

IT-04-74-AR73-14
A 75 - A 60
26 FEBRUARY 2009

75
SF

UNITED
NATIONS



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

Case No. IT-04-74-AR73.14

Date: 26 February 2009

Original: English

IN THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Decision: 26 February 2009

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIC
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
and BERISLAV PUŠIĆ**

PUBLIC

**DECISION ON THE INTERLOCUTORY APPEAL AGAINST
THE TRIAL CHAMBER'S DECISION ON PRESENTATION OF
DOCUMENTS BY THE PROSECUTION IN CROSS-
EXAMINATION OF DEFENCE WITNESSES**

The Office of the Prosecutor:

Mr. Kenneth Scott
Mr. Douglas Stringer

Counsel for the Accused:

Mr. Michael G. Karnavas and Ms. Suzana Tomanović for Jadranko Prlić
Ms. Senka Nožica and Mr. Karim A. A. Khan for Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Slobodan Praljak
Ms. Vesna Alaburić and Mr. Nicolas Stewart for Milivoj Petković
Ms. Dijana Tomašević-Tomić and Mr. Dražen Plavec for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

24

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (“Appeals Chamber” and “Tribunal”, respectively) is seized of an interlocutory appeal filed on 16 January 2009¹ by Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić (jointly, “Appellants”) against the “Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses” rendered by Trial Chamber III (“Trial Chamber”) on 27 November 2008 (“Impugned Decision”).² The Office of the Prosecutor (“Prosecution”) responded on 29 January 2009.³ The Appellants filed their joint reply on 2 February 2009.⁴

I. BACKGROUND

2. The trial proceedings in the present case commenced on 26 April 2006. The Prosecution completed its case on 24 January 2008.⁵ On 20 February 2008, the Trial Chamber case issued an oral decision pursuant to Rule 98 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and dismissed the motions for acquittal filed by Valentin Ćorić and Berislav Pušić.⁶ On 5 May 2008, the co-accused started presenting their respective Defence cases.⁷ Jadranko Prlić closed his presentation on 15 January 2009.⁸ The Trial Chamber is currently hearing Bruno Stojić’s Defence case. Neither Jadranko Prlić nor Bruno Stojić joined the Appeal.

3. On 10 October 2008, the Appellants filed a motion seeking the Trial Chamber’s directions with the view of modifying the existing guidelines⁹ in order to prohibit the admission into evidence of “new documents”¹⁰ tendered by the Prosecution during the cross-examination of Defence

¹ Interlocutory Appeal by Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić Against the Trial Chamber’s 27 November 2008 *Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses*, 16 January 2009 (“Appeal”).

² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 27 November 2008.

³ Prosecution Response to Interlocutory Appeal Concerning the Trial Chamber’s 27 November 2008 *Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses*, 29 January 2009 (“Response”).

⁴ Joint Reply to Prosecution Response Filed 29 January 2009 to Interlocutory Appeal by Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić Against the Trial Chamber’s 27 November 2008 *Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses*, 2 February 2009 (“Reply”).

⁵ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, 24 January 2008, T. 26868.

⁶ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, 20 February 2008, T. 27237-27238.

⁷ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, 5 May 2008, T. 27453.

⁸ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, 15 January 2009, T. 3538.

⁹ *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-T, Decision Adopting Guidelines for the Presentation of Defence Evidence, 24 April 2008 (“Guidelines Decision”).

¹⁰ For the purposes of the current Appeal, the Appellants define “new documents” as documents that have not yet been admitted into evidence, whether or not appearing on the Prosecution’s 65 *ter* list of exhibits (Appeal, fn 2 referring to Impugned Decision para. 4).

witnesses.¹¹ The Trial Chamber denied the said motion by a majority,¹² finding that, while in principle, the Prosecution shall present all the evidence aiming at proving the guilt of the accused during the phase of the presentation of its case-in-chief,¹³ it may be allowed to present “new documents” (other than those aimed exclusively at impeaching a witness’s credibility or refreshing his or her memory) if it could justify such need by providing exceptional reasons in the interests of justice.¹⁴ The Trial Chamber further specified that its decisions on admission of documents tendered by the Prosecution during the cross-examination of Defence witnesses would be made on a case-by-case basis, providing the necessary safeguards for the Defence rights.¹⁵ Finally, the Trial Chamber found that no special modalities were necessary with regards to prior notice of the presentation of the new documents by the Prosecution.¹⁶

