



International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No. IT-98-29-A Date: 30 June 2005 Original: English
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IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision: 30 June 2005

PROSECUTOR

v.

STANISLAV GALIĆ

**DECISION ON THE FIRST AND THIRD RULE 115 DEFENCE MOTIONS TO PRESENT
ADDITIONAL EVIDENCE BEFORE THE APPEALS CHAMBER**

The Office of the Prosecutor:

Mr. Norman Farrell

Counsel For The Accused:

Ms. Mara Pilipović

Mr. Stephane Piletta-Zanin

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal 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 two motions for the admission of additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules") filed by Stanislav Galić ("Appellant") on 11 February 2005 ("First Rule 115 Motion")¹ and on 20 January 2005 ("Third Rule 115 Motion") respectively.²

2. On 5 December 2003, Trial Chamber I, by a majority,³ convicted the Appellant of crimes against humanity and of violations of the laws or customs of war pursuant to Articles 5 and 3 of the Statute, respectively.⁴ He was sentenced to a single sentence of twenty years' imprisonment.⁵ Both the Appellant and the Prosecution subsequently filed an appeal against the Trial Judgement⁶ and, for this purpose, the Appellant seeks the admission of additional evidence.

3. The Appeals Chamber is currently seised of the First Rule 115 Motion and the Third Rule 115 Motion, the Second Rule 115 Motion having been disposed of in a decision filed on 22 March 2005,⁷ in which the Appellant's request for admission of additional evidence was denied.

(i) FIRST RULE 115 MOTION

4. On 18 June 2004, the Appellant filed confidentially a motion pursuant to Rule 115.⁸ Finding that the motion constituted an incomplete and deficient filing in that it did not comply with the provisions of Practice Direction IT/201 on Formal Requirements for Appeals from Judgement,⁹ the Pre-Appeal Judge¹⁰ invited the Appellant to re-file the motion in accordance with these provisions and to include the full official translations from the Registry of the documents attached to the motion.¹¹ On 11 February 2005, the Appellant re-filed this motion, which thus became the First

¹ Defence Motion to Present Before the Appeals Chamber Additional Evidence (Confidential), 11 February 2005.

² Defence Motion to Present Before the Appeals Chamber Additional Evidence, 20 January 2005.

³ Judge Alphons Orié and Judge Amin El Mahdi constituted the majority, with Judge Nieto-Navia partially dissenting. The views of the majority will hereinafter be referred to as the "Trial Chamber".

⁴ *Prosecutor v Stanislav Galić*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003 ("Trial Judgement"), para. 769.

⁵ Trial Judgement, para. 769.

⁶ On 18 December 2003, the Prosecution filed the "Prosecution's Notice of Appeal". On 4 May 2004 the Appellant filed his "Notice of Appeal".

⁷ Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, 22 March 2005.

⁸ Defence Motion to Present Before the Appeals Chamber Additional Evidences (Confidential), 18 June 2004.

⁹ Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002 ("Practice Direction IT/201").

¹⁰ Order Assigning Judges to a Case Before the Appeals Chamber and Designating a Pre-Appeal Judge, 18 December 2003, designating Judge Florence Ndepele Mwachande Mumba as Pre-Appeal Judge.

¹¹ Order on Appellant's Confidential Motion to Present Additional Evidence Before the Appeals Chamber Under Rule 115, 2 February 2005 ("Order on Additional Evidence").

Rule 115 Motion, together with the complete official translations from the Registry of the said documents. Pursuant to a decision granting the Prosecution's request for an extension of time and page limits,¹² the Prosecution filed its response on 28 February 2005,¹³ and the Appellant filed his reply on 4 March 2005.¹⁴

5. In the First Rule 115 Motion, the Appellant requests the admission as additional evidence on appeal of 14 documents, accounts of 3 proposed additional witnesses and parts of the English transcripts of 4 witnesses who testified in the case of *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T ("*Milošević Trial*"). The Prosecution opposes this request and argues that the First Rule 115 Motion should be dismissed.

6. With regards to the question of whether the First Rule 115 Motion was validly filed, Rule 115 establishes that an application for the admission of additional evidence on appeal shall be "filed with the Registrar not later than seventy-five days from the date of the [trial] judgement unless good cause is shown for further delay". The practice in this case is that those seventy-five days are calculated from 7 April 2004 as the date that the French translation of the Trial Judgement was filed.¹⁵ The First Rule 115 Motion is accordingly validly filed being the re-filed version of that of 18 June 2004, which was filed on time.

(ii) THIRD RULE 115 MOTION

7. On 20 January 2005, the Appellant filed the Third Rule 115 Motion. Following a request by the Prosecution,¹⁶ on 7 February 2005, the Pre-Appeal Judge ordered the Appellant to request from the Registry of the Tribunal official translations, into English, of all the documents in Bosnian/Croatian/Serbian ("BCS") attached to the Third Rule 115 Motion and to file these official translations with the Registry.¹⁷ The Appellant did so on 10 March 2005.¹⁸

¹² Decision on Prosecution's Requests for Extensions of Time and of Page Limit for the Response, 21 February 2005.

¹³ Prosecution Response to Defence Re-Filed First Rule 115 Motion, 28 February 2005 ("Response to First Rule 115 Motion").

¹⁴ Defence Reply to Prosecution's (*sic*) Response, 4 March 2005 ("Reply Supporting First Rule 115 Motion"). The Appeals Chamber will only consider those arguments that do not repeat the arguments in the First Rule 115 Motion.

¹⁵ See Decision on Request for Extension of Time to File Notice of Appeal, 22 December 2003 ("Decision on Request for Extension of Time"). See also Order on Additional Evidence, p. 3. See also Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, 22 March 2005, para. 4.

¹⁶ Prosecution Request for Extension of Time and for Order Requiring Official Translations of Documents Attached to Defence Additional Evidence Motion, 26 January 2005. On 31 January 2005, the Appellant filed the "Defence Response on Prosecution Request for Extension of Time and for Order Requiring Official Translations of Documents Attached to the Defence Additional Evidence Motion", opposing the request.

¹⁷ Decision on Prosecution's Request for Extension of Time and for an Order Requiring Official Translations of Documents Attached to the Defence Third Motion for Additional Evidence, 7 February 2005.

¹⁸ Delivery of Translated Documents According to the (*sic*) Decision of the Pre-Appeal Judge dated 7 February 2005, 10 March 2005.

8. On 14 March 2005, the Prosecution filed a request for an extension of page limit to respond to the Third Rule 115 Motion.¹⁹ The Pre-Appeal Judge, in a decision rendered on 16 March 2005, denied the request.²⁰ The Prosecution filed its response to the Third Rule 115 Motion on 21 March 2005²¹ and the Appellant filed his reply on 29 March 2005.²² Considering that 25 and 28 March were holidays, the Reply Supporting Third Rule 115 Motion was validly filed within the four day time limit for filing a reply.²³

9. On 26 April 2005 the Prosecution filed, partly confidentially, a request seeking leave to file a further response to the replies filed by the Appellant supporting the Third Rule 115 Motion and a subsequent motion.²⁴ In a consolidated response,²⁵ attached to the Request for Leave,²⁶ the Prosecution argues that the Appellant raises new arguments in his replies to its responses supporting the Third Rule 115 Motion and the Fourth Rule 115 Motion.²⁷ On 28 April 2005 the Appellant filed a response²⁸ opposing the Prosecution's Request for Leave. Given the Appeals Chamber's decision on the merits contained hereunder, the Appeals Chamber does not find it necessary to address the matters raised in the Request for Leave and Consolidated Response insofar as they relate to the Third Rule 115 Motion. This is without prejudice to the issues raised therein relating to the Fourth Rule 115 Motion, which will be considered in the decision relating to that motion.

¹⁹ Request for Extension of Page Limit for the Prosecution Response to Galić's Third Rule 115 Motion, 14 March 2005.

²⁰ Decision on Request for Extension of Page Limit for the Prosecution's Response to Galić's Third Rule 115 Motion, 16 March 2005.

²¹ Prosecution's Response to Galić's Third Rule 115 Motion, 21 March 2005 ("Response to Third Rule 115 Motion").

²² Defence Reply to Prosecution's Response dated 21 March 2005, 29 March 2005 ("Reply Supporting Third Rule 115 Motion"). The Appeals Chamber will only address those arguments that do not repeat the arguments in the Third Rule 115 Motion.

²³ This is in accordance with the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal IT/155/Rev. 2, 21 February 2005, para. 15 as read with Rule 126(B) the Rules, which provides that in cases where the last day of the time limit prescribed by a Rule or directed by a Chamber for filing falls upon a day when the Registry of the Tribunal does not accept documents for filing, it shall be considered as falling on the first day thereafter when the Registry does accept documents for filing.

²⁴ Prosecution's Request for Leave to File a Consolidated Further Response to Defence Replies Concerning Third and Fourth Rule 115 Motions, 26 April 2005 ("Request for Leave"). This is in relation to the Third Rule 115 Motion and to the Defence Motion to Present before the Appeals Chamber Additional Evidence (Confidential), 18 March 2005 ("Fourth Rule 115 Motion").

²⁵ Prosecution's Consolidated Further Response to Defence Replies Concerning Galić's Third and Fourth Rule 115 Motions, 26 April 2005 ("Consolidated Response").

²⁶ See Confidential Annex A.

²⁷ Request for Leave, paras 1, 3 and 5; Consolidated Response, para. 1. This is with reference to arguments found in the Reply Supporting Third Rule 115 Motion, paras 4 and 5 where, in reply to the Prosecution's arguments that the Defence had failed to demonstrate that the documents were unavailable, the Appellant states that during personal contact with the Ministry of Interior, counsel was informed that they had no documents or any other evidence regarding actions of SRK members and the ABiH, and further that the Defence had no knowledge that such documents existed in the Ministry of Interior since they are strictly confidential documents.

²⁸ Defence Reply to Prosecution's Request for Leave to File Consolidated Further Response to Defence Replies Concerning Third and Fourth Rule 115 Motions, 28 April 2005 ("Response to Request for Leave"). The Appellant argues that the Prosecution's submissions are unfounded because the Appeals Chamber has no legal basis to grant the Prosecution's request and further because the Appellant did not make any new request in the Reply Supporting Third Rule 115 Motion. It argues that in any case, the Consolidated Response was filed out of time since it was filed more than a month after the time prescribed in the Practice Direction. See Response to Request for Leave, paras 7, 8, 10-12.

10. In the Third Rule 115 Motion, the Appellant seeks the admission of 14 documents from the Ministry of Interior of Republika Srpska, and parts of the English transcripts of 2 witnesses who testified in the *Milošević* Trial.²⁹ The Prosecution opposes the Third Rule 115 Motion and submits that it should be dismissed.

II. APPLICABLE LAW

11. The admission of additional evidence is regulated under Rule 115 of the Rules, which provides as follows:

Rule 115

Additional Evidence

- (A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.
- (B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.
- (C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.
- (D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

12. Rule 115 concerns the admission of evidence on appeal in addition to evidence already admitted in respect of a particular fact or issue during trial proceedings.³⁰ In order to be admissible pursuant to Rule 115, the evidence put forward must satisfy a number of requirements. These requirements vary depending on the availability of the evidence at trial.

²⁹ The Appellant also initially sought, in his Third Rule 115 Motion, the admission of a newspaper excerpt, but has since withdrawn this submission: see Fourth Rule 115 Motion, para. 6; Third Rule 115 Motion, para. 11. See also *infra* para. 117.

³⁰ *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, 26 February 2001 (Confidential) ("*Kupreškić* Rule 115 Decision"), para.12.

13. First, the applicant must demonstrate that the proffered evidence was neither available to him at trial in any form³¹ nor discoverable through the exercise of due diligence.³² The applicant's duty to act with reasonable diligence includes making "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber."³³ Counsel must therefore bring any difficulties in relation to obtaining evidence, including those arising from intimidation or inability to locate witnesses, to the attention of the Trial Chamber.³⁴ The party must also seek relief from the Trial Chamber to compel an uncooperative prospective witness to cooperate.³⁵ This obligation to report to the Trial Chamber is intended not only as a step in exercising due diligence, but as a means of self-protection, in that a contemporaneous record then exists that the cooperation of the prospective witness had not been obtained.³⁶

Admissibility if the evidence was not available at trial

14. Where evidence was not available at trial, the proponent of the evidence must show that the evidence is both relevant to a material issue and credible, that is, reasonably capable of belief or reliance,³⁷ and that it *could* have had an impact on the verdict. In other words, the evidence must be such that, in the case of a request by a defendant, when considered in the context of the evidence given at trial, it could show that the conviction was unsafe.³⁸ The party seeking to have additional evidence admitted bears the burden of specifying, with clarity, the impact the proposed evidence could have had upon the Trial Chamber's judgement.³⁹

Admissibility if the evidence was available at trial

15. If the evidence was available at trial, it may still be admissible on appeal if the applicant can meet the burden of establishing that exclusion of the evidence would lead to a miscarriage of

³¹ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("Krstić Subpoenas Decision"), para. 4; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003 ("Krstić Rule 115 Decision"), p. 3.

³² *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of Time Limits and Admission of Additional Evidence, 16 October 1998 ("Tadić Rule 115 Decision"), paras 35-45; *Prosecutor v. Zora Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("Kupreškić Appeal Judgement"), para. 50; *Krstić Rule 115 Decision*, p. 3.

³³ *Tadić Rule 115 Decision*, para. 47; *Krstić Rule 115 Decision*, p. 3; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, "Decision on Motion to Admit Additional Evidence ("Nikolić Rule 115 Decision"), 9 December 2004, para. 21.

