

**UNITED
NATIONS**

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-05-88-A
Date: 15 April 2013
Original: English

IN THE APPEALS CHAMBER**Before:**

Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Khalida Rachid Khan

Registrar:

Mr. John Hocking

Decision of:

15 April 2013

PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
RADIVOJE MILETIĆ
VINKO PANDUREVIĆ

PUBLIC

**DECISION ON RADIVOJE MILETIĆ'S FIRST AND SECOND
MOTIONS FOR ADMISSION OF ADDITIONAL EVIDENCE
ON APPEAL PURSUANT TO RULE 115**

The Office of the Prosecutor:

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Counsel for the Defence:

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Mr. Vujadin Popović
Mr. John Ostojčić for Mr. Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Peter Haynes and Mr. Simon Davis for Mr. Vinko Pandurević

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 “Tribunal”, respectively) is seised of two motions filed by Radivoje Miletic (“Miletic”) on 30 March 2012 and 7 May 2012, respectively, seeking admission of additional evidence on appeal pursuant to Rule 115 of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The Office of the Prosecutor (“Prosecution”) responded on 26 April 2012 and 6 June 2012, respectively, opposing both motions.² Miletic filed his replies on 2 May 2012 and 11 June 2012, respectively.³

I. BACKGROUND

2. On 10 June 2010, Trial Chamber II of the Tribunal (“Trial Chamber”) convicted Miletic pursuant to Article 7(1) of the Tribunal’s Statute (“Statute”) of committing murder, persecution, and other inhumane acts (forcible transfer) as crimes against humanity.⁴ The Trial Chamber sentenced him to 19 years of imprisonment.⁵

3. Miletic appealed his convictions and sentence.⁶ Briefing in relation to Miletic’s appeal is complete since 2 May 2011.⁷

4. On 12 May 2011, Miletic requested an extension of the time-limit for filing motions seeking admission of additional evidence on appeal pursuant to Rule 115 of the Rules.⁸ On 1 June 2011, the Appeals Chamber dismissed his and other Defence motions “as premature, without prejudice to the

¹ *Requête de la défense de Radivoje Miletic [sic] aux fins d’admission d’un document en application de l’article 115 du règlement de procédure et de preuve*, 30 March 2012 (public with public and confidential annexes) (English translation filed on 11 April 2012) (“First Motion”); *Deuxième requête de la défense de Radivoje Miletic [sic] aux fins d’admission d’un document en application de l’article 115 du règlement de procédure et de preuve*, 7 May 2012 (public with public and confidential annexes) (English translation filed on 11 June 2012) (“Second Motion”).

² Prosecution Response to Radivoje Miletic’s Rule 115 Motion, 26 April 2012 (public with public and confidential annexes) (“First Response”), paras 1, 11; Prosecution Response to Radivoje Miletic’s Second Rule 115 Motion, 6 June 2012 (“Second Response”), paras 1, 9.

³ *Réplique de la défense de Radivoje Miletic [sic] à la réponse du procureur du 26 Avril 2012 relative à la requête déposée le 30 Mars 2012 en application de l’article 115 du règlement de procédure et de preuve*, 2 May 2012 (public with confidential annex) (English translation filed on 11 June 2012) (“First Reply”); *Réplique de la défense de Radivoje Miletic [sic] à la réponse du procureur relative à la deuxième requête déposée en application de l’article 115 du règlement de procédure et de preuve*, 11 June 2012 (English translation filed on 21 June 2012) (“Second Reply”).

⁴ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version) (“Trial Judgement”), p. 830.

⁵ Trial Judgement, p. 830.

⁶ *Acte d’appel de la défense de Radivoje Miletic [sic]*, 8 September 2010 (English translation filed on 24 September 2010); *Mémoire d’appel de la défense de Radivoje Miletic [sic]*, 21 January 2011 (confidential; public redacted version filed on 18 April 2011) (English translation filed on 24 March 2011).

⁷ Prosecution Response to Miletic Appeal, 4 April 2011 (confidential; public redacted version filed on 3 August 2011); *Réplique à la réponse du procureur au mémoire d’appel de Radivoje Miletic [sic]*, 2 May 2011 (confidential; public redacted version filed on 7 July 2011) (English translation filed on 30 May 2011).