4. The Appellants sought certification to appeal against the Impugned Decision.¹⁷ The Prosecution opposed the request applying, in the alternative, for certification to appeal the Impugned Decision itself.¹⁸ On 9 January 2009, the Trial Chamber granted the Appellants’ request to lodge an appeal against the Impugned Decision in its entirety but found the Prosecution’s alternative request inadmissible due to the fact that it was filed out of time.¹⁹

II. STANDARD OF REVIEW

5. It is well established that Trial Chambers exercise broad discretion in determining the admissibility of evidence.²⁰ The Appeals Chamber must thus accord deference to a Trial Chamber’s decision in this respect. The Appeals Chamber’s examination is consequently limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error. The Appeals

¹¹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Joint Motion of Praljak, Petković, Ćorić and Pušić Defences Requesting Trial Chamber Directions and Guidelines on Presentation and Admission into Evidence of Documents Presented by The Prosecution During Cross-Examination of Defence Witnesses, 10 October 2008, paras 1-3.

¹² Impugned Decision, p. 12; see also the Partially Dissenting Opinion of Judge Jean-Claude Antonetti attached to the Impugned Decision.

¹³ Impugned Decision, para. 23.

¹⁴ *Ibid.*, paras 15, 17, 20, 23.

¹⁵ *Ibid.*, paras 20, 24, 26.

¹⁶ *Ibid.*, para. 25.

¹⁷ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Joint Motion of Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić Requesting Rule 73 (B) Certification for Appeal Against the Trial Chamber’s 27 November 2008 *Décision portant sur la présentation de documents par l’Accusation lors du contre-interrogatoire des témoins à décharge*, 5 December 2008.

¹⁸ Prosecution Opposition to Defence Request for Certification to Appeal the Trial Chamber’s 27 November 2008 *Décision portant sur la présentation de documents par l’Accusation lors du contre-interrogatoire des témoins à décharge*, 18 December 2008.

¹⁹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Joint Motion for Certification to Appeal the Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 9 January 2009, pp. 5-6 (“Certification Decision”).

²⁰ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal Against the Trial Chamber’s Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009, para. 5 and references cited therein.

Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of discretion.²¹

III. DISCUSSION

A. Arguments of the Parties

6. As a preliminary matter, the Appellants submit that there exists a "Fundamental Principle" according to which the Prosecution should present all the evidence probative of the guilt of the accused during its case-in-chief and that any deviations from this rule may only be allowed on a truly exceptional basis.²² They argue that the Impugned Decision did not apply this "Fundamental Principle" as rigorously as it ought to,²³ and present four grounds of appeal seeking for the Impugned Decision to be set aside.

7. In the first ground of appeal, the Appellants submit that the Impugned Decision fails to take proper account of the essential differences between Prosecution and Defence positions in a trial.²⁴ They stress in particular that there exists a "lack of symmetry" between the Prosecution, which bears the burden of proof, and the Defence which need only answer the Prosecution's case, if at all.²⁵ Moreover, it is submitted that the fact that the Defence may tender documents during the cross-examination of a Prosecution witness, *i.e.* before the Defence case has even started, cannot justify allowing the Prosecution to do the same when cross-examining the Defence witnesses, *i.e.* after the Prosecution case is closed.²⁶ The Appellants advance that these essential differences are also clearly reflected in Rules 65 *ter* (E)(iii) and 65 *ter*(G)(ii) of the Rules.²⁷ Finally, the Appellants state their adherence to the reasoning and conclusions of the Partially Dissenting Opinion of Judge Antonetti attached to the Impugned Decision.²⁸

8. Under the second and third grounds of appeal the Appellants argue that the Trial Chamber's interpretation of the scope of cross-examination under Rule 90(H) of the Rules is unacceptably

²¹ *Id.*

²² Appeal, paras 7-12. The Appellants assert that the "Fundamental Principle" is a logical procedural consequence of the fundamental rights of the accused guaranteed by Article 21 of the Statute of the Tribunal ("Statute") and is firmly established in the jurisprudence of the Tribunal and that of the International Criminal Tribunal for Rwanda (Appeal, fn. 6 and para. 7).

²³ Appeal, para. 13.

²⁴ *Ibid.*, paras 19-29.

²⁵ *Ibid.*, paras 21-23.

²⁶ *Ibid.*, para. 24.

²⁷ *Ibid.*, para. 25.