³⁴ *Tadić Rule 115 Decision*, para. 40; *Kupreškić Appeal Judgement*, para. 50; *Krstić Rule 115 Decision*, p. 3; *Nikolić Rule 115 Decision*, para. 21.

³⁵ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Reasons for the Decisions on Applications for Admission of Additional Evidence on Appeal, 6 April 2004 (Confidential) ("Krstić Reasons Decision"), para. 10; *Krstić Rule 115 Decision*, p. 3.

³⁶ *Krstić Subpoenas Decision*, para. 14; *Krstić Rule 115 Decision*, p. 3.

³⁷ *Krstić Rule 115 Decision*, p. 3; *Kupreškić Appeal Judgement*, para. 52.

³⁸ *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 November 2000, p. 3; *Kupreškić Appeal Judgement*, paras 54 and 68; *Krstić Rule 115 Decision*, p. 3.

justice, in that if it had been available at the trial, it *would* have affected the verdict.⁴⁰ In the *Krstić* case, the Appeals Chamber emphasised that “this heightened standard seeks to ensure the finality of judgements and the application of maximum effort by counsel at trial to obtain and present the relevant evidence,” while at the same time, it does not “permit a factually erroneous conviction to stand, thereby safeguarding an equally important interest of accuracy in judgements.”⁴¹

16. Whether the evidence was available at trial or not, the Appeals Chamber has repeatedly recognised that the evidence shall not be assessed in isolation, but also in the context of the evidence given at the trial⁴² and of that which was admitted on appeal.⁴³

III. SUBMISSIONS OF THE PARTIES AND DISCUSSION

FIRST RULE 115 MOTION

DOCUMENTS

17. In Annex II to the First Rule 115 Motion, the Appellant presents 14 documents. Concerning the availability of these documents, he argues that the investigators for Counsel for Stanislav Galić (“Defence”) put tremendous efforts into discovering and collecting documents from the Sarajevo Romanija Corps (“SRK”) archives during the pre-trial phase, but that many of the documents from the archives were lost after they were disbanded because the archives of the SRK Corps Command were moved many times.⁴⁴ He maintains that his Defence was aware that the documents corresponding to the Brigade and Battalion Commands were missing.⁴⁵ The Appellant refers to the evidence of Witness DP 35,⁴⁶ together with a letter from General Manojlo Milovanović, VRS Minister of Defence, to the Prosecutor, in which he confirms that the SRK archives were lost.⁴⁷ The Appellant states that, on 30 April 2004, days after the receipt of the French version of the Trial Judgement, the Defence received several documents from the Army of Republika Srpska (“VRS”),

³⁹ *Kupreškić* Appeal Judgement, para. 69.

⁴⁰ *Krstić* Rule 115 Decision, p. 4; *Krstić* Subpoenas Decision para. 16.

⁴¹ *Krstić* Reasons Decision, para. 12.

⁴² *Krstić* Rule 115 Decision, p. 4; *Kupreškić* Rule 115 Decision, para. 12; *Kupreškić* Appeal Judgement, paras 66 and 75; *Krstić* Reasons Decision, para. 13; *Nikolić* Rule 115 Decision, para. 25; *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Decision on Application for Admission for Additional Evidence (“*Vasiljević* Rule 115 Decision”), 21 October 2003, p. 3.

⁴³ *Blaškić* Decision on Evidence, p. 3; *Krstić* Rule 115 Decision, p. 4.

⁴⁴ First Rule 115 Motion, para. 12; *see also* paras 13 and 14.

⁴⁵ First Rule 115 Motion, para. 13.

⁴⁶ *See* First Rule 115 Motion, fn. 2, where the Appellant refers to Witness DP 35, T.17608-17609 and 17678.

⁴⁷ First Rule 115 Motion, para. 17.

Headquarters that were not available during trial.⁴⁸ In support of this contention, the Appellant has filed with the First Rule 115 Motion a letter from the VRS Headquarters to his Defence team.⁴⁹

18. In response, the Prosecution submits that the Appellant has failed to comply with the requirements of Rule 115 and Practice Direction IT/201.⁵⁰ The Prosecution submits that the Appellant's submissions in relation to the documents that he seeks to have admitted as evidence on appeal are generalised and often confusing, and therefore not sufficient to show why this evidence was not available to him at trial.⁵¹ It also argues that the Appellant does not demonstrate why, if the evidence is found to have been available at trial, its exclusion would result in a miscarriage of justice.⁵²

19. The Prosecution argues that Witness DP 35's evidence does not support the Appellant's assertion that the Brigade and Battalion documentation of the SRK did not reach the SRK archives and that the archives of the Brigade and Battalion Commands were moved more times, so that many documents of these archives were apparently lost.⁵³ According to the Prosecution, Witness DP 35 attests that he personally did not know where the archives had gone after he last saw them during the war.⁵⁴ The Prosecution also argues that the letter referred to by the Appellant, allegedly from General Milovanović, is not in its correspondence files from trial, and if the Appellant wishes to rely on such a letter, he should file it before the Appeals Chamber.⁵⁵

20. The Prosecution also argues that the Appellant should have presented evidence in support of his claim of unavailability,⁵⁶ together with indications of what steps were taken by the Appellant to gain access to these or similar documents.⁵⁷ It further points out that this evidence, generally speaking, should be first hand knowledge, the source must be identified and the contents of the explanation must be such that they may be verified by the opposing party if necessary.⁵⁸ Otherwise, the Appeals Chamber would be unable to make an assessment of whether due diligence was exercised by counsel and with what result.⁵⁹ The Prosecution submits that the Appellant has not stated what arrangements were in place at trial to obtain such material or how the documents

⁴⁸ First Rule 115 Motion, para. 15.

⁴⁹ First Rule 115 Motion, p. 16. This letter is signed by General Major Stamenko Novaković, under the heading Chief Deputy, and dated 20 April 2004.

⁵⁰ Practice Direction IT/201, para. 11; Response to First Rule 115 Motion, para. 18.

⁵¹ Response to First Rule 115 Motion, paras 19 and 22.

⁵² Response to First Rule 115 Motion, para. 20.

⁵³ Response to First Rule 115 Motion, para. 25.

⁵⁴ Response to First Rule 115 Motion, para. 25.

⁵⁵ Response to First Rule 115 Motion, paras 26, 27 and 34.

⁵⁶ Response to First Rule 115 Motion, paras 29, 30 and 32.

⁵⁷ Response to First Rule 115 Motion, paras 32, 33 and 35.

⁵⁸ Response to First Rule 115 Motion, para. 31.

⁵⁹ Response to First Rule 115 Motion, para. 32.

came to surface only now.⁶⁰ Lastly, the Prosecution argues that Document 14 was in the possession of the Defence during trial and therefore the claim that it was unavailable must fail.⁶¹

21. In reply,⁶² the Appellant argues that he did not find it necessary to attach the letter from General Milovanović, indicating that the SRK archives were lost, because it was addressed to the Prosecution and that is sufficient basis for the Prosecution itself to be ordered by the Appeals Chamber to present it.⁶³ He continues that the Defence was informed that these 14 documents were unattainable because when they asked to be allowed to inspect the SRK archives, of which the 14 documents at issue were a part, they were orally informed that the archives were lost.⁶⁴ The Appellant contends that the Trial Chamber and Prosecution were also informed of this on several occasions.⁶⁵ The Appellant also points out that at trial, photocopies of all documents from the SRK archives that were subsequently recovered by the Defence in various locations were submitted to the Prosecution.⁶⁶ As such, the Appellant argues that the only reason the Defence did not submit the 14 documents attached to his First Rule 115 Motion at trial is because they were only made available to him after trial.⁶⁷ Finally, the Appellant notes that the Defence team at trial “showed considerable efforts to obtain documentation which was in great amount presented and submitted to the Prosecution” and a large amount of that documentation was admitted into evidence.⁶⁸ The Appellant claims that the Prosecution even admitted to the Defence’s significant effort in this regard.⁶⁹ Consequently, the Appellant argues that the Prosecution’s argument that he failed to exercise due diligence or explain what steps he took to obtain the 14 documents at trial, is unfounded.⁷⁰

22. The Appeals Chamber agrees with the Prosecution’s submission that the Appellant has failed to indicate with sufficient detail and clarity that any of the 14 documents, or the information contained therein, was unavailable in spite of the exercise of due diligence. The Appeals Chamber notes that the Appellant has attached the letter from the VRS Headquarters indicating the date of receipt of the documents. Concerning Witness DP 35’s testimony, the relevant portion indicates that the SRK archival material was moved, but that the witness does not know what happened to it

⁶⁰ Response to First Rule 115 Motion, para. 33

⁶¹ Response to First Rule 115 Motion, para. 36.

⁶² The Appeals Chamber notes that the arguments in the Reply Supporting Third Rule 115 Motion concerning unavailability are unclear and has failed to understand his submissions. *See* Reply Supporting First Rule 115 Motion, paras 1-11.

⁶³ Reply Supporting First Rule 115 Motion, paras 2 and 10. The Appeals Chamber is compelled to point out that it struggled to understand the language, logic and arguments in these paragraphs.

⁶⁴ Reply Supporting First Rule 115 Motion, para. 2.

⁶⁵ Reply Supporting First Rule 115 Motion, para. 2.

⁶⁶ Reply Supporting First Rule 115 Motion, para. 6.

⁶⁷ Reply Supporting First Rule 115 Motion, para. 6.

⁶⁸ Reply Supporting First Rule 115 Motion, para. 4.

⁶⁹ Reply Supporting First Rule 115 Motion, para. 5.

thereafter.⁷¹ The Appeals Chamber notes that despite the Appellant's assertion that the Defence was aware that the Brigade and Battalion Commands' documents were missing, the Appellant has not adduced evidence detailing what efforts were made to obtain and present these documents or the information therein during trial to establish the exercise of due diligence. The Appeals Chamber further notes that no evidence was brought to the attention of the Appeals Chamber indicating that the Defence experienced difficulty during trial in obtaining these 14 documents, or the information therein, nor was there any indication that the Defence brought these difficulties to the attention of the Trial Chamber. The Appellant has not filed the letter from General Manojlo Milovanović, therefore the Appeals Chamber is not in a position to consider it, and finds that the Appellant has failed to demonstrate that Documents 1 to 14 were unavailable at trial.

23. Having determined that the Appellant has failed to so demonstrate, the question now is whether this proposed evidence is such that, had it been presented at trial, it would have affected the Trial Chamber's verdict. The Appeals Chamber will now proceed to consider each of the documents in turn under this heightened standard.

DOCUMENT 1

24. Document 1 is a letter from Captain Patrick Henneberry, an officer with the United Nations Protection Force ("UNPROFOR") from July 1992 to February 1993,⁷² addressed to the Headquarter Chief of the SRK in Lukavica and dated 8 February 1993. In this letter, Captain Henneberry raises issues of concern to both the Appellant and UNPROFOR, which had previously been discussed with the Appellant. These include a reminder to investigate a shelling incident and the theft of bullet-proof vests, and requests that the information be given to Captain Henneberry's successor. He also raises concerns about UNPROFOR allegedly providing coordinates of Serb positions to Muslims, and discusses the issue of a liaison officer being on duty at the airport during the night.

25. The Appellant states that Document 1 relates to his 15th and 18th Grounds of Appeal,⁷³ which concern alleged errors in the evaluation of evidence and factual findings and in determining the criminal responsibility of the Appellant. He argues that Document 1 demonstrates that there was a good relationship between the Appellant and UNPROFOR;⁷⁴ that this positive relationship discredits the testimony of Witness Henneberry who stated that the Appellant's goal was to destroy

⁷⁰ Reply Supporting First Rule 115 Motion, paras 7 and 9.

⁷¹ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Witness DP 35, T. 17608, 17609 and 17678 (Private session).

⁷² Witness Henneberry appeared as a Prosecution witness during trial: see Trial Judgement, paras 560, 569 and 745.

⁷³ Although the Appellant lists the grounds to which the proposed additional evidence relates, he fails to make any submissions as to how specifically each item could or would affect the Trial Chamber's verdict.

⁷⁴ First Rule 115 Motion, para. 23.

the city of Sarajevo or expel the Muslims from it;⁷⁵ and that the Appellant always undertook the necessary actions to investigate incidents he was informed of by UNPROFOR.⁷⁶

26. The Prosecution responds that although the Appellant infers that Witness Henneberry's credibility is thereby damaged, the Appellant does not make any submissions as to why the character of the Appellant's relationship with the witness could not have been put to the witness during cross-examination. The Prosecution also states that the letter was not addressed to the Appellant personally but to the Corps Command, and that it does not follow, as a matter of logic, that the witness could not have maintained a cordial relationship with the Appellant in these circumstances, at least for the sake of himself and his fellow United Nations Military Observers ("UNMOs").⁷⁷

27. The Prosecution further argues that the letter only suggests that the Appellant was prepared to investigate one incident in which a United Nations ("UN") facility, being an observation post operated by UNMOs, had been shelled by Serb forces, not that he was prepared to investigate instances of civilians being targeted.⁷⁸ In addition, the Prosecution argues that there was evidence at trial of the Appellant's preparedness to investigate instances of UNPROFOR being targeted,⁷⁹ and there is other evidence that established that the Appellant did not investigate this particular incident.⁸⁰ The Prosecution concludes that, should the Appeals Chamber disagree and decide to admit the letter, since this is a matter that goes to the witness's credibility, the witness should be permitted to respond to the Appellant's allegation.⁸¹

28. The Appellant replies that the Prosecution's argument that the letter was not addressed directly to the Appellant but to the Chief of Staff of the SRK is unfounded, because a letter directed to the Chief of Staff, who was the Appellant's deputy, could also be regarded as an appeal to the Appellant.⁸² He also argues that the Prosecution is wrong and did not submit any evidence showing demands for investigations of attacks on civilians or evidence that such investigations were not

⁷⁵ First Rule 115 Motion, para. 23; *see also* Trial Judgement, para. 681.