⁸ *Requête de la défense de Radivoje Miletic [sic] aux fins d’obtenir une prorogation du délai prévu par l’article 115 du règlement de procédure et de preuve*, 12 May 2011 (English translation filed on 17 May 2011), paras 6, 14.

right to file motions seeking admission of additional evidence on appeal, provided that [the applicants] demonstrate good cause or cogent reasons, as applicable, for the late filing with respect to the proffered evidence.”⁹

II. APPLICABLE LAW

5. Pursuant to Rule 115(A) of the Rules, a party may submit a request to present additional evidence before the Appeals Chamber. This must be done 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.¹⁰

6. For additional evidence to be admissible under Rule 115 of the Rules, the applicant must first demonstrate that the additional evidence tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence.¹¹ The applicant’s duty to act with due diligence includes making appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules to bring evidence on behalf of an accused before the Trial Chamber.¹² The applicant is therefore expected to apprise the Trial Chamber of all the difficulties he encounters in obtaining the evidence in question.¹³

7. The applicant must then show that the evidence is both relevant to a material issue and credible.¹⁴ Evidence is relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence.¹⁵ Evidence is credible if it appears to be reasonably capable of belief or reliance.¹⁶

8. The applicant must further demonstrate that the evidence *could* have had an impact on the verdict, in other words, the evidence must be such that, if considered in the context of the evidence presented at trial, it could show that the verdict was unsafe.¹⁷ A decision will be considered unsafe

⁹ Decision on Defence Requests for Extension of Time to File Motions Pursuant to Rule 115, 1 June 2011 (“Decision of 1 June 2011”), para. 13.

¹⁰ See also *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Public Redacted Version of the 21 June 2012 Decision on Ante Gotovina’s and Mladen Markač’s Motions for the Admission of Additional Evidence on Appeal, 2 October 2012 (“*Gotovina* Decision of 2 October 2012”), para. 6; Decision on Vujadin Popović’s Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011 (“*Popović et al.* Decision of 20 October 2011”), para. 6; Decision of 1 June 2011, para. 10.

¹¹ *Gotovina* Decision of 2 October 2012, para. 7; *Popović et al.* Decision of 20 October 2011, para. 7.

¹² *Gotovina* Decision of 2 October 2012, para. 7; *Popović et al.* Decision of 20 October 2011, para. 7.

¹³ *Gotovina* Decision of 2 October 2012, para. 7; *Popović et al.* Decision of 20 October 2011, para. 7.

¹⁴ *Gotovina* Decision of 2 October 2012, para. 8; *Popović et al.* Decision of 20 October 2011, para. 8.

¹⁵ *Gotovina* Decision of 2 October 2012, para. 8; *Popović et al.* Decision of 20 October 2011, para. 8.

¹⁶ *Gotovina* Decision of 2 October 2012, para. 8; *Popović et al.* Decision of 20 October 2011, para. 8.

¹⁷ *Gotovina* Decision of 2 October 2012, para. 9; *Popović et al.* Decision of 20 October 2011, para. 9.

if the Appeals Chamber ascertains that there is a realistic possibility that the Trial Chamber's verdict might have been different if the new evidence had been admitted.¹⁸

9. If the evidence was available at trial or could have been obtained through the exercise of due diligence, it may still be admissible on appeal if the applicant shows that the exclusion of the additional evidence would lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict.¹⁹

10. In both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the Trial Chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the Trial Chamber's verdict.²⁰ A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.²¹

11. Finally, the significance and potential impact of the tendered material shall not be assessed in isolation, but in the context of the evidence presented at trial.²²

III. DISCUSSION

A. Arguments of the Parties

1. First Motion

12. In the First Motion, Miletić requests the admission, as additional evidence on appeal, of notes written by Manojlo Milovanović ("Milovanović") concerning Milovanović's meeting with Radovan Karadžić ("Karadžić") on 16 March 1995 ("Milovanović Notes").²³ He submits that the Milovanović Notes were not available to him at trial, that he only discovered their existence during the testimony of Milovanović in the *Karadžić* trial,²⁴ and that they were only disclosed by the Registry of the Tribunal ("Registry") upon his request on 24 March 2012.²⁵ He further argues that it was not possible to obtain or discover the Milovanović Notes through the exercise of due diligence prior to their disclosure because they were only presented during the testimony of Milovanović in

¹⁸ *Gotovina* Decision of 2 October 2012, para. 9; *Popović et al.* Decision of 20 October 2011, para. 9.

¹⁹ *Gotovina* Decision of 2 October 2012, para. 10; *Popović et al.* Decision of 20 October 2011, para. 10.

²⁰ *Gotovina* Decision of 2 October 2012, para. 11; *Popović et al.* Decision of 20 October 2011, para. 11.

²¹ *Gotovina* Decision of 2 October 2012, para. 11; *Popović et al.* Decision of 20 October 2011, para. 11.

²² *Gotovina* Decision of 2 October 2012, para. 12; *Popović et al.* Decision of 20 October 2011, para. 12.

²³ First Motion, paras 6, 12-15, 50, Annex 1.

²⁴ First Motion, paras 18, 21. Miletić refers to Milovanović testifying in the *Karadžić* trial on 28-29 February 2012, 1 and 5 March 2012. See First Motion, fn. 21.