²⁸ *Ibid.*, paras 26-29.

broad in allowing cross-examination on issues going outside the testimony-in-chief.²⁹ In the Appellants' submissions, this incorrect interpretation contained in the Rule 90(H) Decision is also advanced in the Impugned Decision and cannot be applied by analogy to the admission of "new documents" by the Prosecution during the cross-examination of Defence witnesses.³⁰ The Appellants stress that "[c]onsiderations in relation to New Documents are significantly different from those relating to oral evidence from a defence witness" and that the "Prosecution had several avenues available to introduce documents during its case-in-chief."³¹

9. Finally, in their fourth ground of appeal, the Appellants argue that the Impugned Decision fails to distinguish Rule 85(A) considerations from the importance of the "Fundamental Principle".³² They underline that the Trial Chamber's powers to allow rebuttal evidence or the re-opening of a case are consistent with the "Fundamental Principle", in that they prove the existence of the general principle regarding the sequence of the presentation of evidence, and do not constitute true departures or exceptions therefrom, contrary to the exception established by the Impugned Decision.³³

10. The Prosecution responds that the Appeal should be rejected in its entirety.³⁴ In support of its arguments, the Prosecution first submits that imposing new rules on the use and disclosure of documents applicable only to the Prosecution's cross-examination of Defence witnesses at this stage of the trial is not justified or appropriate³⁵ and that procedural equality is violated by the relief sought in the Appeal, as well as by the Impugned Decision itself.³⁶ In this regard, it recalls that the restrictions on the use of new documents established by the Impugned Decision were not in effect at the time when the Prosecution filed its Rule 65 *ter* list, or during the Prosecution case-in-chief, or even during the Defence cases presented by Prlić and Stojić.³⁷ Regarding the advance notice,³⁸ the Prosecution submits that no party can be expected to know what documents will be relevant and useful for cross-examination until after the witness has given his or her testimony-in-chief, even more so when the Prosecution does not know "virtually anything" about the Defence case.³⁹ The

²⁹ *Ibid.*, paras 19, 30-34 referring to Judge Antonetti's Partially Dissenting Opinion attached to the Rule 90 (H) Decision.

³⁰ Appeal, paras 19, 35-38.

³¹ *Ibid.*, para. 37.

³² *Ibid.*, paras 19, 39-40.

³³ *Ibid.*, paras 39-40.

³⁴ Response, para. 61.

³⁵ *Ibid.*, paras 5.1, 6-18.

³⁶ *Ibid.*, paras 7-10, 18.

³⁷ *Ibid.*, paras 9-12.

³⁸ See *supra*, para. 3.

³⁹ Response, paras 12-14 referring in particular to para. 12 of Judge Harhoff's Dissenting Opinion attached to *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Reasons for Oral Decision on Admission of Exhibits 1316 and 1317,

Prosecution adds that nothing in the Rules, the Tribunal's jurisprudence or the guidelines applied throughout the present trial, support the unilateral imposition of any form of advance notice requirement for disclosure of documents to be used in cross-examination.⁴⁰

11. Secondly, the Prosecution asserts that there should be no absolute ban on the use or admission of new documents in connection with cross-examination pursuant to Rule 90(H) of the Rules.⁴¹ According to the Response, the admission of any new documents outside the Prosecution case-in-chief is not a re-opening of its case,⁴² and the threshold of "exceptional reasons in the interests of justice" imposed by the Impugned Decision is therefore incorrect.⁴³ In this regard, it is submitted that Rule 89(C) and (D) of the Rules provide a sufficient framework for the admission of evidence and does not imply any limitation on the types of evidence and the stages of its admission.⁴⁴ On the contrary, such limitations may result in the unjustified exclusion of relevant and probative evidence.⁴⁵ The Prosecution points out that there is no so-called "Fundamental Principle" in the jurisprudence of the Tribunal.⁴⁶ Finally, it underlines that Rule 90(H) of the Rules does not contain any such restriction either.⁴⁷

12. Thirdly, the Prosecution argues that there is no clear distinction between documents aimed at undermining the credibility of a witness and documents aimed to prove the guilt of an accused,⁴⁸ and that, in this regard, Rule 90(H)(i) of the Rules supports the view that the Trial Chamber may consider "new documents" used at cross-examination for matters that go beyond the credibility of the witness.⁴⁹

13. Finally, the Prosecution asserts that the Appeal makes no reference to any specific prejudice that would have resulted from the current approach to admission of documents during the cross-examination, stressing that the Defence has never objected to the admission of any particular

24 April 2008: "[...] The effect of such requirement would be that the Prosecution would feel obliged to include *all* of its material right away in its *65ter* list, which in turn would be counter-productive". See also, Response, paras 16-18.