⁷⁶ First Rule 115 Motion, para. 23.

⁷⁷ Response to First Rule 115 Motion, para. 39.

⁷⁸ Response to First Rule 115 Motion, para. 40.

⁷⁹ Response to First Rule 115 Motion, para. 40.

⁸⁰ The Prosecution refers to the evidence of Witness Lt. Col. James Cutler who was Witness Captain Henneberry's immediate superior. It submits that two letters written by him were tendered into evidence and attaches these letters to its Response in Annexes A and B. It is the Prosecution's submission that their content, together with Witness Lt. Col. James Cutler's evidence that he never received any response other than being orally informed that the matter was still under investigation, render Document 1 of no assistance to the Appellant in relation to his purported preparedness to investigate: *see* Response to First Rule 115 Motion, para. 41.

⁸¹ Response to First Rule 115 Motion, para. 43.

⁸² Reply Supporting First Rule 115 Motion, para. 14.

conducted. On the contrary, the Appellant submits that he offered evidence at trial of investigations being conducted.⁸³

29. The Appeals Chamber notes that, at trial, the Defence did not deny that the Appellant had the ability to prevent or punish the commission of the crimes, but argued that he did not have the need to do so because "SRK units did not take part in any illegal actions".⁸⁴ The Appeals Chamber considers that the Appellant's claim that he always investigated incidents of which he was informed by UNPROFOR is not supported by Document 1, as it suggests that the Appellant considered investigating *one* incident where a UN facility was shelled by Bosnian Serb forces. Furthermore, the Appeals Chamber also finds that evidence was adduced at trial indicating that the SRK did investigate and punish an incident involving an attack against UNPROFOR.⁸⁵ While Document 1 provides evidence of an additional incident that was investigated, similar evidence was already on record, and it in no way provides support for the Appellant's claim that *all* such incidents were investigated. Considering further that the Appellant was not convicted of crimes involving an attack on UNPROFOR members but on civilians,⁸⁶ the Appellant has not shown that Document 1 would have affected the verdict at trial.

30. The Appeals Chamber is not persuaded by the Appellant's argument that the cordial nature of Captain Henneberry's letter provides proof that the witness was not being truthful when he gave evidence of the Appellant's statement that his goal was to either destroy the city or expel the Muslims in Sarajevo. The Appeals Chamber fails to see how evidence that Captain Henneberry maintained a cordial relationship with the Appellant can be taken as directly inconsistent with Witness Henneberry's evidence at trial. This is even more so since Witness Henneberry was not the only witness that gave evidence of the Appellant's statement of his goal. The Trial Chamber also took into account the evidence of Witness Donough O'Keeffe that he protested to the Appellant against the indiscriminate targeting of civilians.⁸⁷ Consequently, the Appeals Chamber finds that the Trial Chamber's findings on Witness Henneberry's credibility could not have been affected if presented with Document 1 at trial. For these reasons, the Appeals Chamber finds that the exclusion of Document 1 would not lead to a miscarriage of justice.

⁸³ Reply Supporting First Rule 115 Motion, paras 15-17, referring to paras 40 and 41 of the Response to First Rule 115 Motion. The Appeals Chamber is compelled to point out that it struggled to understand the language, logic and arguments in these paragraphs.

⁸⁴ *Prosecutor v. Stanislav Galić*, Case No.: IT-98-29-PT, Pre Trial Brief of the Defence Pursuant to Rule 65 *ter* (F), 29 October 2001, para. 7.25 -7.27; *Prosecutor v. Stanislav Galić*, Case No.: IT-98-29-T, Defence's Final Trial Brief, 22 April 2003, para. 24.

⁸⁵ Trial Judgement, para. 716.

⁸⁶ Trial Judgement, para. 749.

⁸⁷ Trial Judgement, para. 745; Witness O'Keeffe, T. 9184-6. Witness O'Keeffe was the Senior UNMO in post in Sarajevo from March to June 1993.

DOCUMENT 2

31. Document 2 is a confidential report of the Igman Brigade Command to, *inter alia*, the SRK Command, dated 7 February 1993 and signed by Lieutenant Colonel Spasoje Čojić. The report outlines the actions of a group of Serbian women and their attempts to put pressure on UNPROFOR to apply the necessary measures to dissolve Muslim prisons and camps in the territory of the former BiH.

32. The Appellant submits that Document 2 relates to his 19th Ground of Appeal, paragraph (f), which alleges the conditions of commanding troops as a mitigating circumstance.⁸⁸ The Appellant argues that it shows the complex nature of his command responsibilities at the time as well as the difficulties he faced in maintaining a good relationship with UNPROFOR.⁸⁹ Therefore the Appellant submits that the Trial Chamber did not take into account all mitigating factors when deciding on the Appellant's sentence.⁹⁰

33. The Prosecution submits that Document 2 is irrelevant to the issues at trial, on the grounds that it does not relate at all to the conduct of any SRK forces towards civilians on the Muslim side of the Sarajevo theatre of conflict.⁹¹ With regard to mitigation, the Prosecution argues that it fails to see how the admission of this document and the circumstances referred to therein could be relevant to or have an impact on his sentence.⁹²

34. The Appeals Chamber is not persuaded by the Appellant's submission that the exclusion of Document 2 would lead to a miscarriage of justice. As indicated by the Appellant, it is intended to show the complexity of the circumstances faced by the Appellant while commanding during the period relevant to the indictment. The Appeals Chamber notes the Appellant's submission that there is already evidence on record from General Radinović, the Defence military expert, on this point.⁹³ General Radinović gave evidence that "[a] complex and vast zone of responsibility of the SRK in itself was a limiting factor in the chain of command."⁹⁴ Since the proposed evidence in Document 2 merely proffers information already considered by the Trial Chamber, the Appeals Chamber finds that it would not have resulted in a different verdict if it had been admitted at trial. Document 2 is therefore rejected.

⁸⁸ First Rule 115 Motion, para. 9.

⁸⁹ First Rule 115 Motion, para. 29.

⁹⁰ First Rule 115 Motion, para. 29. The Appellant repeats this argument in the Reply Supporting First Rule 115 Motion, para 18.

⁹¹ Response to First Rule 115 Motion, para. 45.

⁹² Response to First Rule 115 Motion, para. 46.

⁹³ Defence Appellant's Brief, 19 July 2004, ("Defence Appellant's Brief"), paras 566, 567, 569, and the accompanying footnotes.

DOCUMENTS 3, 4, 5 6, 7 AND 8

35. Document 3 is an Order from Lieutenant Colonel Spasoje Čojić from the Igman Brigade Command addressed to the "Command", dated 23 May 1993. It highlights criticisms voiced against the army of Republika Srpska by the Government of Republika Srpska relating to looting, smuggling, profiteering and other criminal activities, and forbids such activities. It also orders the discipline and punishment of those who participate in "Paramilitary", "Parapolice" and "Parapolitics". Document 4 is an Order from the Appellant to the SRK Brigade and Regiment Commands, dated 22 May 1993, requiring the reporting of enemy violations of a cease-fire previously ordered. Document 5 is an Order dated 17 February 1994, signed by Lieutenant Colonel Spasoje Čojić for the Commander, addressed to all Brigade Units. Document 5 is dated 17 February 1994 and addressed to all Brigade Units. It contains directions for the putting in place of measures to ensure combat readiness together with those that will ensure respect of the cease-fire and also deals with the treatment of violations of the cease-fire. It orders the non-opening of fire at the urban parts of Sarajevo.

36. Documents 6 and 7 are both addressed to the Commanders of the 1st to 4th Artillery Battalions, the 1st and 2nd Battalions, the Armoured Mechanised Company, the Intervention Company, and the Reconnaissance Platoon, and are both signed by Lieutenant Colonel Spasoje Čojić. Document 6, dated 15 May 1993, provides for the undisturbed passage of humanitarian aid and calls for the application of the Geneva Conventions and other regulations of international law in doing so. Document 7 is an Order dated 21 March 1993, and provides measures intended to curb the abusive consumption of ammunition. Document 8 is an Order dated 13 February 1994, signed by Lieutenant Colonel Spasoje Čojić and addressed to all Brigade Units. It directs that prisoners and civilians be respected and treated humanely and in accordance with the laws of war and the Geneva Conventions.

37. The Appellant submits that Documents 3, 4, 5, 6, 7 and 8 relate to his 18th Ground of Appeal,⁹⁵ regarding his criminal responsibility. The Appellant argues that from these documents, it can be seen that the Igman Brigade Command strictly abided by the Orders of the SRK Command "that fire should be opened only against select targets, targets should be selectively chosen, that weapons should be refit from automatic to semiautomatic fire, that only targets on a reasonable distance should be targeted, that passage should be provided as well as protection of sent equipment

⁹⁴ Expert Report of Radovan Radinović, Exhibit D1925, para. 307. See also Exhibit D1925, paras 33, 300 and 312 where he further discusses the complex nature of the circumstances.

⁹⁵ First Rule 115 Motion, para. 4.

and personnel that provides help to the civilian population”.⁹⁶ He also argues that these documents contain orders providing that the Geneva Conventions had to be applied and that any paramilitary, para-police, para-political activities were prohibited, as well as that offenders against such orders would be severely punished.⁹⁷ According to him, they also show, a strict division of military and local government obligations.⁹⁸

38. In addition, the Appellant argues that these documents show that he gave orders going down the SRK chain of command, which Orders entailed a prohibition of the intentional targeting of civilians and show that the Trial Chamber was wrong in finding that the Appellant undertook a campaign of sniper activities and shelling against the civilian population in Sarajevo with the intention of terrorising the population.⁹⁹ The Appellant further argues that it was on the basis of this error that the Trial Chamber wrongly concluded that the Appellant was guilty pursuant to Article 7(1) of the Statute.¹⁰⁰

39. The Prosecution argues that Document 3 was prompted by criticisms made at a session of the Assembly of Republika Srpska (“RS”) four days earlier.¹⁰¹ It argues that, according to the document, deputies complained that VRS forces were perpetrating crimes such as theft, black marketeering, profiteering and drunkenness on their side of the front line, thereby instilling fear in their own residents, and says that these criminal activities were of no relevance to the criminal behavior which was alleged in the indictment.¹⁰² As to the Order that paramilitary forces be eliminated, the Prosecution argues that it was both the Prosecution and Defence cases that the Appellant took steps to eliminate or subsume under his command such forces by mid-1993, which was accepted by the Trial Chamber.¹⁰³ The Prosecution submits that, therefore, this document neither satisfies the test of relevance under Rule 115 nor could it have had a decisive impact on the decision at trial.¹⁰⁴

40. With regards to Documents 4, 5 and 6, the Prosecution contends that there was voluminous evidence at trial of cease-fires being ordered and broken by both sides.¹⁰⁵ It further argues that the Trial Chamber concluded that the ordering of cease-fires from time to time and the relative diligence with which they were quickly obeyed by the Appellant’s forces demonstrated the degree

⁹⁶ First Rule 115 Motion, para. 24.

⁹⁷ First Rule 115 Motion, para. 24.

⁹⁸ First Rule 115 Motion, para. 24.

⁹⁹ First Rule 115 Motion, para. 24.

¹⁰⁰ First Rule 115 Motion, para. 24.

¹⁰¹ Response to First Rule 115 Motion, para. 49.

¹⁰² Response to First Rule 115 Motion, para. 49.

¹⁰³ Response to First Rule 115 Motion, para. 50, referring to paras 618, 655-656 of the Trial Judgement.

¹⁰⁴ Response to First Rule 115 Motion, paras 50 and 51.

of command and control which the Appellant exerted over his forces, and therefore, these Orders would not add to the evidence which was before the Trial Chamber.¹⁰⁶ The Prosecution argues that Document 5 is consistent with evidence already adduced at trial that a cease-fire was scrupulously observed after the Markale shelling incident in the immediate post-shelling period, but that, gradually, sniper fire increased and later, shelling resumed.¹⁰⁷ With regards to Document 6, it argues additionally that to the extent that Document 6 and other documents expressly or impliedly required SRK forces to comply with the laws of war, the Trial Chamber noted that many Defence witnesses, who were front-line infantry soldiers, frequently gave evidence that they received orders not to fire at civilians.¹⁰⁸ It also states that the Defence tendered into evidence documents purporting to be Orders by the Appellant himself not to target civilians and reminding his troops to comply with the Geneva Conventions,¹⁰⁹ therefore it is neither additional to evidence available to the Appellant at trial nor to evidence adduced at trial.¹¹⁰ The Prosecution concludes that the cumulative effect of additional evidence of this character could not be capable of impacting on the verdict, as the Trial Chamber concluded that, despite the presence of such Orders, the targeting of civilians remained unabated.¹¹¹

41. With regards to Document 7, the Prosecution argues that, to the extent that it forbade excessive and wasteful expenditure of ammunition, it is not relevant to the facts in issue at the trial. As far as the Appellant relies on it to suggest that fire be brought to bear only upon military objectives, the Prosecution reiterates that ample evidence of this type and nature was adduced at trial and fully evaluated by the Trial Chamber and so Document 7 is of no genuine novelty.¹¹²

42. With regards to Document 8, the Prosecution argues that since it primarily relates to the treatment of prisoners of war and civilians of Serbian ethnicity who came into the control of the Igman Brigade's soldiers,¹¹³ the Order is of no assistance to the Appellant because the fundamental issue of fact which was in dispute at trial was whether the Appellant, through his subordinates, had deliberately targeted civilians of all ethnicities on the enemy's side of the confrontation lines.¹¹⁴ It further argues that, to the extent that it is proffered to show that the SRK gave Orders to treat

¹⁰⁵ Response to First Rule 115 Motion, para. 54. The Prosecution also makes a number of references to Trial Judgement, paras 251, 255, 256, 287, 311, 362, 364, 562, 630, 635, 661, 683, 687 and 733-735.

