sought, and good reason showing why those grounds were not included (or were not correctly phrased) in the original notice of appeal;¹¹

RECALLING that a party seeking variation of its grounds of appeal "must, at least, explain precisely what amendments are sought and why, with respect to *each* such amendment, the 'good cause' requirement of Rule 108 is satisfied" and that "generic submissions" will fall short of satisfying this requirement;¹²

⁶ Motion, paras 6 (p. 3), 23, 31, 67, 84.

⁷ Prosecution's Response to Nikola Šainović's Motion to Amend his Appeal Submissions and to Admit Additional Evidence, 21 January 2011 ("Response"); see also *Corrigendum* to Prosecution's Response to Nikola Šainović's Motion to Amend his Appeal Submissions and to Admit Additional Evidence, 21 January 2011.

⁸ Response, paras 2, 4-16, 30.

⁹ Response, paras 3, 17-30.

¹⁰ Decision on Sreten Lukić's Motion for Leave to Vary his Grounds of Appeal, 10 February 2011 ("Lukić Decision of 10 February 2011"), p. 2, referring to Decision on Nebojša Pavković's Second Motion to Amend his Notice of Appeal, 22 September 2009 ("Pavković Decision of 22 September 2009"), paras 8, 16.

¹¹ Lukić Decision of 10 February 2011, p. 2, referring to Pavković Decision of 22 September 2009, para. 7; Decision on Nebojša Pavković's Motion to Amend his Notice of Appeal, 9 September 2009 ("Pavković Decision of 9 September 2009"), para. 5.

¹² Lukić Decision of 10 February 2011, p. 2, citing *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Dragan Jokić's Request to Amend Notice of Appeal, 14 October 2005, para. 7 (emphasis in original); see also Pavković Decision of 22 September 2009, para. 6; Pavković Decision of 9 September 2009, para. 4; Cf. Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, paras 2, 3.

CONSIDERING that Šainović makes submissions which in his view relate to several grounds of his appeal without specifying which submissions relate to which individual ground, and thus fails to explain precisely what amendments he seeks to make to his Notice of Appeal;¹³

FINDING therefore that the First Request fails to satisfy the requirements of Rule 108 of the Rules;

CONSIDERING, with regard to the Second Request, that under Rule 115 of the Rules a party may submit a request to present additional evidence before the Appeals Chamber no later than 30 days from the date of filing of the brief in reply unless good cause or, after the appeal hearing, cogent reasons are shown for a delay;¹⁴

NOTING that Šainović filed his Reply Brief on 15 February 2010 and thus the said time limit expired on 17 March 2010;¹⁵

RECALLING that “the good cause requirement obliges the moving party to demonstrate that it was not able to comply with the time limit set out in the Rule, and that it submitted the motion in question as soon as possible after it became aware of the existence of the evidence sought to be admitted”;¹⁶

NOTING that document 5D294 was admitted as an exhibit at trial¹⁷ and therefore cannot constitute “additional evidence” pursuant to Rule 115 of the Rules,¹⁸ and that documents P473 (p. 99), P1674, and P1747 were available to Šainović at trial in both English and B/C/S;¹⁹

¹³ See Motion, paras 7 (p. 4), 35, 78.

¹⁴ Rule 115(A) of the Rules; see also Decision on Nikola Šainović’s Second Motion for Admission of Additional Evidence on Appeal, 8 September 2010 (“Šainović Decision of 8 September 2010”), para. 6.

¹⁵ Defence Brief in Reply, 15 February 2010 (confidential; public redacted version filed on 22 July 2010); see also Rule 126 of the Rules.

¹⁶ Šainović Decision of 8 September 2010, para. 20, citing *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Miroslav Bralo’s Motion for Admission of Additional Evidence, 12 January 2007 (confidential), para. 13; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Prosecution’s Motion to Admit Additional Evidence in Relation to Dario Kordić and Mario Čerkez, 17 December 2004, p. 2; see also *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 16.

¹⁷ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lazarević Second Motion for Admission of Documents from Bar Table, 2 April 2008, paras 15(c), 16(g).

¹⁸ Cf. Decision on Vladimir Lazarević’s Motion to Present Additional Evidence and on Prosecution’s Motion for Order Requiring Translations of Excerpts of Annex E of Lazarević’s Rule 115 Motion, 26 January 2010 (“Lazarević Decision of 26 January 2010”), para. 20; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Appellant Momčilo Krajišnik’s Motion to Present Additional Evidence, 20 August 2008, para. 10; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 21.