⁴⁰ Response, para. 17.

⁴¹ *Ibid.*, paras 19-48.

⁴² *Ibid.*, paras 19, 27.

⁴³ *Ibid.*, para. 28.

⁴⁴ *Ibid.*, para. 24; see also paras 26 *et seq.* on the arguments relating to the sequence of evidence presentation, and paras 45-48 specifying that the Prosecution "is not proposing to make any such 'freestanding' use of 'new documents', but is only addressing the use of relevant and probative documents that are responsive to a witness' evidence", the admission of which should be analyzed on a case-by-case basis.

⁴⁵ Response, paras 29, 33.

⁴⁶ *Ibid.*, paras 36-40 referring to *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decision on Admission of Exhibits 1316 and 1317, 15 April 2008 ("*Delić* Decision") and *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Defence Request for Guidelines Concerning the Use of Statements not in Evidence and the Admissibility of Evidence During Cross-Examination, 17 December 2008 ("*Popović* Decision").

⁴⁷ Response, paras 31, 56.

⁴⁸ *Ibid.*, paras 49-56.

⁴⁹ *Ibid.*, para. 56.

document tendered by the Prosecution in such circumstances.⁵⁰ Even should such prejudice be shown, the Trial Chamber retains the authority to take the necessary measures to adequately remedy for it.⁵¹

14. The Appellants reiterate in their Reply that the crucial issues are the fact that the burden of proof lies on the Prosecution and the consequent lack of symmetry between the Prosecution and the Defence positions.⁵² They add that the absence of an explicit requirement of advance notice from the Rules is logical given that nothing in the Rules allows for tendering evidence probative of the accused's guilt after the closure of the Prosecution's case.⁵³ The Appellants further argue that even if one document may be used to impeach a witness's credibility and admitted for the truthfulness of its content, there is no difficulty in requiring a Trial Chamber to be clear about the purpose of its admission, *e.g.* specifying that such document will not be relied upon to prove the accused's guilt.⁵⁴ Concerning the question of prejudice, the Appellants stress that the "potential prejudice to an accused is implicit in the Fundamental Principle and the onus cannot fairly be thrown on to the defence to show positive reasons for resisting the addition of new evidence probative of guilt after the close of the Prosecution case".⁵⁵ The purpose of the Appeal is therefore to have the matter resolved before the presentation of the Appellants' cases so as to allow for their confident conduct.⁵⁶

B. Analysis

(a) Terminology

15. As noted above, the parties refer to the term "new documents".⁵⁷ In accordance with the case-law cited in the analysis below, the Appeals Chamber will continue to use the term "fresh evidence".⁵⁸ For the purposes of the present decision, this term refers to material that was not included in the Prosecution Rule 65 *ter* list and not admitted during the Prosecution's case-in-chief but that is tendered by the Prosecution when cross-examining Defence witnesses. The Appeals

⁵⁰ *Ibid.*, paras 57-58, 60.

⁵¹ *Ibid.*, para. 59.

⁵² Reply, paras 6, 8, 10, 12.

⁵³ *Ibid.*, para. 11.

⁵⁴ *Ibid.*, para. 21.

⁵⁵ *Ibid.*, para. 22.

⁵⁶ *Id.*

⁵⁷ See *supra*, fn. 10.

⁵⁸ Cf. *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-AR73.1, Decision on the Prosecution's Appeal Against the Trial Chamber's Order to Call Alibi Rebuttal Evidence During the Prosecution's Case in Chief, 16 October 2008 ("*Lukić Decision*"), paras 16-17 referring to *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići Appeal Judgement*"), para. 271; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez Appeal Judgement*"), para. 216 and fn. 306.

Chamber further clarifies that, in this decision, the term is not limited to the material that was not available to the Prosecution during its case-in-chief.