¹⁰⁶ Response to First Rule 115 Motion, para. 54, referring to Trial Judgement, para. 635.

¹⁰⁷ Response to First Rule 115 Motion, para. 55. The Prosecution also refers to Trial Judgement, paras 562 and 734.

¹⁰⁸ Response to First Rule 115 Motion, para. 56, referring to Trial Judgement, para. 565.

¹⁰⁹ Response to First Rule 115 Motion, para. 56, referring to Defence Exhibit D1492 and Trial Judgement, paras 707-708, 717-719.

¹¹⁰ Response to First Rule 115 Motion, para. 56.

¹¹¹ Response to First Rule 115 Motion, para. 57, referring to the Trial Judgement, para. 717.

¹¹² Response to First Rule 115 Motion, para. 60.

¹¹³ Response to First Rule 115 Motion, para. 63.

¹¹⁴ Response to First Rule 115 Motion, para. 64.

civilians humanely and to comply with the Geneva Conventions, it is neither additional to that which was available to the Defence at trial nor to the evidence adduced at trial.¹¹⁵

43. The Appeals Chamber notes that the Trial Chamber recognised that there was evidence to the effect that the Appellant issued Orders to respect the Geneva Conventions of 1949,¹¹⁶ that he underscored the importance of respecting them,¹¹⁷ and, in addition, that he prohibited paramilitary groups.¹¹⁸ However, the Trial Chamber also found that it had been demonstrated that lack of proper instruction was clear¹¹⁹ since there were several witnesses who did not receive precise Orders to this effect.¹²⁰ The Appeals Chamber also notes that, during trial, a number of Defence witnesses gave evidence that no measures were taken to punish perpetrators of unlawful attacks against civilians.¹²¹ These included Witness DP 35, who testified that he was not aware of anyone at all being charged as a result of an investigation carried out within the SRK in the relevant period for unlawful behaviour resulting in the injury or death of civilians on the other side of the confrontation line.¹²² Considering that Documents 3, 4, 5, 6, 7 and 8 do not therefore add anything to evidence already before the Trial Chamber, the Appeals Chamber finds that the Appellant has failed to show that this proposed evidence would have had an impact on the verdict and that therefore its exclusion of this evidence would lead to a miscarriage of justice. The evidence proffered is therefore rejected.

DOCUMENT 9

44. Document 9 is a letter to the SRK Republic of Serbian Krajina Command, dated 29 August 1993, from Colonel Spasoje Čojić of the Igman Brigade listing weapons of foreign origin confiscated in combat operations.

¹¹⁵ Response to the First Rule 115 Motion, para. 64, referring to Trial Judgement, para. 707.

¹¹⁶ Trial Judgement, para. 708, referring to Exhibit D1492, an Order by the Appellant to his troops dated 15 September 1993. One of the items of the Order concerns a reminder to comply with the Geneva Conventions.

¹¹⁷ Trial Judgement, para. 605, referring to Witness DP 17, T. 16791-2; Witness DP 35, T. 17519-20; Radinović Report, Filing Page number 8023 (Order for the undisturbed passing of humanitarian aid, delivery, by General Galić, dated 15 May 1993).

¹¹⁸ See, for example, Trial Judgement, paras 655 and 656.

¹¹⁹ Trial Judgment, para. 709.

¹²⁰ See, for example, Trial Judgement, para. 710, which refers to the evidence of Witness DP 34, an SRK Brigade Commander, who did not recall receiving any Orders that gave him concerns about the legitimacy of the targets. In addition, Witness DP 35, an SRK Commander, and Witness AD, testified about their Orders to fire in an indiscriminate manner. See also Trial Judgement, para. 711, which refers to the evidence of Witness Francis Briquemont who believed that the lack of preventive measures was deliberate. He testified that the French Battalion drew up a map of sniping positions. Generals Mladić and Delić were informed about that situation, but nothing was done to stop such sniping activity.

¹²¹ Trial Judgement, paras 710, 712-714. Witness DP 34 testified that, during the indictment period, he was never instructed to conduct any type of investigation concerning the unlawful targeting by the SRK of Muslim civilians; Witness DP 10, an SRK Platoon Commander in Grbavica, testified similarly that during the period covered in the indictment, he was aware of no incidents in which any members of his company, his battalion, his brigade or his Corps were reported or disciplined for failing to follow an Order.

¹²² Trial Judgement, para. 712.

45. The Appellant argues that Document 9 relates to his 15th Ground of Appeal, paragraph E,¹²³ which concerns errors committed by the Trial Chamber in the evaluation of evidence including testimonies, and errors in factual findings.¹²⁴ The Appellant submits that Document 9 shows weapons confiscated during combat, which establishes that the ABiH was well-equipped and that during the war it was provided with weapons from the United States of America, Republic of South Africa, Korea and Afghanistan.¹²⁵ The Appellant adds that this shows that a war was ongoing in Sarajevo between equal arms since it is clear that the weapons in question were big caliber infantry weapons.¹²⁶ He submits that this contradicts all statements given by Prosecution witnesses that the ABiH soldiers were unarmed and that they had only light weaponry.¹²⁷

46. The Prosecution responds that it is not clear from the document whether the weaponry confiscated was that used by the armed forces opposed to the Appellant's forces.¹²⁸ It argues that the Appellant has not pointed to any evidence identifying the nature of the weapons mentioned in the document, so it is unclear whether they are properly described as being anything other than "light weaponry".¹²⁹ In particular a rifle, machine gun and 40mm weapon would appear to qualify as being light infantry weapons.¹³⁰ The Prosecution contends that it is not apparent what conclusions the Appellant seeks to draw from this report. If it is that the opposing forces possessed the type of weaponry that enabled them to perpetrate the offences with which the Appellant was charged, there was evidence to this effect at trial.¹³¹ The Prosecution further argues that, in any event, it was never its contention that the ABiH was either unarmed or had only light weaponry.¹³² Rather, it was that the ABiH was overwhelmingly out-gunned by the weaponry of the SRK, in particular by the SRK's heavy weapons such as tanks, howitzers, field artillery and mortars.¹³³

47. The Appeals Chamber notes that Document 9 does not state from whom the listed weapons were confiscated. Moreover, since the Appellant has failed to indicate the relevance of the proposed evidence for any of the Trial Chamber's findings, the Appeals Chamber finds that the evidence would not have had an impact on the verdict, and that the exclusion of Document 9 would not lead to a miscarriage of justice, and therefore it is rejected as additional evidence.

¹²³ First Rule 115 Motion, para. 8.

¹²⁴ Defence Appellant's Brief, pp. 56-66.

¹²⁵ First Rule 115 Motion, para. 28.

¹²⁶ First Rule 115 Motion, para. 28.

¹²⁷ First Rule 115 Motion, para. 28.

¹²⁸ Response to First Rule 115 Motion, para. 67.

¹²⁹ Response to First Rule 115 Motion, para. 67.

¹³⁰ Response to First Rule 115 Motion, para. 67.

¹³¹ Response to First Rule 115 Motion, para. 67.

DOCUMENT 10

48. Document 10 is signed by Colonel Ljuban Kosovac, is addressed to the SRK Command and dated 16 November 1993. It is the summary report on the operation of the SRK Command's Military Prosecutor's Office and Military Court for October 1993.

49. The Appellant submits that Document 10 relates to his 18th Ground of Appeal,¹³⁴ which concerns his criminal responsibility. The Appellant argues that Document 10 shows that it is the Military Prosecution which initiates criminal proceedings, and that in the period for which the report is presented, there were no charges of breaches of international law. He contends that this proves that the Appellant had no authority to prosecute perpetrators of crimes, as well as that there was no data on the filing of criminal charges and the initiating of proceedings regarding crimes violating international customs of war.¹³⁵ Therefore, he concludes, this evidence undermines the Trial Chamber's finding that the Appellant deliberately took no action against unlawful sniper activities and shelling.¹³⁶

50. The Prosecution responds that Document 10 does not constitute evidence that the Appellant was powerless to prosecute perpetrators of crimes. Rather, the first sentence of the report underscores that the Military Prosecution unit was attached to the SRK Command.¹³⁷ The Prosecution argues that the document demonstrates the ability of the SRK and the Appellant to prosecute SRK troops for criminal offences and notes a number of prosecutions in the relevant period, but none for war crimes.¹³⁸ Therefore, the Prosecution submits that this document is consistent with and does not add anything to evidence which was adduced at trial.¹³⁹ Furthermore, the Prosecution argues that the Defence position at trial had not been to argue that the Appellant lacked the ability to prevent or punish the commission of crimes, but rather that he had no need to do so, and that the Appellant does not provide any basis in the First Rule 115 Motion for reversing his position.¹⁴⁰ It is the Prosecution's position that this document does not meet the test for relevance under Rule 115 nor could it have a decisive impact on the decision at trial.¹⁴¹

51. The Appeals Chamber recalls that, during trial, the Defence did not dispute that the Appellant had the ability to prevent or punish commissions of crimes, but argued that he did not

¹³² Response to First Rule 115 Motion, para. 68.

¹³³ Response to First Rule 115 Motion, para. 68.

¹³⁴ First Rule 115 Motion, para. 7.

¹³⁵ First Rule 115 Motion, para. 27.

¹³⁶ First Rule 115 Motion, para. 27 referring to Trial Judgement, para. 742.

¹³⁷ Response to First Rule 115 Motion, para. 71.

¹³⁸ Response to First Rule 115 Motion, para. 71.

¹³⁹ Response to First Rule 115 Motion, para. 71, referring to Trial Judgement, paras 654-658 and 712-721.

¹⁴⁰ Response to First Rule 115 Motion, para. 72, referring to Trial Judgement, para. 654.

have the need to do so.¹⁴² In addition, and converse to the Appellant's submissions, the Appeals Chamber considers that Document 10 does not contradict the Trial Chamber's finding that no action was taken against unlawful sniper activities and shelling, but rather confirms that no such action was taken. It has already been established that various witnesses informed the Appellant of unlawful sniper activity and shelling,¹⁴³ but despite those reports, no efforts or attempts were made to gather data for the purposes of filing criminal charges and initiating proceedings. The Appeals Chamber finds that this proffered evidence would not have affected the verdict at trial, and therefore its exclusion would not lead to a miscarriage of justice.

DOCUMENTS 11, 12 AND 14

52. Document 11 is an Order from Major General Ratko Mladić from the Main Staff of the Serbian Republic of Bosnia-Herzegovina Army to the Commander of the SRK, dated 14 July 1992. It forbids troops from firing at UNPROFOR forces or buildings, from opening fire on Sarajevo town except: (1) from infantry weapons in self-defence; (2) from large caliber weapons exceptionally on clearly visible enemy positions where the enemy is firing; and (3) from artillery only with the prior approval of the Main Staff. It further states that any unauthorised fire will be regarded as criminal and legal measures will be adopted. Document 12 is a cease-fire Order signed by the Appellant, dated 29 March 1993 and addressed to the Commands of the SRK Brigades and Regiments, reiterating the observance of a previous cease-fire Order. Document 14 is an Order to the Commands of Brigades, Regiments and Independent Battalions of the SRK dated 16 June 1993¹⁴⁴ directing the observance of a cease-fire.

53. The Appellant submits that Documents 11, 12, and 14 represent Orders of the Main Staff of the VRS and the Command of the SRK, which prohibit the opening of any kind of fire on Sarajevo, dating back to 13 July 1992, which Orders were implemented by the Appellant from the moment he took over of the command until the end of his commanding over SRK forces.¹⁴⁵ Since the Order also states that fire should be opened only in self-defence by the soldiers, the Appellant argues that it shows the prohibition of disproportional response to provocations of the ABiH.¹⁴⁶ Therefore this proves that the Trial Chamber erred in finding that there existed a plan of carrying out a campaign

¹⁴¹ Response to First Rule 115 Motion, para. 73.

¹⁴² See, for example, Trial Judgement, para. 654.

¹⁴³ Trial Judgement, paras 503 and 681 together with accompanying footnotes.

¹⁴⁴ The name of the signatory on this document appears as "Deputy Commander, Colonel Dragan Nađetić".

¹⁴⁵ First Rule 115 Motion, para. 25.