²⁵ First Motion, paras 19-20, 22.

the *Karadžić* trial.²⁶ He contends that the Prosecution had the Milovanović Notes since at least February 2012 but failed to disclose them to the Defence.²⁷

13. Miletić argues that the Milovanović Notes are relevant to the Trial Chamber’s findings with regard to his role in the drafting of Directive 7,²⁸ which was “central to the Indictment against [him] and the basis for his conviction”.²⁹ He submits that the Milovanović Notes show that he was excluded from the final drafting stage of Directive 7, and that the finalisation of Directive 7 was entrusted to Karadžić and Milovanović during a meeting held on 16 March 1995, and thus relate to his grounds of appeal 10.1 and 10.2.³⁰ Specifically, Miletić contends that the Milovanović Notes unquestionably demonstrate: (i) that Milovanović was involved in the drafting of Directive 7;³¹ (ii) why the directive dated 8 March 1995 was not transmitted to the subordinate units before 17 March 1995; and (iii) why Miletić did not transmit the directive to the subordinate units.³² Miletić also submits that the Milovanović Notes relate to his ground of appeal 20, wherein he challenges the credibility of Milovanović, as they show that the witness’s testimony during Miletić’s trial was unreliable.³³

14. Miletić claims that the Milovanović Notes could have had an impact on the Trial Chamber’s findings and changed the outcome of the trial, because they allegedly show that the preparation of the final draft of Directive 7 was entrusted to Milovanović and that there was no reason for Miletić himself to know the final text of Directive 7.³⁴ Specifically, Miletić asserts that the Trial Chamber’s finding that he was well-acquainted with the final text of Directive 7, including the parts setting out the criminal objective to forcibly remove the Bosnian Muslims from the enclaves, would have been different if the Trial Chamber had the Milovanović Notes at its disposal.³⁵ Miletić submits that the Trial Chamber did not take into account Milovanović’s role in the drafting of Directive 7 and based its findings on the assumption that Milovanović was absent from the Main Staff of the Army of Republika Srpska during the relevant period.³⁶ Miletić further submits that, according to the Milovanović Notes, Milovanović had a meeting with Karadžić on 16 March 1995 and “discussed a document drafted by the Main Staff” and that, therefore, the meeting “could only have been about

²⁶ First Motion, paras 21-22.

²⁷ First Motion, para. 20.

²⁸ First Motion, paras 26-30.

²⁹ First Motion, para. 30. See also First Motion, para. 31.

³⁰ First Motion, paras 15-16, 29-30, 35, 40, 44.

³¹ First Motion, paras 29, 38-39; First Reply, paras 18, 23-24.

³² First Motion, para. 29.

³³ First Motion, paras 17, 30, 44, 46.

³⁴ First Motion, paras 33, 35, 40, 42.

³⁵ First Motion, paras 32-33, 41-43.

³⁶ First Motion, para. 34.

Directive 7”.³⁷ Finally, Miletić submits that the Trial Chamber also based its findings as to his knowledge about the final text of Directive 7 on the testimony of Ljubomir Obradović (“Obradović”) that the document was kept in a certain strongbox to which Miletić had access. He argues, however, that as no evidence was presented to show that the document was placed in the strongbox in March 1995 or earlier, the Milovanović Notes are more relevant to assessing his role in the drafting of Directive 7 than Obradović’s testimony.³⁸

15. The Prosecution responds that Miletić failed to satisfy the requirements of Rule 115 of the Rules and that the Appeals Chamber should dismiss the First Motion.³⁹ Specifically, the Prosecution submits that the evidence concerning the 16 March 1995 meeting contained in the Milovanović Notes could have been obtained at trial during the cross-examination of Milovanović.⁴⁰

16. The Prosecution further contends that the Milovanović Notes could or would not have affected the Trial Chamber’s findings regarding Miletić’s central role in the drafting of Directive 7 and his detailed knowledge of its contents – including the criminal parts.⁴¹ The Prosecution submits that the Trial Chamber was well aware that Karadžić and Milovanović met on 16 March 1995, and reasonably found that Miletić played a central role in the drafting of Directive 7 based on the evidence.⁴² It further submits that the Milovanović Notes do not contradict the Trial Chamber’s findings or the evidence underlying these findings.⁴³

17. Moreover, the Prosecution submits that the Milovanović Notes do not show that Directive 7 was discussed and finalised during the 16 March 1995 meeting, and that Miletić fails to support his arguments to the contrary.⁴⁴ It also contends that, even if Directive 7 had been discussed, the Milovanović Notes could not have affected the Trial Chamber’s findings as the possibility of Directive 7 being discussed during the 16 March 1995 meeting was “left open” by the Trial Chamber.⁴⁵

18. Finally, the Prosecution argues that Miletić fails to show that the Milovanović Notes could impact upon the Trial Chamber’s “cautious assessment of and reasonable reliance on Milovanović’s

³⁷ First Motion, para. 34; See also First Reply, paras 11-13.

³⁸ First Motion, paras 36-37.

³⁹ First Response, paras 1, 11.

⁴⁰ First Response, paras 1-3.

⁴¹ First Response, paras 1, 3-5.

⁴² First Response, paras 4, 8.

⁴³ First Response, paras 4-5, 8.

⁴⁴ First Response, paras 6-7.