2. Preliminary Matters

(a) Scope of Appeal

16. First, the Appeals Chamber notes that the Appellants expressly rely on the arguments contained in their relevant submissions before the Trial Chamber.⁵⁹ In this regard, the Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.⁶⁰ Consequently, a party may not merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber.⁶¹ Therefore, the present decision will not address the arguments that the Appellants simply reiterate after they have been rejected at trial, unless they seek to demonstrate that the Trial Chamber committed a specific error of law or fact invalidating the decision or weighed relevant or irrelevant considerations in an unreasonable manner.⁶²

17. Second, the Appellants submit that the Impugned Decision is intricately linked to the Trial Chamber's "Decision on Scope of Cross-Examination under Rule 90 (H) of the Rules" issued on the same day ("Rule 90(H) Decision"). They therefore suggest that "so far as reasoning behind the Rule 90(H) [Decision] is also part of the reasoning behind the Impugned Decision, the Appeals Chamber is bound to consider and correct such reasoning where flawed".⁶³ While the Appeals Chamber cannot exclude that the Trial Chamber may indeed at any moment reconsider its Rule 90(H) Decision if it deems so appropriate, the scope of this Appeal lies strictly within the

⁵⁹ See, e.g., Appeal, para. 14.

⁶⁰ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-AR73.2, Decision on Krajišnik's Appeal Against the Trial Chamber's Decision Dismissing the Defense Motion for a Ruling That Judge Canivell is Unable to Continue Sitting in This Case, 15 September 2006, para. 9; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, para. 5; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić Interlocutory Appeal against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 6.

⁶¹ *Prosecutor v. Savo Todović*, Case No. IT-97-25/I-AR11bis.1 & IT-97-25/I-AR11bis.2, Decision on Savo Todović's Appeals Decisions on Referral under Rule 11bis, 4 September 2006, paras 73, 112; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 13; see also *Prosecutor v. Enver Handžihasanović and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 9 and, generally, paras 31, 35-36.

⁶² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR72.1, Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction, 16 November 2005, para. 11.

⁶³ Appeal, paras 17-18.

Impugned Decision⁶⁴ and there is no jurisdiction for the Appeals Chamber to decide on matters that the Trial Chamber explicitly declined to certify for appeal.⁶⁵

18. Finally, the Prosecution also appears to be in disagreement with the Impugned Decision and, throughout its Response, invites the Appeals Chamber to correct it accordingly.⁶⁶ The Appeals Chamber recalls that the Trial Chamber expressly denied the Prosecution's request for certification to appeal the Impugned Decision.⁶⁷ Therefore, the Appeals Chamber will only consider the Prosecution's arguments insofar as they properly respond to the submissions raised in the Appeal. Similarly, the Prosecution's request to "issue a Decision approving the *Popović* Decision as the correct statement of Tribunal jurisprudence"⁶⁸ cannot *per se* be admissible in the framework of a response to an appeal filed in the present case.

19. The Appeals Chamber considers that the issue before it is whether the Trial Chamber erred by finding that the Prosecution is allowed to adduce fresh evidence after the closure of its case-in-chief, if the admittance of such evidence is justified by "exceptional reasons in the interests of justice".⁶⁹ Pursuant to the conclusions above, the Appeals Chamber will not address the arguments of the parties in the order of the grounds of appeal, but rather by subject matters relevant to the resolution of the Appeal.

3. Applicable Provisions

20. According to Rule 85(A) of the Rules, the sequence of the presentation of evidence at trial should be as follows, "[u]nless otherwise directed by the Trial Chamber in the interests of justice":

- (i) evidence for the prosecution;
- (ii) evidence for the defence;
- (iii) prosecution evidence in rebuttal;
- (iv) defence evidence in rejoinder;
- (v) evidence ordered by the Trial Chamber pursuant to Rule 98; and
- (vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

21. Rules 89(C) and 89(D) further provide that "[a] Chamber may admit any relevant evidence which it deems to have probative value" and "may exclude evidence if its probative value is

⁶⁴ Certification Decision, pp. 3-5.

⁶⁵ *Cf. Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Praljak and Petković Defence Request for Certification to Appeal the Decision on Scope of Cross-Examination under Rule 90 (H) of the Rules, 9 January 2009.

⁶⁶ *E.g.* Response, paras 5.4, 8, 11, 26, 28, 51, 61.

⁶⁷ Certification Decision, p. 5; see also, Reply, paras 16, 23.

⁶⁸ Response, paras 5.4, 61.

⁶⁹ See Impugned Decision, para. 23 referring to fresh evidence aimed at establishing the guilt of the accused.

substantially outweighed by the need to ensure a fair trial”. Furthermore, in compliance with Rule 90(F) of the Rules, a Trial Chamber “shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time”.