¹⁴⁶ First Rule 115 Motion, para. 25.

of shelling and sniping against civilians in Sarajevo, that the Appellant carried out the plan, and that the Appellant ordered the crimes as found in the Trial Judgement.¹⁴⁷

54. With regards to Document 11, the Prosecution contends that it was not a blanket ban on firing into the city of Sarajevo, because the Order was qualified to exclude infantry weapons, fire in “self defence” and exceptional fire from large caliber weapons.¹⁴⁸ In addition, since the Order pre-dates the indictment period by two months, it is only relevant to the issue of whether the Appellant inherited a pre-existing campaign of sniping and shelling of civilians when he assumed command of the SRK in September 1992.¹⁴⁹ Since the Trial Chamber did not make any finding as to whether the campaign was pre-existing, a finding on this issue is thus irrelevant to the Trial Chamber’s determination of the Appellant’s guilt or otherwise for the offences charged.¹⁵⁰ The Prosecution argues that Document 12 would not affect the verdict as the Trial Chamber already dealt with the issue of cease-fires and found that, in spite of similar Orders, the cease-fires were ordered and broken by both sides,¹⁵¹ and that the targeting of civilians continued unabated.¹⁵² The Prosecution argues that Document 14 was tendered into evidence by the Defence during trial and is therefore inadmissible as evidence on appeal.¹⁵³

55. The Appeals Chamber finds that Document 14 was indeed tendered and admitted into evidence at trial, and it is therefore rejected.¹⁵⁴ A review of the Trial Judgement reveals that the Trial Chamber was satisfied that the Appellant called occasionally for the decrease of fire against the civilian population of Sarajevo, and that when prompted by outside action, he also, at other times, intended to target, by direct or indiscriminate fire, civilians and the civilian population in the city of Sarajevo, with the goal of spreading terror within the civilian population of Sarajevo.¹⁵⁵ Therefore, the Appeals Chamber finds that Document 11 is consistent with the Trial Chamber’s findings and does not add anything to them.

¹⁴⁷ First Rule 115 Motion, para 25, referring to Trial Judgement, para. 749.

¹⁴⁸ Response to First Rule 115 Motion, para. 75.

¹⁴⁹ Response to First Rule 115 Motion, para. 76.

¹⁵⁰ Response to First Rule 115 Motion, para. 76.

¹⁵¹ Response to First Rule 115 Motion, para. 54.

¹⁵² Response to First Rule 115 Motion, para. 57.

¹⁵³ Response to First Rule 115 Motion, paras 86 and 87. This does not appear to be disputed by the Appellant who contends that “[a]ll these documents analyzed by the Prosecution in para[s] 37-82 of its Response obviously represent documents except number 14, which was submitted with Request of Appellant in other form in order to show that orders were transmitted by various means and those evidence and that came to subordinated units”: Reply Supporting First Rule 115 Motion, para. 12.

¹⁵⁴ The Appeals Chamber has confirmed that Document 14 was admitted in evidence at trial and marked as Defence Exhibit D1925.

¹⁵⁵ Trial Judgement, para. 745.

56. The Appeals Chamber also finds that these documents entailing Orders to observe cease-fires are consistent with evidence adduced at trial.¹⁵⁶ The Trial Chamber found that the trial record was replete with evidence from a number of military and international personnel who testified to the reduction of fire after cease-fire agreements or after complaints were lodged.¹⁵⁷ These documents do not contain any novel information that goes beyond that adduced at trial, therefore, the Appeals Chamber finds that they do not meet the requirements of Rule 115. Documents 11, 12 and 14 are therefore rejected.

DOCUMENT 13

57. Document 13 is a letter from Colonel Dragan Marčetić, Deputy Commander of the SRK, addressed to the Sarajevo Airport Commander dated 20 March 1993. The letter concerns the investigation into the use of anti-aircraft weaponry against a UN airplane.

58. The Appellant argues that this document shows that the SRK Command always carried out investigations regarding incidents when it had sufficient information on these incidents and therefore proves that the Trial Chamber erred in finding that the Appellant did not take actions to prevent illegal engaging since he always carried out investigations when he received complete information.¹⁵⁸

59. The Prosecution contends that both the Defence and the Prosecution adduced evidence at trial to the effect that the Appellant was willing on occasion to investigate instances of attacks by his subordinates on UN facilities.¹⁵⁹ It further argues that Document 13 does not introduce fresh evidence but concerns behaviour which was already the subject of evidence in the trial, and which was not challenged by either party.¹⁶⁰ This is because, the Prosecution submits, the Defence position at trial was not to contest the Prosecution's position that there were no such investigations,

¹⁵⁶ See Trial Judgement, para. 734. At trial, several witnesses testified to this, *see*, for example, the evidence of Witness General Rose, Witness Van Lynden Fraser and Witness Y in relation to the speed of implementation of cease-fire agreements. Witness Van Lynden Fraser testified how, in March 1994, after the Total Exclusion Zone ("TEZ") agreement was signed, it became suddenly safe to walk across Marin Dvor Square, one of the most notorious "sniping" places in Sarajevo. To Witness General Rose, the speed of implementation of the TEZ agreement showed that the warring parties had total and absolute control over their military machines. Witness Y noted that the level of control over sniping activity was so high that when a cease-fire agreement was implemented, sniping stopped within half a day, at the most. Witness Van Lynden Fraser noticed that SRK snipers were well-coordinated and concluded that they were acting under Orders coming from the chain of command. He also testified that the Appellant could influence the level of sniping activity if complaints were communicated to him.

¹⁵⁷ Trial Judgement, para. 733.

¹⁵⁸ First Rule 115 Motion, para. 26.

¹⁵⁹ Response to First Rule 115 Motion, para. 80, referring to the Trial Judgement, para. 716.

¹⁶⁰ Response to First Rule 115 Motion, para. 82.

but to argue that no such incidents were reported to the Appellant and thus had nothing to investigate.¹⁶¹

60. The Appeals Chamber is not satisfied that Document 13 shows that the SRK Command always carried out investigations after receiving complete information regarding the incidents. Document 13 neither adds to nor contradicts the evidence at trial that the SRK Command investigated attacks on the UN.¹⁶² This document is therefore inadmissible under the requirements of Rule 115 because the Appellant has failed to show that it would have affected the verdict at trial.

TRANSCRIPTS OF WITNESS TESTIMONY

61. The Appellant also seeks the admission into evidence of the testimonies of witnesses who have testified in other cases.¹⁶³ This proposed evidence is in the form of transcripts of four witnesses who testified in the *Milošević* Trial, namely Berko Zečević, David Harland, David Owen and Hrvoje Sarinić.¹⁶⁴

62. Concerning the unavailability of the above proffered evidence, the Appellant simply submits that they “were not available at trial, in accordance the time when they testified in Milosevic case.”¹⁶⁵

63. The Prosecution submits that the Appellant has made virtually no submissions on the non-availability of the evidence of Berko Zečević, Hrvoje Sarinić, David Owen and David Harland at trial, and that he has wrongly assumed that he is relieved from doing so simply because they testified in the *Milošević* Trial and after the completion of his trial.¹⁶⁶ The Prosecution submits that Berko Zečević was available at trial where he gave evidence as an expert witness and was cross-examined at length by the Defence.¹⁶⁷ It submits that the Appellant has made no submissions as to why he did not pursue the line of questioning he now seeks to adduce from the *Milošević* Trial.¹⁶⁸ Therefore it is clear that this witness was available at trial and the appeal process should not be used to remedy shortcomings in the tactics the Defence chose to use in cross-examination at trial.¹⁶⁹ The Prosecution argues that the Defence must have at least known of the existence of the nature of the

¹⁶¹ Response to First Rule 115 Motion, para. 81.

¹⁶² Trial Judgement, para. 716.

¹⁶³ First Rule 115 Motion, Annex 3.

¹⁶⁴ These are referred to as “statements” in the First Rule 115 Motion, para. 22.

¹⁶⁵ First Rule 115 Motion, para. 22.

¹⁶⁶ Response to First Rule 115 Motion, para. 117.

¹⁶⁷ Response to First Rule 115 Motion, para. 119.

¹⁶⁸ Response to First Rule 115 Motion, para. 119.

¹⁶⁹ Response to First Rule 115 Motion, para. 119.

evidence of David Harland, since he originally appeared on the Prosecution's Rule 65 *ter* (E) (ii) list at trial.¹⁷⁰

64. In reply, the Appellant argues that the Defence was not able to call David Harland as a witness because the Prosecution put his name on the witness list, then decided not to call him, by which time it was too late for the Defence to call him as a witness.¹⁷¹ In relation to Hrvoje Sarinić and David Owen, the Appellant argues that the Defence did not know they were in possession of the information that they presented in the *Milošević* Trial about Markale Market, especially since they were witnesses from the political field as opposed to the military field.¹⁷²

65. The Appeals Chamber notes that the Appellant's submissions with regards to the unavailability of these proposed witnesses at trial are generalised and fail to disclose any particular efforts made by the Defence to find these potential witnesses or the evidence they would adduce at trial. For example, in the case of David Harland, the Defence was free to inform the Trial Chamber of its desire to call him once the Prosecution decided not to, despite any lateness in the proceedings. This was not done, nor has there been any explanation by the Appellant indicating why it was not done. The Appeals Chamber reiterates that the onus is upon the Appellant to show why the evidence was not available.¹⁷³ This has not been satisfied despite the Pre-Appeal Judge's Order which allowed the Appellant a chance to rectify this aspect of this motion.¹⁷⁴ Finding that the Appellant has failed to demonstrate that the evidence of David Owen, David Harland, Hrvoje Sarinić and Berko Zečević was unavailable at trial, the Appeals Chamber will proceed to consider whether the exclusion of their evidence would lead to a miscarriage of justice.

66. The Appellant argues that the trial transcripts of the testimonies of Berko Zečević, Hrvoje Sarinić, David Owen and David Harland concern his 17th Ground of Appeal, paragraph a.5.8.2,¹⁷⁵ relating to the scheduled sniping incident No.16 and, according to him, show that Markale Market was not shelled by the Serbs.¹⁷⁶

67. Berko Zečević is a shelling expert who testified in the present case and in the *Milošević* Trial.¹⁷⁷ The Appellant submits that during trial, this witness did not state, and did not want to state anything about the possibility that a man who is not an expert could hear the sound of mortar mine

¹⁷⁰ Response to First Rule 115 Motion, para. 120.

¹⁷¹ Reply Supporting First Rule 115 Motion, para. 44.

¹⁷² Reply Supporting First Rule 115 Motion, para. 45.

¹⁷³ *Kupreškić* Rule 115 Decision, para. 65.

¹⁷⁴ Order on Additional Evidence, p. 3, which invited the Appellant to re-file the motion in full compliance with Practice Direction IT/201.

¹⁷⁵ First Rule 115 Motion, para. 11.

¹⁷⁶ First Rule 115 Motion, paras 34, 36-41.

¹⁷⁷ First Rule 115 Motion, para. 36.

during flight and, on the basis of that, draw conclusions.¹⁷⁸ The Appellant says that when cross-examined by Mr Milošević on whether it was possible to hear the flight of a mortar mine, this witness stated that it was not possible.¹⁷⁹ The Appellant further argues that if a witness in some other case presents new or different claims from those he presented earlier, as in the case of Berko Zečević, it should be treated as new evidence and not be used to find the guilt of an accused.¹⁸⁰ The Appellant argues that therefore this casts doubt on the Trial Chamber's finding that the mortar mine that fell on Markale, if it fell at all, was fired from SRK positions.¹⁸¹

68. The Prosecution argues that in the *Milošević* Trial, Berko Zečević did not, as contended by the Appellant, say that it was not possible to hear the sound of mortar in flight, instead he said that modern systems for determining the origin of fire on the basis of sound required three localisers.¹⁸² The Prosecution goes on to say that even if the Appeals Chamber agrees with the Appellant as to the meaning of Berko Zečević's statement, that would not affect the Prosecution's case as both Witnesses AF and AK-1, residents of Sarajevo and Sredrenik respectively, testified to the *sound of the firing* of the shell, as opposed to the *hearing of the shell in flight*,¹⁸³ and further that, since Berko Zečević's evidence would not have affected the decision at trial, it should not be admitted as additional evidence.¹⁸⁴

69. The Appellant submits that the testimony of Hrvoje Sarinić will also show that the Trial Chamber erred in finding that a mortar mine was deliberately fired from SRK positions on Markale Market.¹⁸⁵ Hrvoje Sarinić testified in the *Milošević* Trial that he had been told by Mr Milošević that the Muslims had shelled the Markale Market, but that Mr Milošević had later shifted the blame to Radovan Karadžić. He further states that he was told by former Colonel De Boer that from his analysis, the projectile he had examined had come from territory under Muslim control.¹⁸⁶

70. The Prosecution submits that the evidence of Hrvoje Sarinić is unsubstantiated hearsay and similar to arguments raised by the Appellant at trial, which were considered by the Trial Chamber.¹⁸⁷ It submits that, in any event, Prosecution witnesses such as Witnesses AD and General Michael Rose, the Commander of the UNPROFOR in BiH from February 1993 to January 1994, testified about the possibility of the ABiH itself causing the explosion at Markale Market, by static

¹⁷⁸ First Rule 115 Motion, para. 36.

¹⁷⁹ First Rule 115 Motion, para. 36.

¹⁸⁰ Reply Supporting First Rule 115 Motion, para. 43.

¹⁸¹ First Rule 115 Motion, para. 37, referring to paras 491 and 493 of the Trial Judgement.

¹⁸² Response to First Rule 115 Motion, para. 126.

¹⁸³ Response to First Rule 115 Motion, para. 119.

¹⁸⁴ Response to First Rule 115 Motion, para. 126.

¹⁸⁵ First Rule 115 Motion, para. 38, referring to para. 493 of the Trial Judgement.

¹⁸⁶ *Milošević* Trial Transcript, T.31367.