⁴⁵ First Response, para. 7.

evidence”.⁴⁶ With respect to Miletić’s arguments challenging the Trial Chamber’s reliance on Obradović’s testimony, the Prosecution responds that the Trial Chamber reasonably relied on his testimony together with other evidence, and that Miletić’s suggestion that Directive 7 might not have been in his strongbox by 17 March 1995 is speculative.⁴⁷

19. In reply, Miletić argues that, during Milovanović’s testimony in May and June 2007, he could not have questioned Milovanović about the 16 March 1995 meeting as he only became aware of the meeting in September 2008 when the appointment diary of Karadžić’s secretary was disclosed.⁴⁸ He further argues that Obradović was not in the Main Staff at the time Directive 7 was being drafted and has no knowledge about when it was drafted.⁴⁹

20. Miletić also replies that the Trial Chamber noted the existence of a meeting on 16 March 1995, but found that it had no basis to draw any conclusion as to the substantive contents of the discussion.⁵⁰ Miletić submits that as the Milovanović Notes confirm that Directive 7 was discussed and finalised during the 16 March 1995 meeting, which Miletić did not attend, they could and should have led the Trial Chamber to assess his role in the drafting of Directive 7 differently.⁵¹ Miletić further contends that the Milovanović Notes could and should have affected the Trial Chamber’s assessment of Milovanović’s testimony.⁵²

2. Second Motion

21. In the Second Motion, Miletić requests the admission, as additional evidence on appeal, of a letter written by Neven Madej, Chargé d’Affaires for the Permanent Mission of the Republic of Croatia to the United Nations Office in Geneva, dated 19 July 1995, containing information regarding a meeting of the EU Council of Ministers, and notably the statements made by Carl Bildt (“Bildt”) regarding the fall of Srebrenica (“19 July 1995 Letter”).⁵³ According to Miletić, the 19 July 1995 Letter shows that the capture of Srebrenica was not planned in Directive 7, and that the military activities around Srebrenica in July 1995 were a response to attacks by the Army of Bosnia and Herzegovina (“ABiH”), and thus relates to his grounds of appeal 3.1, 3.3, and 3.4.⁵⁴ Miletić submits that he was unaware of the 19 July 1995 Letter until its Croatian version was

⁴⁶ First Response, para. 10.

⁴⁷ First Response, para. 9. The Prosecution also argues that the arguments concerning Obradović’s testimony should be dismissed on the basis that Rule 115 of the Rules is not the proper vehicle for advancing arguments that should have been made in an appeal brief. See First Response, para. 9.

⁴⁸ First Reply, paras 6-8.

⁴⁹ First Reply, para. 15.

⁵⁰ First Reply, para. 20.

⁵¹ First Reply, paras 18-20.

⁵² First Reply, paras 21-24.

⁵³ Second Motion, paras 6, 12-13, 41, Annex 1.

⁵⁴ Second Motion, paras 14-15, 27-28, 30-33, 38.

disclosed by the Prosecution on 20 April 2012, and he only received the English version on 26 April 2012.⁵⁵ He argues that it was not available at trial as “it was classified as confidential by the Croatian administration”,⁵⁶ and that he filed the Second Motion as soon as possible after receiving the English version of the 19 July 1995 Letter.⁵⁷

22. Miletić submits that the 19 July 1995 Letter is relevant and reliable, as it concerns the capture of Srebrenica – the key fact in the case against him – and sheds new light on the causes for the actions taken by the Serb forces in July 1995 in Eastern Bosnia.⁵⁸ Miletić argues that the origin of the 19 July 1995 Letter, *i.e.* the fact that it emanates from a United Nations Member State that did not have a direct interest in the relevant events at the time, and that it was disclosed by the Prosecution, make the 19 July 1995 Letter entirely reliable.⁵⁹ Miletić also claims that the Prosecution, by disclosing the 19 July 1995 Letter under Rule 68 of the Rules, acknowledges that the 19 July 1995 Letter is likely to exonerate him in whole or in part or to undermine the Prosecution’s evidence.⁶⁰

23. Miletić argues that the 19 July 1995 Letter would have had an impact on the Trial Chamber’s findings and changed the outcome of the trial because it allegedly shows that “the responsibility for the fall of Srebrenica could be attributed to the offensive operations of the ABiH”,⁶¹ and not to the issuance of Directive 7.⁶² He further argues that the Trial Chamber’s findings that there was a link between Directive 7 and the military activities around the enclaves, and that the plan to attack the enclaves was conceived in Directive 7, would have been different if the Trial Chamber had the 19 July 1995 Letter at its disposal.⁶³

24. The Prosecution responds that the Second Motion should be dismissed because Miletić has not satisfied the requirements of Rule 115 of the Rules.⁶⁴ The Prosecution submits that the 19 July 1995 Letter could not have affected the verdict.⁶⁵ In particular, the Prosecution argues that the information contained in the 19 July 1995 Letter is vague, general and a repetition of evidence considered by the Trial Chamber.⁶⁶ The Prosecution submits that there is no indication of the basis

⁵⁵ Second Motion, paras 16-18.