22. Finally, Rule 90(H) of the Rules states that

(i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

4. Alleged Errors

(a) Sequence of the Presentation of Evidence

23. The Appeals Chamber recalls that, “[a]s a general rule, the Prosecution must present the evidence in support of its case during its case in chief”.⁷⁰ This stems from the rights of the accused under Article 21(4)(b) and (e) of the Statute pursuant to which “when evidence is tendered by the Prosecution there must be a fair opportunity for the accused to challenge it”.⁷¹ Consequently, when the Prosecution seeks to introduce fresh evidence, after the closure of its case-in-chief, it has to specifically justify its request.⁷² The Trial Chamber may authorize the deviation from the said sequence if it is satisfied that it is in conformity with the other applicable provisions, notably Rule 89(D) of the Rules. The Impugned Decision is correctly premised on this principle noting that, pursuant to Rule 85(A) of the Rules, the sequence of the presentation of evidence may be changed if the Trial Chamber deems it to be in the interests of justice.⁷³ Therefore, the Appeals Chamber cannot agree with the Appellants that there is an *absolute ban* for the Prosecution to tender evidence once its case presentation has been closed (save for rebuttal and re-opening). In sum, the Trial Chamber has the discretion to admit fresh evidence under Rule 89(C) and (D) of the Rules, taking

⁷⁰ *Lukić* Decision, paras 11 and 12 (“evidence which strengthens the Prosecution’s case [...] must be led in its case in chief”); *Kordić and Čerkez* Appeal Judgement, para. 216; See also, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision III on the Admissibility of Certain Documents, 10 September 2004, para. 5; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukašin Andrić, and Dobro Aleksovski and Decision *Proprio Motu* Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy, 18 May 2005 (“*Milošević* Decision”), paras 9-11.

⁷¹ *Delić* Decision, para. 22.

⁷² *Čelebići* Appeal Judgement, para. 271; *Delić* Decision, para. 22.

⁷³ Impugned Decision, paras 12, 15, 16, 23.

into account both the probative value of that evidence and the need to ensure a fair trial.⁷⁴ Where the admittance of this evidence constitutes a variation of the sequence of the presentation of evidence set out in Rule 85(A) of the Rules, the Trial Chamber may exercise its discretion to admit the evidence only where it is in the interests of justice.⁷⁵

24. In order to clarify the circumstances under which it would allow admission of fresh evidence after the closure of the Prosecution case-in-chief, the Trial Chamber emphasized that it would do so only in exceptional circumstances where the interests of justice so require, such as “the importance of the ‘new document’”.⁷⁶ It went on to specify that, with respect to material aimed at establishing the guilt of an accused, the Prosecution must also “explain to the Chamber when and by which means it obtained these documents, when it disclosed them to the Defence and why they are being offered only after the conclusion of its case”.⁷⁷ Finally, the Trial Chamber stated that it would proceed with the assessment of such requests on a case-by-case basis, after having permitted the Defence to challenge the evidence, particularly bearing in mind the potential infringement on the rights of the accused caused by the sought admission.⁷⁸ The Appeals Chamber is satisfied that this careful approach establishing a high threshold for the admission of fresh evidence duly mindful of Rule 89(C) and (D) of the Rules may be justified, depending on the specific circumstances of the case. The Appellants have thus not demonstrated any error in the Trial Chamber’s conclusions in this regard.

(b) Prejudice

25. However, the practical application of this caveat is a different issue which is not the subject-matter of this Appeal. Indeed, the Impugned Decision only deals with a “theoretical debate” and aims at establishing general modalities of admission of the Prosecution’s fresh evidence.⁷⁹ It thus leaves sufficient room for both parties to present their arguments with respect to any specific material tendered into evidence. In this sense, the Appeals Chamber recalls that “where the accused *opposes the admission of evidence* during cross-examination due to alleged breach of his right to a fair trial, a Trial Chamber must consider how it intends to strike the appropriate balance between the need to ensure the rights of the accused and its decision to admit such evidence”.⁸⁰ In doing so, the Trial Chamber will have to consider “the mode of disclosure of the documents in question, the

⁷⁴ Cf. *Kordić and Čerkez* Appeal Judgement, para. 222 referring to fresh evidence that was not available to the Prosecution during its case-in-chief.

⁷⁵ *Kordić and Čerkez* Appeal Judgement, para. 216.

⁷⁶ Impugned Decision, para. 20.

⁷⁷ *Ibid.*, para. 20.