¹⁸⁷ See Trial Judgement, paras 462 and 492.

explosion and/or by being fired by the ABiH from the field.¹⁸⁸ Therefore, the Prosecution submits that his evidence should not be admitted on appeal as it does not contribute to the determination of the issue in dispute.¹⁸⁹

71. The Appellant submits that David Owen also testified in the *Milošević* Trial and stated that it has never been established who was responsible for the firing of the shell that fell on Markale even though the investigation as ordered by the Secretary General of the UN was carried out.¹⁹⁰ The Appellant adds that David Harland, an expert in the *Milošević* Trial, stated that there was evidence that the shell was fired from the Muslim side, but further testified that after detailed investigation, it was established that it was impossible to determine who fired the shell.¹⁹¹

72. The Prosecution responds that David Harland and David Owen were not themselves parties to an investigation into the Markale Market incident, and that the UN reports to which they refer were: (1) inconclusive as to the source of fire (in addition to other reports of local investigations); (2) were tendered into evidence by the Prosecution; and (3) were rigorously analysed by the Trial Chamber in the Trial Judgement.¹⁹² It concludes that this material is not novel and could not have affected the Trial Chamber's decision.¹⁹³

73. The Appeals Chamber notes that it is normal for a witness who testified in several trials about the same event or occurrence to focus on different aspects of that event, depending on the identity of the person at trial and the questions posed to the witness.¹⁹⁴ Therefore, not every discrepancy may undermine a witness's credibility. Considering the evidence adduced by Berko Zečević during both the *Milošević* Trial and the Appellant's trial, the Appeals Chamber finds that his testimony during the *Milošević* Trial to the effect that three localisers of sound are needed in order to determine the origin of fire is not inconsistent with his evidence in the Appellant's trial. This is because in the *Milošević* Trial his answer referred to the modern way of determining the origin of fire, which he said involves equipment, in response to the question whether it is possible to determine the origin of fire from a distance of 2000 metres,¹⁹⁵ whilst in his expert statement in the Appellant's trial he said that a mortar round could be heard in flight.¹⁹⁶ The Appeals Chamber therefore finds that it is not satisfied that Berko Zečević's testimony from the *Milošević* Trial affects

¹⁸⁸ Response to First Rule 115 Motion, para. 128, referring to Witness AD, T. 10709-10710 (closed session) and Witness Rose, T. 10196.

¹⁸⁹ Response to First Rule 115 Motion, para. 128.

¹⁹⁰ First Rule 115 Motion, para. 39.

¹⁹¹ First Rule 115 Motion, para. 40.

¹⁹² Response to First Rule 115 Motion, para. 129, referring to Trial Judgement para. 449 and to Exhibit P2261.

¹⁹³ Response to First Rule 115 Motion, para. 30.

¹⁹⁴ *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR 96-10-A and ICTR-96-17-A, Reasons for the Decision on Request for Admission of Additional Evidence, 8 September 2004, para. 31.

¹⁹⁵ *Milošević* Trial Transcript, T. 2667-2666.

his credibility nor affects the Trial Chamber's findings that the mortar mine that fell on Markale Market was fired from SRK positions.

74. With regards to the evidence of Hrvoje Sarinić, David Harland, David Owen and Berko Zečević which relates to the direction from which the mortar mine that landed on Markale Market was fired, the Trial Chamber found that the 120mm mortar shell that exploded in Markale Market on 5 February 1994 was fired from the direction north-northeast of the market, at a bearing of approximately 18.5 to 23.6 degrees.¹⁹⁷ There were several witnesses who gave technical and non-technical evidence to this effect.¹⁹⁸ The Appeals Chamber agrees with the Prosecution's submission that similar arguments as to inconclusiveness of the evidence were raised and considered by the Trial Chamber at trial.¹⁹⁹ In addition, the Appellant fails to provide any particulars relating to any expertise possessed by Hrvoje Sarinić or David Owen, nor to indicate why any particular weight should be given to their testimonies. None of the proposed additional evidence is such that if introduced at trial it would have affected the verdict. Accordingly, the Appeals Chamber is not satisfied that the exclusion of the testimony of these proposed witnesses would lead to a miscarriage of justice and as a result their statements and transcripts are rejected as additional evidence.

PROPOSED ADDITIONAL WITNESSES

75. The Appellant seeks the admission of the evidence of Bernhard Volker, Blagoje Kovačević and Milorad Krajsumović, who are three witnesses who have not yet testified before this Tribunal.²⁰⁰ The Appellant submits that the proposed evidence of Blagoje Kovačević and Milorad Krajsumović relates to his 17th (a.3) and 18th (k) Grounds of Appeal²⁰¹ concerning erroneous factual findings relating to the existence of a campaign of sniping and shelling by SRK forces against civilians and the criminal responsibility of the Appellant under Article 7(1) of the Statute respectively. The proposed evidence of Bernhard Volker relates to his 17th Ground of Appeal,

¹⁹⁶ Prosecution Exhibit 3276.1.

¹⁹⁷ Trial Judgement, para. 465.

¹⁹⁸ See Trial Judgement, paras 454 and 465. These include, *inter alia*, the evidence of Witness Suljić who testified that he interviewed persons living along the shell's estimated flight path, who told him that seconds before the Markale Market incident, they heard a shell coming from the north-eastern direction, and also Witnesses Hamill, Khan, Grande, and Dubant who found that the mortar shell had been fired from the direction north-northeast of Markale Market, at a bearing of 18.5 to 23.6 degrees.

¹⁹⁹ Trial Judgement, para. 462. See also Trial Judgement, para. 449 where the Trial Chamber noted the findings of the authors of the UN Report to the effect that they concluded that there is insufficient physical evidence to prove that one party or the other fired the mortar bomb and that the mortar bomb could have been fired by either side.

²⁰⁰ First Rule 115 Motion, Annex 1.

²⁰¹ First Rule 115 Motion, para.10.

paragraph a.5.8.2,²⁰² relating to the scheduled sniping incident No.16 and, according to him, shows that Markale Market was not shelled by the Serbs.²⁰³

76. With regards to the availability of the evidence of these proposed witnesses, the Appellant argues that the Defence spoke with many people and faced many difficulties, including situations when certain witnesses refused to appear before the Tribunal,²⁰⁴ and refused to talk to Defence representatives due to fear for their personal safety.²⁰⁵ In relation to Blagoje Kovačević and Milorad Krajsumović, the Appellant submits that despite attempts during trial, the Defence did not manage to obtain their addresses and convince them that there would be no danger to themselves or their family members in the event that they appeared before the Tribunal.²⁰⁶ He also argues that after the completion of the trial, the Defence received information that a French journalist, Bernhard Volker, was charged before a court in Paris for publishing information about the shelling of Markale.²⁰⁷ He states that the Defence has contacted this potential witness who is prepared to testify before the Tribunal.²⁰⁸

77. The Prosecution argues that the evidence of the proposed witnesses was clearly available at trial and that the Appellant makes unsubstantiated claims of a very general nature²⁰⁹ and gives a very cursory description, which is insufficient to show that these three witnesses were not available to him during trial notwithstanding the application of due diligence.²¹⁰ It contends that the Appellant has not specified whether any of these three proposed witnesses in fact expressed any reluctance to speak with Defence representatives or to give evidence at trial, and it is entirely unclear why these witnesses were not contacted earlier.²¹¹ It also argues that the Appellant has failed to append any documentation or other forms of evidence attesting to concrete steps taken by the Defence to secure the presence of these witnesses at trial.²¹² The Prosecution refers to Krajsumović and Kovačević, and submits that their names could have easily been found out by the Appellant,²¹³ especially in the case of Kovačević, since at trial, a Prosecution witness mentioned that he was his Battalion Commander.²¹⁴ It adds that no details are provided as to the date of the information itself or the date on which the Appellant became aware of Bernard Volker's

²⁰² First Rule 115 Motion, para. 11.

²⁰³ First Rule 115 Motion, paras 34, 36-41.

²⁰⁴ First Rule 115 Motion, para. 18.

²⁰⁵ First Rule 115 Motion, para. 19.

²⁰⁶ First Rule 115 Motion, para. 20.

²⁰⁷ First Rule 115 Motion, para. 21.

²⁰⁸ First Rule 115 Motion, para. 21.

²⁰⁹ Response to First Rule 115 Motion, para. 96.

²¹⁰ Response to First Rule 115 Motion, para. 95.

²¹¹ Response to First Rule 115 Motion, para. 97, 98, 99.

²¹² Response to First Rule 115 Motion, paras 97, 98, 99, 100, 118 and 120.

²¹³ Response to First Rule 115 Motion, para. 99.

²¹⁴ See Response to First Rule 115 Motion, fn. 71, referring to Witness DP 11, T. 14985.

information,²¹⁵ especially since the newspaper report and his acquittal before a French court happened more than 7 years ago, prior to the commencement of the Appellant's trial.²¹⁶

78. The Appeals Chamber considers that the Appellant has failed once again to demonstrate that the proffered evidence of Blagoje Kovačević, Milorad Krajsumović and Bernhard Volker was unavailable at trial. For instance, Bernhard Volker published the information sought by the Appellant prior to the Appellant's trial. Additionally, the Appellant has not provided details of his attempts during trial to locate Blagoje Kovačević and Milorad Krajsumović and convince them to testify, nor has he shown that this was ever brought to the attention of the Trial Chamber. For these reasons, the Appeals Chamber finds that their proposed evidence was available at trial. Accordingly, the Appeals Chamber will proceed to consider whether the exclusion of this evidence would result in a miscarriage of justice.

79. Blagoje Kovačević, who was Battalion Commander, provides in his statement, *inter alia*, that Orders were received from the higher Command to save ammunition, to open fire only at "fire targets" and to strictly take care not to target civilians.²¹⁷ He also states that he never received any request to carry out an investigation into any criminal incident and was never told that his soldiers were responsible for the deliberate targeting of civilians. He continues that there were cases of lack of discipline on the part of soldiers, in which cases, disciplinary measures were taken against them.²¹⁸

80. The Appellant contends that, on the basis of this statement, it is apparent that Orders from the Brigade Command were that they were to strictly take care of the protection of civilians.²¹⁹ These Orders, the Appellant submits, were forwarded to the Company Commanders who were obliged to familiarise all combatants with the Orders.²²⁰ He submits that this shows that the Trial Chamber erred in finding that the Appellant ordered the intentional targeting of civilians, which was the basis on which it concluded that the Appellant was guilty pursuant to Article 7(1) of the Statute.²²¹

81. Milorad Krajsumović was a Commander of the tank platoon within the 1st Infantry Brigade,²²² and states in his statement that their orders were only to act in self defence and that he never targeted civilians or civilian objects, nor was he ever asked to investigate such incidents as

²¹⁵ Response to First Rule 115 Motion, para. 103.

²¹⁶ Response to First Rule 115 Motion, para. 104.

²¹⁷ First Rule 115 Motion, Annex 1.

²¹⁸ First Rule 115 Motion, Annex 1.

²¹⁹ First Rule 115 Motion, paras 30, 31.

²²⁰ First Rule 115 Motion, para. 31.

²²¹ First Rule 115 Motion, paras 30, 31, referring to Trial Judgement, paras 742 and 747.

²²² First Rule 115 Motion, para. 32.

there were not any.²²³ The Appellant submits that the witness is ready to testify that all soldiers were familiar with orders not to target civilians, to save ammunition and to open fire only when necessary to respond to ABiH attacks, which contradicts the Trial Chamber's position that the Appellant had ordered attacks against civilians.²²⁴

82. The Appellant submits that both these witnesses would confirm that they didn't send any information to their respective commands stating that there were omissions in the behaviour of members of units under their respective commands, because they themselves did not know of such incidents.²²⁵ The Appellant argues that this is proof that he who held the highest position was not informed of any incident and therefore could not have intentionally omitted to take steps to prevent unlawful sniper activity and shelling as concluded by the Trial Chamber.²²⁶

83. The Prosecution submits that the evidence of Blagoje Kovačević does not contain any genuinely novel evidence and is similar to other evidence already given at trial.²²⁷ Regarding Milorad Krajsumović, it argues that similar evidence was given at trial,²²⁸ since many front-line infantry soldiers who were Defence witnesses frequently gave evidence that they received Orders not to fire at civilians.²²⁹ It also argues that the Defence tendered into evidence documents purporting to be Orders by the Appellant himself not to target civilians²³⁰ and reminding his troops to comply with the Geneva Conventions.²³¹ Since the proposed evidence is duplicative of that already given,²³² the Prosecution concludes, it should not be admitted in these appeal proceedings.²³³

84. The Appeals Chamber notes that, during trial, similar evidence was admitted of witnesses confirming that their orders were not to target civilians.²³⁴ Thus, the proposed evidence of Blagoje Kovačević and Milorad Krajsumović is not inconsistent with material already before the Trial Chamber or with its subsequent findings. The Appeals Chamber is not satisfied that had they

²²³ First Rule 115 Motion, Annex 1.

²²⁴ First Rule 115 Motion, para. 32.

²²⁵ First Rule 115 Motion, para. 33.

²²⁶ First Rule 115 Motion, para. 33.

²²⁷ Response to First Rule 115 Motion, para. 107.

²²⁸ Response to First Rule 115 Motion, paras 110 and 111. The Prosecution also points out that, although the Appellant seeks the admission of the proposed evidence of Milorad Krajsumović to oppose the finding that a notorious source of sniper fire was a partially-built Orthodox Church building in Veljine, adjacent to Dobrinja, there was evidence to the same effect available at trial, and was given by Witness DP 9 and considered by the Trial Chamber, which found that it was contradicted by evidence in the Trial Record, in particular by photographs of the site, at Trial Judgement, para. 354.

²²⁹ Response to First Rule 115 Motion, para. 112, referring to Trial Judgement, para. 565.

²³⁰ Response to First Rule 115 Motion, para. 112, referring to Trial Judgement, para. 707.

²³¹ Response to First Rule 115 Motion, para. 112, referring to Defence Exhibit D1492 and to Trial Judgement, para. 707.

²³² Response to First Rule 115 Motion, para. 113.

²³³ Response to First Rule 115 Motion, para. 113.