⁵⁶ Second Motion, para. 17.

⁵⁷ Second Motion, paras 19-21, 39.

⁵⁸ Second Motion, paras 22, 26-28.

⁵⁹ Second Motion, paras 23-25.

⁶⁰ Second Motion, para. 26.

⁶¹ Second Motion, para. 30.

⁶² Second Motion, paras 29-32, 39. See also Second Motion, paras 27-28.

⁶³ Second Motion, paras 32-37.

⁶⁴ Second Response, paras 1, 9.

⁶⁵ Second Response, paras 1, 8.

⁶⁶ Second Response, paras 1, 4, 6.

of Bildt's opinion that the "Bosnian Serbs were genuinely committed to a cessation of hostilities".⁶⁷ Further, the Prosecution argues that, even assuming that the 19 July 1995 Letter accurately reflects Bildt's opinion at the time, Miletić fails to show that the verdict may have been different.⁶⁸ The Prosecution argues that Miletić fails to articulate how Bildt's opinion undermines the clear language of Directive 7 and, in any event, it cannot serve to negate the overwhelming evidence of the criminal plan that was accepted by the Trial Chamber.⁶⁹ The Prosecution submits that the Trial Chamber based Miletić's guilt not simply on his responsibility for his role in drafting Directive 7, but on a cumulative appraisal of his individual acts and contributions to the joint criminal enterprise at all stages of its implementation.⁷⁰

25. The Prosecution also responds that the mere fact that it disclosed the 19 July 1995 Letter pursuant to its obligation under Rule 68(i) of the Rules is not proof that it acknowledges the information contained therein, or that it considers the information to be exculpatory in nature.⁷¹

26. In reply, Miletić submits that he is not seeking admission of the 19 July 1995 Letter in order to show that there was no attack on the civilian population of Srebrenica, but to show the link between the military actions of the Serbs and the offensive operations of the ABiH, and to show that military actions around Srebrenica were not conducted on the basis of Directive 7.⁷² Miletić argues that the 19 July 1995 Letter provides that the offensive actions of the Muslim and Croatian forces formed the factual basis for Bildt's opinion.⁷³ Miletić further replies that, even if he was not convicted solely for his role in the drafting of Directive 7, this role constituted the basis for his conviction such that a different assessment of this role would have an impact on his responsibility.⁷⁴ He contends that the Prosecution's argument that his guilt was based on a cumulative appraisal of his acts should not be a basis to dismiss the Second Motion.⁷⁵

27. Miletić also replies that the Prosecution fails to cite any similar evidence that was presented at trial and assessed by the Trial Chamber.⁷⁶ Finally, Miletić submits that, although the 19 July 1995 Letter constitutes hearsay evidence, it should be considered with the greatest attention.⁷⁷

⁶⁷ Second Response, para. 1. See also Second Response, para. 4.

⁶⁸ Second Response, para. 3.

⁶⁹ Second Response, para. 7. See also Second Response, para. 5.

⁷⁰ Second Response, para. 8.

⁷¹ Second Response, para. 2.

⁷² Second Reply, paras 7-8, 10, 13.

⁷³ Second Reply, para. 6.

⁷⁴ Second Reply, paras 11-12.

⁷⁵ Second Reply, para. 11.

⁷⁶ Second Reply, para. 13.

⁷⁷ Second Reply, para. 14.

B. Analysis

1. Preliminary Matters

28. The Appeals Chamber recalls that the 30-day time-limit prescribed under Rule 115 of the Rules in this case expired on 1 June 2011.⁷⁸ Consequently, for all motions filed after this deadline, the moving party must “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”.⁷⁹

29. Miletić filed the First Motion and the Second Motion on 30 March 2012 and 7 May 2012, respectively. The Appeals Chamber notes that the Milovanović Notes and the 19 July 1995 Letter were disclosed to Miletić by the Prosecution after the expiration of the 30-day deadline imposed by the Rules.⁸⁰ In these circumstances, the Appeals Chamber considers that good cause for the late filing of both the First Motion and Second Motion has been shown and will accordingly consider both motions as validly filed.⁸¹

2. Admissibility of Milovanović Notes and 19 July 1995 Letter

(a) Milovanović Notes

(i) Availability at trial

30. The Appeals Chamber is satisfied that the Milovanović Notes were unavailable at trial as they were only disclosed to him by the Registry on 24 March 2012.⁸² Further, with respect to Miletić’s awareness of the information contained in the notes, the Appeals Chamber observes that Milovanović did not refer to the 16 March 1995 meeting with Karadžić during his testimony at trial from 29 May to 1 June 2007, and that Miletić did not question him in this regard.⁸³ However, the Appeals Chamber is convinced that, by at least November 2008, Miletić knew of the time and participants of the meeting as he used the diary of Karadžić’s secretary⁸⁴ to cross-examine witness Novica Simić on 24 November 2008 about the 16 March 1995 meeting.⁸⁵ Subsequently, referring

⁷⁸ *Popović et al.* Decision of 20 October 2011, para. 25; Decision of 1 June 2011, para. 10.