¹⁹ See Response, paras 19-20; see also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Prosecution’s Submissions Pursuant to Rule 65 ter(E) with *Confidential* Annex A and Annexes B and C, 10 May 2006, Annex B, pp. 56, 161, 166.

NOTING Šainović's submission that he found the proffered evidence "relevant to the case only after having analysed the text of the [Trial] Judgement in his language";²⁰

CONSIDERING that Šainović fails to explain why the analysis of the additional evidence could not have been carried out by counsel within the 30 day time limit prescribed by Rule 115 of the Rules;

FINDING therefore that Šainović fails to show good cause for the late filing of the Second Request;

NOTING that even if good cause had been shown for the late filing of the Second Request, Šainović still has to demonstrate that the tendered evidence is both relevant to a material issue and credible, and that, in view of its availability at trial, its exclusion would lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict;²¹

CONSIDERING that with respect to document P473 (p. 99), Šainović fails to explain how the information on the number of displaced Serbian persons contained therein differs from the evidence that was presented at trial,²² and thus fails to demonstrate that had the document been admitted at trial it *would* have affected the verdict;²³

NOTING that documents P1747, dated 3 June 1999, and P1674, dated 10 June 1999, contain orders issued by Svetozar Marjanović, Deputy Chief of Staff of the Supreme Command, and Pavković, Commander of the 3rd Army, respectively, concerning "the implementation of the peace agreement"²⁴ and the "military and technical agreement", respectively;²⁵

NOTING Šainović's submission that documents P1674 and P1747 relate to the Trial Chamber's finding that during the Joint Command meeting on 1 June 1999, Šainović conveyed Slobodan Milošević's order on the cessation of hostilities and the withdrawal of the Army of Yugoslavia ("VJ") from Kosovo;²⁶

²⁰ Motion, para. 6 (p. 3).

²¹ Šainović Decision of 8 September 2010, paras 8, 10, and references cited therein.

²² See Response, para. 24, referring to Sandra Mitchell, 11 Jul 2006, T. 565-566; Exh. P738, p. 2.

²³ The Appeals Chamber observes that the "interests of justice" test relied upon by Šainović (see Motion, paras 31, 67) reflects neither the current requirements of Rule 115(B) of the Rules nor the established jurisprudence of the Tribunal (see Decision on Sreten Lukić's First Motion to Admit Additional Evidence on Appeal, 11 March 2010, para. 11; Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010 (public redacted version), para. 12; Lazarević Decision of 26 January 2010, para. 13).

²⁴ P1747, p. 1.

²⁵ P1674, p. 1.

²⁶ Motion, paras 62, 68, referring to Trial Judgement, vol. 1, para. 1215; Trial Judgement, vol. 3, para. 359.

CONSIDERING that Šainović fails to demonstrate that documents P1674 and P1747 would have affected the Trial Chamber's finding that at the meeting of 1 June 1999 Šainović informed the participants, among them Pavković, that (i) an agreement would be signed soon; (ii) that it envisaged the withdrawal of the VJ and the forces of the Ministry of Interior ("MUP") from Kosovo; and (iii) that this withdrawal would have to commence soon, and that therefore "also in 1999 [Šainović] was able to convey orders and provide approval for certain VJ and MUP activities";²⁷

FINDING therefore that Šainović fails to show that had documents P1674 and P1747 been admitted at trial, they *would* have affected the verdict;

RECALLING that the requirements of Rule 115 of the Rules are cumulative and that the Appeals Chamber need not consider whether the other requirements of the Rule have been met;²⁸

EMPHASISING that the findings in this Decision pertain strictly to the admissibility of the proposed evidence and not to the merits of the appeals filed by the parties;

FOR THE FOREGOING REASONS,

DISMISSES the First Request without prejudice to Šainović's right to file a new motion seeking variation of his grounds of appeal that:

- (1) identifies, with precision, each change sought to be made to his Notice of Appeal; and
- (2) demonstrates why there is "good cause" for each change within the meaning of Rule 108 of the Rules; or
- (3) explains why each requested variation is of substantial importance to the success of the appeal, such that permitting each amendment at this stage is necessary to avoid a "miscarriage of justice";

DISMISSES the Second Request.

²⁷ Trial Judgement, vol. 3, paras 356, 359; see also Trial Judgement, vol. 1, paras 1148-1149.

²⁸ Decision on Sreten Lukic's Second Motion to Admit Additional Evidence on Appeal, 29 April 2010, para. 44; Lazarević Decision of 26 January 2010, fn. 82.

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

Dated this 22nd day of March 2011,
At The Hague, The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]