²³⁴ Trial Judgement, paras 565, 707 and 708 and accompanying footnotes.

appeared as witnesses before the Trial Chamber they would have affected the Trial Chamber's decision, and thus rejects the request that they be called as witnesses.

85. The Appellant also submits that Bernhard Volker, journalist for TVF1, is prepared to testify.²³⁵ He submits that he was charged before a court in Paris on allegations of publishing information that the shelling of Markale was not carried out by the Serbian side, but by the Muslim side, and that he received this information from a French high-ranking military official who was on duty in Sarajevo at the time.²³⁶ Bernhard Volker was acquitted and is, the Appellant asserts, prepared to testify that this French high ranking military official told him that the Serbs did not shell Markale.²³⁷

86. The Prosecution objects to the admission of the evidence of Bernard Volker because no statement of his proposed evidence has been presented, but merely a summary by the Appellant of what apparently this witness will testify about.²³⁸ The Prosecution submits that, because the Appellant has not complied with the minimum requirement of filing the proposed additional evidence, there is no relevant information to form the basis for the conclusions the witness purportedly reaches,²³⁹ which details are from an unnamed source.²⁴⁰ Therefore, it provides no basis on which the Appeals Chamber could impugn the findings of the Trial Chamber and accordingly fails to meet the criteria of admissibility under Rule 115.²⁴¹ The Prosecution argues that, in any event, this information would not have affected the verdict.²⁴²

87. The Appeals Chamber notes that the Appellant has failed to file a statement or other documentation of the proposed evidence of Bernhard Volker. In failing to do so, the Appellant has failed to provide any basis on which the Appeals Chamber could evaluate his request and has consequently failed to facilitate the Appeals Chamber's consideration of the proposed evidence of this potential witness. On this basis alone, this part of the motion is dismissed.²⁴³

²³⁵ First Rule 115 Motion, para. 34.

²³⁶ First Rule 115 Motion, para. 34.

²³⁷ First Rule 115 Motion, para. 34.

²³⁸ Response to First Rule 115 Motion, para. 114.

²³⁹ Response to First Rule 115 Motion, para. 93.

²⁴⁰ Response to First Rule 115 Motion, para. 115.

²⁴¹ Response to First Rule 115 Motion, para. 115.

²⁴² The Prosecution argues, for example, that the Trial Chamber heard evidence from General Sir Michael Rose, the UNPROFOR Commander for Bosnia and Herzegovina at the time of the shelling. General Rose was in a position to be fully aware of the findings of all UN investigations into which side was responsible for the incident. He testified that two investigations were ordered by the UN, and both concluded that it was not possible to determine from which side of the confrontation line the mortar had been fired. See Response to First Rule 115 Motion, para. 116.

²⁴³ This is a sufficient basis for dismissing a request, see for example, *Naletilić and Martinović* Rule 115 Decision, para. 13.

THIRD RULE 115 MOTION

88. Since the Third Rule 115 Motion was filed over 75 days from the date of the Trial Judgement, the first issue for determination by the Appeals Chamber is whether good cause has been shown for the Appellant's delay in filing it.²⁴⁴ The Appellant argues that good cause is shown by the fact that, on 18 November 2004, the Defence was informed by the Prosecution that they had found some documents that could fall under Rule 68(i) of the Rules, which documents were subsequently delivered to the Defence. Of these, the Appellant submits that the Defence identified 14 documents which were not available during the trial, which are now the subject of the Third Rule 115 Motion.²⁴⁵ The Prosecution makes no submissions as to whether the good cause requirement has been met.

89. The Appeals Chamber is satisfied that the Appellant has demonstrated good cause on the basis that these documents were delivered to him by the Prosecution after the expiry of 75 days from the date of filing of the French translation of the Trial Judgement and were then filed promptly by the Appellant.

DOCUMENTS

90. The Appellant does not make any submissions as to unavailability but simply submits that, "[s]ince it is obvious that documents, attached to the [Third Rule 115] Motion, were not available during trial, and since the above-mentioned documents came into Defence possession by the delivering from the Prosecution, the Defence submits that these are reliable documents whose contents points (*sic*) that they are relevant for establishing the facts in this proceeding, and that each document itself and in their totality could be a decisive factor in reaching the decision at trial."²⁴⁶

91. The Prosecution argues that the Appellant has not met the requirements of unavailability under Rule 115. It submits that the fact that the Appellant received the documents recently does not demonstrate that due diligence on his part has been exercised at trial, nor that the evidence was unavailable despite the exercise of due diligence by the Defence.²⁴⁷ It argues that the Defence was

²⁴⁴ See Decision On Request For Extension Of Time, which indicated that since Counsel has chosen French as the Defence's working language in the proceedings before the Tribunal, it is in the interests of justice to start counting from the date of filing of the French translation of the Trial Judgement. Considering that 7 April 2004 was the date of filing of the French translation of the Trial Judgement, the Third Rule 115 Motion should have been filed no later than 21 June 2004.

²⁴⁵ Third Rule 115 Motion, pp. 2 and 3.

²⁴⁶ Third Rule 115 Motion, para. 4.

²⁴⁷ Response to Third Rule 115 Motion, para. 3.

still obliged to provide evidence and explain in sufficient detail the steps it took to obtain the evidence in any form.²⁴⁸

92. Second, the Prosecution argues that the Appellant's submissions relating to credibility and reliability fall short of demonstrating that the evidence appears to be reasonably capable of belief or reliance,²⁴⁹ even if they were disclosed and delivered to the Defence by the Prosecution, since the Prosecution cannot guarantee their credibility and reliability.²⁵⁰ It argues that several aspects of the documents suggest that they are not even *prima facie* credible, such as that four of them have no "signatory" at the end, two of them contain insufficient details such as address and birth-date to verify the identity of the informant, and two of them contain express words suggesting that they cannot be treated as reliable.²⁵¹

93. The Appellant replies, with regards to credibility, that lack of signature does not affect the credibility of the documents, because according to the service rules, such documents do not have to be signed and each document clearly shows who has made it.²⁵²

94. Considering availability, the Appeals Chamber notes that once again the Appellant has not made any submissions explaining the steps he took to discover the evidence contained in these documents at trial. An applicant is required to provide particulars of his efforts to show that the potential evidence was not available to him at trial in any form,²⁵³ and in this particular case, the Appellant has omitted to demonstrate that he took any steps at trial to find the information contained in the documents. The Appeals Chamber finds that the Appellant has not demonstrated that these documents were unavailable.

95. The Appeals Chamber recalls, with regards to credibility, that it will refuse to admit evidence only if it is so lacking in terms of credibility and reliability that it is devoid of any probative value in relation to a decision pursuant to Rule 115.²⁵⁴ Noting the Prosecution's objections that the evidence is not reasonably capable of belief or reliance together with the Appellant's submissions on this point, the Appeals Chamber will consider these arguments, where

²⁴⁸ Response to Third Rule 115 Motion, para. 3.

²⁴⁹ Response to Third Rule 115 Motion, para. 4.

²⁵⁰ Response to Third Rule 115 Motion, paras 5 and 6.

²⁵¹ Response to Third Rule 115 Motion, para. 7.

²⁵² Reply Supporting Third Rule 115 Motion, para. 8. The Appellant also submits that the documents do contain sufficient particulars to identify the informants and that the documents that suggest that they may be treated as unreliable are not important for the purposes of determining the documents' credibility "since these allegations only express part of the caution while obtaining information": Reply Supporting Third Rule 115 Motion, para. 9. The Appeals Chamber has not been able to comprehend this submission.

²⁵³ *Krstić* Rule 115 Decision, p. 3.

²⁵⁴ *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 22; *Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-01-71-A, Decision on the Admission of Additional Evidence, 14 April 2005, p. 7.

relevant, below, together with those concerning whether the exclusion of the documents would lead to a miscarriage of justice.

96. Finally, it is necessary to note that, in contravention of Practice Direction IT/201, the Appellant in the Third Rule 115 Motion does not identify which of his grounds of appeal each item of proffered evidence relates to.

DOCUMENTS 1, 2, 3, 4, 10, 11, 13 AND 14

97. Documents 1, 2, 3, 4, 10, 11, 13, and 14 are official notes and information gathered by the Ministry of Interior of Republika Srpska–National Security Service of Sarajevo, Ilidža and Ilijaš sectors. Their dates range from 26 August 1992 to 29 January 1993. They provide a wide variety of information received through interviews with individuals detailing the direction of an expected enemy attack and a description of enemy positions. The Appellant submits that these documents contain information received through operative work from an interview with people who escaped from Muslim-controlled parts of Sarajevo into parts of Sarajevo which were under the control of the SRK.²⁵⁵ He argues that it is clear from this information that various civilian buildings, which he lists in paragraph 6 of the Third Rule 115 Motion, such as Energoinvest, were used for military purposes by the ABiH army.²⁵⁶ He continues that it is clear from the information mentioned that the ABiH forces were equipped with various weapons which were placed in the environs of the said civilian buildings,²⁵⁷ that the Serb population was used as live shields for digging trenches, that the alleged massacre in Vise Miskin street and the shelling of Pivara were organised, that all things were taken out of the Vijecnica City hall before it was set on fire, and that executions of Serbs were performed.²⁵⁸

98. The Appellant further submits that all this evidence is enough to show that the Trial Chamber erred in finding that the SRK forces shelled civilians and civilian areas and that this was done upon the Order of the Appellant.²⁵⁹ The Appellant also argues that this proposed evidence shows that the Trial Chamber's finding that there was "unselective shelling or deliberate shelling on civilians was erroneous, because there were no civilian areas in Sarajevo", as supported by the evidence of Defence Expert Witness Prof. Dr. Radovan Radinović.²⁶⁰

²⁵⁵ Third Rule 115 Motion, para. 6.

²⁵⁶ Third Rule 115 Motion, para. 6.

²⁵⁷ Third Rule 115 Motion, para. 6.

²⁵⁸ Third Rule 115 Motion, para. 6.

²⁵⁹ Third Rule 115 Motion, para. 7, referring to Trial Judgement, paras 733, 735, 736, 738, 740 and 742.

²⁶⁰ Third Rule 115 Motion, para. 7.

99. The Prosecution objects to the admission of these documents and highlights seven problems inherent in the Appellant's submissions. They are that the Appellant:

- i. fails to identify which document or documents refer to the 70 or so locations he lists in paragraph 6 of the Third Rule 115 Motion;²⁶¹
- ii. inaccurately identifies certain locations as alleged military targets;²⁶²
- iii. neither places these locations on maps tendered in trial, nor offers supplementary evidence to show their precise positions;²⁶³
- iv. fails to link any of the locations in paragraph 6 in a temporal manner to the indictment and to the Trial Chamber's factual findings on specific incidents forming the basis for his convictions;²⁶⁴
- v. fails to show how findings of the Appellant's knowledge of criminal activity of the SRK could be affected by documents which concern locations relating, if at all, to the underlying criminal incidents and not to the Appellant's knowledge thereof;²⁶⁵
- vi. does not explain why some of these locations are legitimate military targets; and²⁶⁶
- vii. fails to address how the actual information contained in the documents about those locations could impact on the findings of the Trial Chamber.²⁶⁷

100. The Prosecution refers in its submission, as an example, to Document 1, which states that an attack can be expected from the direction of Energoinvest, but does not show it was used for military purposes. The Prosecution argues that, even if it did, the Appellant has not identified the building referred to in the document and therefore has not shown how the references in the documents to Energoinvest add to or affect the evidence about this location at trial.²⁶⁸ Similarly, the Prosecution argues that the Appellant fails to articulate how references to heavy weaponry in Document 2 add to or affect evidence on these matters at trial since the presence and sometimes use of heavy weaponry by the ABiH was accepted by the Prosecution and Trial Chamber.²⁶⁹ The Prosecution points out that it conceded the presence of tanks in the Ciglane tunnel, and other ABiH

²⁶¹ Response to Third Rule 115 Motion, para. 10.

²⁶² Response to Third Rule 115 Motion, para. 11.

²⁶³ Response to Third Rule 115 Motion, para. 12.

²⁶⁴ Response to Third Rule 115 Motion, para. 13.

²⁶⁵ Response to Third Rule 115 Motion, para. 15.

²⁶⁶ Response to Third Rule 115 Motion, para. 16.

²⁶⁷ Response to Third Rule 115 Motion, para. 17.

²⁶⁸ Response to Third Rule 115 Motion, para. 20.

²⁶⁹ Response to Third Rule 115 Motion, para. 22.

tanks at various locations within the confrontation lines.²⁷⁰ It notes that the Trial Chamber accepted evidence that one instance of fire on Koševo Hospital was the result of tank-fire from within the confrontation lines,²⁷¹ and further noted evidence that UN observers witnessed armoured personnel carriers and a tank in the vicinity of Koševo Hospital.²⁷²

101. The Prosecution also argues that, although the Appellant submits that the documents corroborate trial testimony that Bosnian authorities used Serbs from Sarajevo to dig trenches, and the Prosecution conceded at trial that prisoners of Serbian ethnicity may have been mistreated, no explanation of relevance or impact is presented.²⁷³ With regards to the Appellant's submissions relating to the Vase Miskin massacre, the Prosecution submits that it occurred prior to the indictment period, is not even mentioned in the Trial Judgement, and is of no consequence to the verdict.²⁷⁴ The Prosecution also argues that the Appellant is unclear as to what the incidents of the shelling of Pivara and the setting fire of Vijecnica were.²⁷⁵ This is because no references as to the dates of their occurrence were provided, there is no suggestion that an informant witnessed these events, the Appellant has not discounted the possibility that the valuables were removed for other reasons, and therefore the document is neither conclusive of motive nor of responsibility.²⁷⁶

102. The Appeals Chamber agrees with the Prosecution's submission that Documents 1 and 2 are dated 26 August 1992 and therefore outside the indictment period.²⁷⁷

103. The Appeals Chamber also notes that the Appellant argues that these documents are intended to confirm the testimony of many witnesses who testified that members of the ABiH stayed in civilian facilities and acted from them.²⁷⁸ The Appeals Chamber observes, however, that this information is not new: the Prosecution did not dispute, at trial, that some members of the ABiH operated from civilian buildings.²⁷⁹ Moreover, the Appellant has not shown which of the Trial Chamber's findings on the individual incidents of shelling or sniping would be affected by the individual documents, which in addition is not clear from the documents themselves. The Appeals

²⁷⁰ Response to Third Rule 115 Motion, para. 22, referring to the Trial Judgement para. 428.