⁷⁹ *Popović et al.* Decision of 20 October 2011, para. 25.

⁸⁰ See *supra*, paras 12, 21.

⁸¹ See *Gotovina* Decision of 2 October 2012, para. 14; See also *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/I-A, Decision on Dragomir Milošević’s Motion to Present Additional Evidence, 20 January 2009, para. 22.

⁸² See First Motion, Annex 4 (confidential). See also *supra*, para. 12.

⁸³ See T. 12271-12319.

⁸⁴ Exh. 5D1322.

⁸⁵ T. 28739-28741. See also First Reply, para. 7: “The existence of [the 16 March 1995] meeting was brought to the attention of the Defence in September 2008 when the Prosecution disclosed the Appointment Diary of President Radovan Karadžić’s secretary”. See also *supra*, para. 19.

again to the diary of Karadžić's secretary during cross-examination of witness Slobodan Kosovac on 14 January 2009, Miletić elicited testimony as to the purported contents of the 16 March 1995 meeting.⁸⁶ The Appeals Chamber recalls that the last Defence case at trial was concluded on 12 March 2009⁸⁷ and that the cases of the Prosecution, Vujadin Popović, Drago Nikolić, Miletić, and Milan Gvero were subsequently re-opened on several occasions.⁸⁸

31. The Appeals Chamber notes that Miletić does not offer any explanation as to why he did not explore and avail himself of options available at trial to seek the introduction of evidence pertaining to the information contained in the Milovanović Notes, including the most obvious option – the recalling of Milovanović as a witness for questioning regarding the 16 March 1995 meeting.

32. Thus, the Appeals Chamber is not convinced that Miletić has demonstrated that he fulfilled his duty to act with due diligence and made “the best case in the first instance” by bringing the evidence that he considers crucial before the Trial Chamber.⁸⁹ Therefore, the Appeals Chamber finds that the Milovanović Notes were available at trial for the purposes of Rule 115 of the Rules as the information contained therein was discoverable through the exercise of due diligence. As a consequence, the Milovanović Notes can only be admitted as additional evidence on appeal if the Appeals Chamber is satisfied that their exclusion *would* lead to a miscarriage of justice, in that if they had been admitted at trial, they *would* have affected the verdict.⁹⁰

(ii) Relevance, Credibility, and Impact on the Verdict

33. The Appeals Chamber considers that the Milovanović Notes are sufficiently credible as, during his testimony in the *Karadžić* trial, Milovanović acknowledged writing these notes and they were subsequently admitted as a public exhibit in that case.⁹¹ Consequently, the Appeals Chamber finds the Milovanović Notes to be *prima facie* credible for the purposes of being considered admissible as additional evidence on appeal pursuant to Rule 115 of the Rules.⁹²

34. The Appeals Chamber recalls that the evaluation of relevance at the stage of admissibility of additional evidence on appeal has been defined as a consideration of “whether the proposed evidence sought to be admitted relates to a material issue”.⁹³ The Milovanović Notes indicate that

⁸⁶ T. 30086.

⁸⁷ T. 32690. See also Trial Judgement, Annex 2, para. 25.

⁸⁸ See Trial Judgement, Annex 2, paras 28-35.

⁸⁹ See *Popović et al.* Decision of 20 October 2011, para. 36 and references cited therein.

⁹⁰ See *Popović et al.* Decision of 20 October 2011, para. 36. See also *supra*, para. 9.

⁹¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, T. 25624-25626, 1 March 2012. See also First Motion, Annex 1, pp. 13559-13561 (Registry pagination).

⁹² See *Gotovina* Decision of 2 October 2012, para. 26.

⁹³ See, e.g., *Ephrem Setako v. The Prosecutor*, Case ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend his Notice of Appeal and Motion to Admit Evidence, 23 March 2011, para. 32; *Ferdinand Nahimana et al. v. The*

Milovanović and Karadžić had a meeting in Pale on 16 March 1995, as there were “some documents that needed to be signed and which were made by the General Staff Operations Administration for the purpose of the Supreme Command since they did not have people skilled for that.”⁹⁴ According to the Milovanović Notes, Milovanović and Karadžić also discussed the general situation on the battlefield.⁹⁵ The Appeals Chamber notes that the Milovanović Notes do not expressly mention that Directive 7 was discussed, but recalls that the Trial Chamber found that:

On 16 March a meeting took place at Karadžić’s office, attended by Milovanović and Tolimir. There is no evidence Miletić was present during the meeting. Taking into consideration the persons attending the meeting, Directive 7 may well have been discussed. However, the Trial Chamber has no basis to draw any conclusion as to the substantive content of the discussion at the meeting. The Trial Chamber further finds that based on the available evidence the actual date of Directive 7 cannot be established. Nevertheless, the Trial Chamber is satisfied that at least on 17 March 1995, the Directive was finalised since on this date it was forwarded to the corps.⁹⁶

35. As the Milovanović Notes provide information pertaining to the substance of the 16 March 1995 meeting, regardless of whether or not Directive 7 was expressly discussed, the contents of the document are sufficiently relevant to a material issue.