⁷⁸ *Ibid.*, paras 20-22, 24, 26.

⁷⁹ *Ibid.*, para. 8.

⁸⁰ *Delić* Decision, para. 22 (emphasis added).

purpose of their admission, the time elapsed between disclosure and examination of the witness, the languages known to Counsel and the accused, as well as any other relevant factual considerations”.⁸¹ In striking the balance under Rule 89(D) of the Rules, the Trial Chamber will also consider the available measures to address the prejudice, if any, by “for example, providing more time for [re]-examination, adjourning the session, or granting the possibility of recalling the witness”.⁸² If, on balance, the fresh evidence is found to be inadmissible during the presentation of the Defence case, the Prosecution may still, under certain conditions, seek its admission as evidence in rebuttal.⁸³

26. Furthermore, the Appeals Chamber recalls that the burden of demonstrating that a Trial Chamber erred in exercising its discretion in admitting fresh evidence lies on the party alleging the errors.⁸⁴ With respect to the present Appeal, the Appellants failed to meet this burden, merely referring to potential prejudice as a matter of principle. The Appeals Chamber rejects these general allegations and re-emphasizes that “[t]he mere fact that [the admitted evidence] was probative of the Prosecution’s case does not mean that the [a]ccused were prejudiced”.⁸⁵

(c) Nature of the Tendered Materials

27. In its *Delić* Decision, the Appeals Chamber emphasized that specifying the purpose of admission of fresh evidence despite the Defence’s objections is necessary in order to properly address the prejudice caused by such admission.⁸⁶ In this sense, the Appeals Chamber considers that the risk of prejudice caused by the admission of fresh evidence probative of guilt is potentially greater as compared to fresh evidence admitted with the sole purpose of impeaching the witness.⁸⁷

28. With reference to the *Delić* Decision, the Trial Chamber resolved that fresh evidence probative of the Appellants’ guilt may only be admitted during the presentation of their respective cases in exceptional circumstances.⁸⁸ While the Impugned Decision appears to be more lenient to the admission of the fresh evidence for the sole purpose of “impeaching a witness’s credibility or refreshing his/her memory”, it still specifies that the Trial Chamber will decide on the admission on

⁸¹ *Ibid.*, para. 23.

⁸² *Id.*

⁸³ *Cf. Milošević* Decision, para. 13.

⁸⁴ *Kordić and Čerkez* Appeal Judgement, paras 223-224.

⁸⁵ *Ibid.*, para. 224.

⁸⁶ *Delić* Decision, para. 23.

⁸⁷ *Cf. ibid.*, para. 22.

⁸⁸ Impugned Decision, paras 11, 23.

the case-by-case basis in conformity with Rule 89 of the Rules.⁸⁹ In light of the above clarifications, the Appeals Chamber does not find that such approach is erroneous.

29. As far as the arguments regarding the practical difficulties related to the distinction are concerned, the Appeals Chamber is not convinced that the fact that a document may contain information going both to the guilt of an accused and to the credibility of a witness poses any difficulty to the application of the above caveats. Indeed, it is not the contents of the document that the Trial Chamber is required to assess, but the *purpose of its admissibility*. With respect to the assessment of the evidence, the Trial Chamber has the discretion to limit the purpose for which the admitted pieces of evidence may be used.

(d) Other Issues

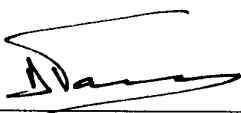
30. In light of its findings above, there is no need for the Appeals Chamber to address the issues related to disclosure and Rule 90(H) of the Rules. In any case, considerations pertaining to the scope of cross-examination or any prejudice caused by the non-disclosure of the tendered material at an earlier stage may become relevant to the Trial Chamber's decision on admission made on a case-by-case basis.⁹⁰ The Appeals Chamber re-emphasizes that what matters is that the admission of the fresh evidence tendered by the Prosecution after the closure of its case-in-chief is justified by the interests of justice and does not entail violation of the fair trial rights, which is in full compliance of Rules 85, 89(C), 89(D) and 90(F) of the Rules.

IV. DISPOSITION

31. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal in its entirety.

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

Done this 26th day of February 2009,
At The Hague, The Netherlands.



Judge Andrézia Vaz, Presiding

[Seal of the Tribunal]

⁸⁹ *Ibid.*, para. 24.

⁹⁰ See *supra*, paras 23-24; Impugned Decision, paras 24-26.