²⁷¹ Response to Third Rule 115 Motion, para. 22, referring to the Trial Judgement, para. 502.

²⁷² Response to Third Rule 115 Motion, para. 22, referring to the Trial Judgement para. 506.

²⁷³ Response to Third Rule 115 Motion, para. 23.

²⁷⁴ Response to Third Rule 115 Motion, para. 24.

²⁷⁵ Response to Third Rule 115 Motion, para. 25.

²⁷⁶ Response to Third Rule 115 Motion, para. 25.

²⁷⁷ Initial Indictment, 26 March 1999, para. 5, which states that the indictment period runs from 10 September 1992 to 10 August 1994. The Appeals Chamber notes that, although the Appellant submits that it is clear from this information that buildings such as Energoinvest were used for military purposes, Document 1 does not support this contention. Although the document mentions Energoinvest, it only states that "an attack by enemy forces can probably be expected from the Energoinvest axis" and not as submitted by the Appellant. *See* Third Rule 115 Motion, para. 6.

²⁷⁸ Third Rule 115 Motion, para. 6.

²⁷⁹ The Prosecution also points out that even a Prosecution witness who was a member of the ABiH testified at trial that his battalion headquarters were located in the "Jugodrvno" store building, which was also inhabited by civilians in the floors above: Response to Third Rule 115 Motion, para. 22. As for Koševo Hospital, *see* Trial Judgement, para. 506.

Chamber finds that they would not have had an impact on the verdict since the Trial Chamber already considered similar evidence and thus, its exclusion of these documents as evidence on appeal would not lead to a miscarriage of justice.

DOCUMENT 5, 6, 7, 8 AND 12

104. Document 5 is a report dated 7 December 1992 and signed by Srdjan Sehovac, of the Ilidža National Security Service Work Organisation, reporting on information received that Muslim forces will attack and also that they will try to transfer ammunition. Document 6 is a letter signed by Predrag Čeranić for the Chief of the National Security Service of Sarajevo Sector dated 27 January 1993 and addressed to the Ministry of Interior of Republika Srpska, which details reports that UNPROFOR forces make it possible for the Muslim side to transfer people and weapons over the airport. Document 7 is an Official Note signed by Srdjan Sehovac to the Ministry of the Republika Srpska dated 29 January 1993 identifying the Muslim person engaging in the procurement of weapons, and reporting on the amounts of ammunition possessed by the Muslim forces; the Official Note maintains that this evidence shows that Muslim forces continue to cross over via the airport. Document 8 is a letter signed by the Chief of National Security Service Sector Sarajevo dated 1 December 1993 and addressed to the RS Ministry of the Interior, National Security Service Bijelina reporting on the actions of the Muslim side. Document 12 is an Official Note signed by Srdjan Sehovac dated 3 October 1992 reporting that they had received information that Muslims get weapons through the airport.

105. The Appellant submits that Documents 5, 6, 7, 8 and 12 show that Butmir Airport was misused for military purposes, *i.e.*: for weapon, ammunition and equipment transfer, and also for the transfer of ABiH members, whether it was done with or without UNPROFOR knowledge.²⁸⁰ He says that this also shows that the periodic actions of the SRK on ABiH positions near the airport were not performed to attack UNPROFOR forces or civilians crossing the runway, but were legitimate acts by the SRK, showing that the Trial Chamber erred in believing the testimony of Abdel Razek and Witness DP 35.²⁸¹

106. The Prosecution argues that these documents are consistent with evidence at trial where the Trial Chamber noted the evidence that the fire was indiscriminate and that the Appellant sought through his Orders to attack anyone crossing the runway, regardless of their civilian or military status, in order to prevent his military opponents from transferring personnel and equipment.²⁸²

²⁸⁰ Third Rule 115 Motion, paras 8 and 9.

²⁸¹ Third Rule 115 Motion, para. 8, referring to para. 743 of the Trial Judgement.

²⁸² Response to Third Rule 115 Motion, para. 30, referring to Trial Judgement, paras 411-416 and 743.

107. In the Trial Judgement, the Trial Chamber found that civilians who crossed the airport tarmac were targeted because the Appellant had doubts that those movements might be for a military purpose and was therefore aware that his Orders in relation to preventing the crossing of the airport tarmac were followed, meaning that a number of civilians trying to cross the airport tarmac were targeted in full awareness of their civilian status or in reckless disregard of the possibility that they were civilians.²⁸³ The Appeals Chamber finds that Documents 5, 6, 7, 8 and 12 are consistent with these findings and with the evidence of Abdel Razek and Witness DP 35, on which the Trial Chamber relied. Since they do not undermine the Trial Chamber's findings and their exclusion would not lead to a miscarriage of justice, Documents 5, 6, 7, 8, and 12 are rejected as additional evidence.

DOCUMENT 9

108. Document 9 is a letter signed by Predag Čeranić, addressed to the Under Secretary of National Security, Dragan Kijač, and dated 10 November 1992. It details the incidents surrounding the beating up of a member of the White Eagles under the command of Dragoslav Bokan by a member of the RS Army and how it irritated members of the Serbian army in Nedžarići. The Appellant argues that Document 9 confirms that the Appellant, as Commander of the SRK, had constant problems with members of paramilitary formations, who could act out of the commanding system at any time.²⁸⁴ Therefore, the Appellant submits, this proposed evidence brings into doubt the Trial Chamber's conclusion that there was complete control in the chain of command and that, in this way, there would be a complete estimation about allegedly illegal sniper activities and the shelling on civilians.²⁸⁵

109. The Prosecution submits that Document 9 is consistent with the Trial Chamber's findings regarding paramilitaries and that since the Appellant has not explained its impact on the Trial Chamber's findings, its admission should be denied.²⁸⁶

110. The Appeals Chamber agrees with the Prosecution's submission that Document 9 is consistent with the Trial Chamber's findings regarding paramilitaries. The Trial Chamber considered the implications of evidence concerning the difficulty of controlling paramilitary forces on the effectiveness of the Appellant's command and control.²⁸⁷ The Appeals Chambers therefore finds that Document 9 would not have had an impact on the verdict since the Trial Chamber already

²⁸³ Trial Judgement, para. 743.

²⁸⁴ Third Rule 115 Motion, para. 10.

²⁸⁵ Third Rule 115 Motion, para. 10, referring to the Trial Judgement, paras 701, 702, 705 and 706.

²⁸⁶ Response to Third Rule 115 Motion, para. 34, referring to the Trial Judgement, paras 655-657.

²⁸⁷ Trial Judgement, para. 655.

considered similar evidence and thus, its exclusion would not lead to a miscarriage of justice. Its admission is therefore rejected.

TRANSCRIPT OF WITNESS TESTIMONY: EVE CREPIN AND PATRICK BARRIOT

111. The Appellant also seeks the admission of sections of the trial transcripts of Eve Crepin and Patrick Barriot in the *Milošević* Trial. In the excerpt of Eve Crepin's testimony, she gives evidence of occasional attacks by the Muslims on UNPROFOR. She also testifies that "at the same time, Markale 1 marketplace was due to the Muslims calling to all the officers on the ground and all the military spokesmen on the ground."²⁸⁸ Patrick Barriot gave evidence of the alleged terrorist acts conducted by Bosnian Muslims against the French Blue Helmets. He stated that all French Ballistics experts found that the 27 May 1992 attack, the Markale attack on 5 February 1994, as well as the attack against Markale on 2 August 1994 were not due to Serb fighters but to Muslim snipers.²⁸⁹

112. The Appellant submits that these witnesses stated that the massacre on Markale Market was an action of Muslim forces, which was confirmed by all international experts.²⁹⁰ The Appellant submits that this reinforces that only one thing is certain: that there is no evidence that the shelling of Markale Market was performed by members of the SRK, contrary to the conclusions of the Trial Chamber.²⁹¹

113. The Prosecution submits that the Appellant has not made any submissions regarding the unavailability of the evidence of Eve Crepin and Patrick Barriot and has neither provided supporting evidence nor indicated what steps he took to identify and locate these potential witnesses during trial.²⁹² The Prosecution continues that the mere fact that they gave evidence in the *Milošević* Trial after completion of the Appellant's trial does not relieve him of the obligation of showing why the evidence was not available to him at trial.²⁹³ Second, the Prosecution submits that the evidence in these transcripts should not be admitted since they lack reliability and credibility and could not have had a decisive impact on the decision at trial because these witnesses were not parties to any investigation into the Markale Market and their evidence is based on unnamed experts and unidentified sources.²⁹⁴ It states that the allegation that the round originated in Muslim territory is not novel and is similar to that considered and heard by the Trial Chamber, and that therefore the

²⁸⁸ *Milošević* Trial Transcript, T. 34794.

²⁸⁹ *Milošević* Trial Transcript, T. 34916.

²⁹⁰ Third Rule 115 Motion, para. 12.

²⁹¹ Third Rule 115 Motion, para. 13, referring to paras 438-493 of the Trial Judgement.

²⁹² Response to Third Rule 115 Motion, para. 36.

²⁹³ Response to Third Rule 115 Motion, para. 36.

²⁹⁴ Response to Third Rule 115 Motion, para. 37.

Appellant has failed to show how it could have impacted the Trial Chamber's decision differently.²⁹⁵

114. In his reply, the Appellant submits that the Defence only found out that Eve Crepin and Patrick Barriot had knowledge of events in Sarajevo after it had heard their testimonies.²⁹⁶ He further submits that the credibility of these witnesses is evident and it is not hearsay evidence since these witnesses were familiar with the facts.²⁹⁷ He concludes that, at trial, evidence was admitted that mortar mine was not fired from SRK positions with the evidence of Prof. Vilicić, and that evidence, together with the arguments of these two witnesses, shows that the Trial Chamber erred when it concluded that the mortar shell which fell on Markale was fired from SRK positions.²⁹⁸

115. Concerning the availability of the evidence of Patrick Barriot and Eve Crepin, the Appeals Chamber reiterates that the mere fact that they gave evidence in another case and that the Appellant was not aware that they were in possession of this information until then does not in itself suffice to demonstrate unavailability of the evidence at trial. In order to establish unavailability, the Appellant must demonstrate that the proffered evidence was not available to him at trial in any form.²⁹⁹ Since the Defence did not identify any difficulties in obtaining potential evidence similar to these witnesses', nor disclose any particular efforts that it made to that effect, the Appeals Chamber is not satisfied that this evidence was unavailable and thus, it will apply the heightened standard of whether the exclusion of this proposed evidence would lead to a miscarriage of justice.

116. During trial, there was evidence on the record that mortar mines fired on Markale Market originated from ABiH territory.³⁰⁰ In addition, the Appellant has failed to provide the Appeals Chamber with any particulars indicating any expertise that these witnesses may have or details as to why he submits that they were familiar with the facts. For the foregoing reasons, the Appeals Chamber finds the Appellant has failed to show that these witnesses would have had an impact on the verdict and how the exclusion of these transcripts would lead to a miscarriage of justice. As a result, they are rejected as additional evidence on appeal.

117. Lastly, the Appellant had requested the Appeals Chamber to issue a binding Order to the Republic of Croatia for a file signed by Franjo Turek regarding Markale Market.³⁰¹ In support of his request, the Appellant had sought to have admitted a newspaper excerpt dated 14 January 2005

²⁹⁵ Response to Third Rule 115 Motion, para. 38.

²⁹⁶ Reply Supporting Third Rule 115 Motion, para. 23.

²⁹⁷ Reply Supporting Third Rule 115 Motion, para. 24.

²⁹⁸ Reply Supporting Third Rule 115 Motion, para. 24.

²⁹⁹ *Krstić* Rule 115 Decision, p. 3

³⁰⁰ Trial Judgement, para. 462.

³⁰¹ Third Rule 115 Motion, para. 11.

from the newspaper "Globus".³⁰² Considering that the Appellant no longer wishes to pursue his request,³⁰³ it is now moot and will not be addressed by the Appeals Chamber.


CUMULATIVE EFFECT

118. In assessing the cumulative effect of all the additional evidence sought to be admitted in the First Rule 115 Motion and Third Rule 115 Motion, the Appeals Chamber finds that the proposed evidence cumulatively does not meet the standard of admissibility under Rule 115. In sum, the Appeals Chamber finds that neither the individual nor the cumulative effect of the proposed additional evidence would impugn the Trial Chamber's findings.

IV. CONCLUSION

For the foregoing reasons, the Appeals Chamber **DISMISSES** the First Rule 115 Motion and the Third Rule 115 Motion.

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



Theodor Meron
Presiding Judge

Done this 30th day of June 2005
At The Hague, The Netherlands

[Seal of the Tribunal]

³⁰² Third Rule 115 Motion, para. 11.

³⁰³ Fourth Rule 115 Motion, para. 6.