36. With respect to the impact on the verdict, the Appeals Chamber concludes that the Trial Chamber’s findings that Miletić “played a pivotal role in the plan to forcibly remove the Bosnian Muslims from Srebrenica and Žepa”⁹⁷ (“JCE to Forcibly Remove”) and that he “drafted Directive 7, which set out the common plan”⁹⁸ would not have been affected if the Trial Chamber had considered the Milovanović Notes. First, the Milovanović Notes provide the same information that the Trial Chamber took into consideration when making its findings, *i.e.* that Milovanović and Karadžić met on 16 March 1995 and may have discussed Directive 7.⁹⁹ Second, Miletić’s submission that the meeting of 16 March 1995 could only have been about Directive 7 is, at best, speculative, as the Milovanović Notes refer to “some documents that needed to be signed” without further specification.¹⁰⁰ Third, the Trial Chamber’s findings on Miletić’s involvement in the drafting of Directive 7 and the JCE to Forcibly Remove were made on the basis of a large array of evidence which showed his individual contributions to the joint criminal enterprise at all stages of its implementation.¹⁰¹ Last, the Appeals Chamber notes that the Trial Chamber’s findings are not contradicted by the contents of the Milovanović Notes. As recalled above, the significance and

Prosecutor, Case No. ICTR-99-52-A, Decision on Appellants Jean-Bosco Barayagwiza’s and Ferdinand Nahimana’s Motions for Leave to Present Additional Evidence Pursuant to Rule 115, 12 January 2007, para. 7.

⁹⁴ First Motion, Annex 1, p. 53.

⁹⁵ First Motion, Annex 1, p. 53.

⁹⁶ Trial Judgement, para. 1650 (internal references omitted).

⁹⁷ Trial Judgement, para. 1716.

⁹⁸ Trial Judgement, para. 1716. See also Trial Judgement, paras 115-116, 1626, 1644-1654, 1704-1706.

⁹⁹ Trial Judgement, para. 1650.

¹⁰⁰ First Motion, Annex 1, p. 53.

¹⁰¹ Trial Judgement, paras 1704-1718.

potential impact of the tendered material must be assessed in the context of the evidence presented at trial.¹⁰² Miletić fails to substantiate how the Milovanović Notes, in light of the other evidence considered by the Trial Chamber, would have led it to a different conclusion. Consequently, the Appeals Chamber finds that, had the Milovanović Notes been admitted at trial, their admission would not have affected the Trial Chamber's conclusions in this regard.¹⁰³

37. Additionally, in light of the above with respect to the alleged impact on the Trial Chamber's conclusions, the Appeals Chamber declines to consider Miletić's submission challenging the Trial Chamber's reliance on Obradović's testimony,¹⁰⁴ as it is without bearing on the outcome of this decision.

38. Consequently, the Appeals Chamber will not admit the Milovanović Notes as additional evidence on appeal pursuant to Rule 115 of the Rules.

(b) 19 July 1995 Letter

(i) Availability at Trial

39. The Appeals Chamber recalls that the 19 July 1995 Letter was disclosed to Miletić on 20 April 2012¹⁰⁵ and that he received its English translation on 26 April 2012.¹⁰⁶ Additionally, the 19 July 1995 Letter was not discoverable through the exercise of due diligence since it emanates from the Permanent Mission of the Republic of Croatia to the UN Office in Geneva and had been classified by the Croatian administration as confidential.¹⁰⁷ The Appeals Chamber also notes that the Prosecution did not make any submission regarding the availability of the 19 July 1995 Letter at trial.¹⁰⁸ The Appeals Chamber is further satisfied that the information contained in the 19 July 1995 Letter, *i.e.* the statements of Bildt, was not discoverable through the exercise of due diligence. Thus, the Appeals Chamber is therefore satisfied that the 19 July 1995 Letter was unavailable at trial for the purpose of Rule 115 of the Rules. Consequently, the 19 July 1995 Letter will be admitted as additional evidence on appeal if the Appeals Chamber is satisfied that it is credible, relevant and *could* have had an impact on the verdict.¹⁰⁹

¹⁰² *Cf. supra*, para. 11.

¹⁰³ Trial Judgement, paras 199-200, 1626, 1637, 1646, 1650-1653, 1704-1705, 1716, 1729.

¹⁰⁴ See *supra*, para. 14.

¹⁰⁵ See Second Motion, Annex 2 (confidential). See also *supra*, para. 21.

¹⁰⁶ See Second Motion, para. 18.

¹⁰⁷ See Second Motion, para. 17, Annex 1.

¹⁰⁸ See generally, Second Response.

¹⁰⁹ See *supra*, para. 8.

(ii) Relevance, Credibility, and Impact on the Verdict

40. The Appeals Chamber considers that the 19 July 1995 Letter bears sufficient indicia of credibility, including dates and signatures. Consequently, the Appeals Chamber finds the 19 July 1995 Letter to be *prima facie* credible for the purposes of being considered admissible as additional evidence on appeal pursuant to Rule 115 of the Rules.¹¹⁰ The Appeals Chamber also considers that the 19 July 1995 Letter is relevant to the Trial Chamber's findings concerning events that transpired in Srebrenica in July 1995.

41. The 19 July 1995 Letter indicates that Bildt, while giving a speech to a meeting of the EU Council of Ministers, "placed more criticism and blame for the fall of Srebrenica on the offensive actions by the Army of Bosnia and Herzegovina and the HVO /Croatian Defence Council/ and stressed that the Bosnian Serbs were genuinely committed to a cessation of hostilities."¹¹¹ In the 19 July 1995 Letter, Neven Madey related the impression that Bildt's assessment of the situation and the steps taken were "considerably at odds with developments".¹¹² From the outset, the Appeals Chamber notes that the information contained in the 19 July 1995 Letter is a brief narrative of alleged opinions expressed by Bildt which, in evidentiary terms, would have only little weight, if any, attached to it.

42. With respect to the impact on the verdict, the Appeals Chamber is not convinced by Miletić's argument that the 19 July 1995 Letter 'undeniably' shows that the capture of Srebrenica was not planned in Directive 7.¹¹³ The Appeals Chamber notes that the Trial Chamber considered similar evidence at trial to that contained in the 19 July 1995 Letter, *i.e.* evidence that the Bosnian Serbs responded to the offensive actions of the ABiH.¹¹⁴ Moreover, the Appeals Chamber also recalls the Trial Chamber's finding that while Directive 7 contained legitimate military goals, it clearly denoted an illegal plan for an attack directed against the civilian population.¹¹⁵ The Trial Chamber also found, in relation to the military actions on the part of the Army of the Republika Srpska, that the full scale, indiscriminate and disproportionate attack levelled against the "United Nations protected civilian enclaves" was not part of legitimate military aim.¹¹⁶ The Appeals Chamber therefore observes that the Trial Chamber, despite hearing evidence on offensive military operations by the ABiH, was not convinced that the widespread and systematic attack against the

¹¹⁰ See *Gotovina* Decision of 2 October 2012, para. 26.

¹¹¹ Second Motion, Annex 1, p. 1.

¹¹² Second Motion, Annex 1, p. 1.

¹¹³ See Second Motion, para. 31.

¹¹⁴ Trial Judgement, paras 204, 209-211, 244-246, 666-669, 762, 774-775, 1486.

¹¹⁵ Trial Judgement, para. 762. See also Trial Judgement, paras 760-764.

¹¹⁶ Trial Judgement, para. 775.

civilian population in Žepa and Srebrenica could be attributed to such operations, as argued by Miletić.

43. Regarding Miletić's arguments that Directive 7 did not contain plans for an attack on the enclaves, but was limited to separating the enclaves,¹¹⁷ the Appeals Chamber is of the view that the 19 July 1995 Letter does not provide any information on this issue. In light of the Trial Chamber's consideration of evidence submitted at trial and its conclusion that Directive 7 "clearly denotes at the same time an illegal plan for an attack directed against a civilian population taking the form of measures aimed at forcing the population of Srebrenica and Žepa to leave the enclaves",¹¹⁸ Miletić fails to substantiate how the 19 July 1995 Letter could have affected the Trial Chamber's conclusion in this respect.

44. Further, the Trial Chamber's findings noted above were made on the basis of numerous pieces of evidence presented at trial,¹¹⁹ none of which are directly contradicted by the contents of the 19 July 1995 Letter. Consequently, had the 19 July 1995 Letter been admitted at trial, it could not have affected the Trial Chamber's conclusions or impacted the verdict.

45. Additionally, in light of the above with respect to the alleged impact on the Trial Chamber's conclusions, the Appeals Chamber declines to consider Miletić's submissions on the Prosecution's alleged acknowledgement of the 19 July 1995 Letter as being likely to exonerate him.¹²⁰ The Appeals Chamber is of the view that the submissions are without bearing on the outcome of this decision.

46. Consequently, the Appeals Chamber will not admit it as additional evidence on appeal pursuant to Rule 115 of the Rules.

47. Finally, the Appeals Chamber emphasises that its 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.

IV. DISPOSITION

48. In light of the foregoing, the Appeals Chamber **DISMISSES** the First Motion and the Second Motion.

¹¹⁷ See Second Motion, para. 33.

¹¹⁸ Trial Judgement, para. 762. See also Trial Judgement, paras 760-767.

¹¹⁹ Trial Judgement, paras 760, 770-773 and references cited therein.

¹²⁰ See *supra*, para. 22.

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



Judge Patrick Robinson
Presiding

Dated this fifteenth day of April 2013,
At The Hague,
The Netherlands.

[Seal of the Tribunal]