



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-94-1-A
Date: 15 October 1998
Original: ENGLISH

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 15 October 1998

PROSECUTOR

v.

DUŠKO TADIĆ

DECISION ON APPELLANT'S MOTION FOR THE EXTENSION OF THE
TIME-LIMIT AND ADMISSION OF ADDITIONAL EVIDENCE

The Office of the Prosecutor:

Ms. Brenda Hollis
Mr. Michael Keegan

Counsel for the Appellant:

Mr. Milan Vujin
Mr. John Livingston

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("the International Tribunal") is seised of an appeal against conviction and sentence by Duško Tadić ("Appellant") and a cross-appeal by the Prosecutor. Currently pending before it is a motion entitled "Motion for The Extension Of The Time Limit" ("the Motion"), filed by the Appellant on 6 October 1997 in which the Appellant seeks to admit additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules"). This is a decision on the Motion.

II. PROCEDURAL BACKGROUND

2. On 7 May 1997 the Appellant was convicted by Trial Chamber II of the International Tribunal of certain offences under the Statute of the International Tribunal ("the Statute"), as set out in its Opinion and Judgment¹. The Appellant filed Notice of Appeal against the Judgement on 3 June 1997. On 8 September 1997, the Appellant requested an extension of the time-limit for the filing of its appeal brief in order to collect and present additional evidence pursuant to Rule 115. On 19 September 1997, at the Appellant's request, the Presiding Judge of the Appeals Chamber convened an *in camera* hearing, at which both the Appellant and the Office of the Prosecutor ("the Prosecution") presented oral arguments.

3. On 6 October 1997, the Appellant filed the Motion, seeking to present additional evidence under Rule 115. After receiving the response of the Prosecution on 20 October 1997, a hearing on the Motion was held on 22 January 1998. At this time the Appeals Chamber ordered, *inter alia*, that the normal appeal proceedings were to be suspended until the determination of the Motion, and set out a ten-point timetable for receiving the further submissions of the parties².

4. On 2 February 1998, pursuant to a request filed by the Appellant, the Appeals Chamber issued an *ex parte* order addressed to Republika Srpska and granted the Appellant until 2 May 1998 to file any material obtained pursuant to that and other orders.

¹ Opinion and Judgment, *Prosecutor v. Tadić*, Case No. IT-94-1-T, 7 May 1997 ("Judgement").

² Transcript, *Prosecutor v. Tadić*, Case No. IT-94-1-A, 22 Jan. 1998, pp. 104-111.

5. The Appellant filed his "Appellant's Brief In Relation To Admission Of Additional Evidence On Appeal Under Rule 115" ("Appellant's Rule 115 Brief") and supporting material on 5 February 1998, to which the Prosecution responded on 9 March 1998.

6. On 23 March and 1 May 1998, the Appellant filed the remainder of his submissions in support of the Motion. The Appellant also sought an extension of time of 28 days in which to file one additional witness statement. On 7 May 1998 the Prosecution also sought an extension of time to file its Response to the Appellant's Rule 115 Brief. Both requests were granted: the Prosecution filed its Response to the Appellant's Rule 115 Brief on 8 June 1998 and the Appellant filed his reply on 25 June 1998, a "Substituted Copy" of this document being later filed 15 July 1998³. This completed the filings and submissions in this matter.

³ This is the version of this document referred to hereafter.

III. ARGUMENTS OF THE PARTIES

7. The Appeals Chamber will now summarise the arguments of the parties in relation to the principal issues.

A. Unavailability under Rule 115

1. Appellant's arguments

8. The Appellant argues that there is a substantial amount of evidence which was "unavailable" at trial within the meaning of Rule 115 of the Rules which it presents as referring to evidence

- (a) which was not before the Trial Chamber for its consideration;
- (b) which was "unavailable" to Appellant for any one or more of five reasons:
 - (i) it was not in existence at the time of the trial;
 - (ii) the Appellant was unaware of its existence;
 - (iii) the Appellant's lawyers at trial were unable to adduce the evidence, e.g., because the witnesses felt intimidated and refused to give evidence;
 - (iv) the Appellant's lawyers failed to seek out and/or otherwise obtain the evidence in question, whether negligently or not;
 - (v) the Appellant's lawyers failed to call the evidence other than with the agreement of Appellant; and
- (c) which, if omitted, might create a doubt as to whether a miscarriage of justice had occurred⁴.

9. The Appellant submits that witness and documentary evidence was not available at trial for a number of reasons, including:

- (a) difficulty faced by Appellant in obtaining and collecting evidence in Republika Srpska at the time of the trial, as well as other investigatory difficulties, which meant that
 - (i) some witnesses were unwilling to come forward;
 - (ii) some witnesses could not be contacted at the time of the trial;

⁴ Motion for the extension of the time limit, *Prosecutor v. Tadić*, Case No. IT-94-1-A, 6 Oct. 1997, para. 2 ("Motion").

- (iii) some witnesses would not come forward due to threats or intimidation, in particular by Simo Drljača (now deceased) and/or Mišo Daničić;
- (b) the circumstances that the trial defence team
 - (i) chose not to call witnesses available to it (sometimes despite the request of the Appellant to do so);
 - (ii) did not have access to the evidence now sought to be adduced;
 - (iii) were ultimately responsible for the failure to present "credible and potentially decisive evidence" on behalf of the Appellant at trial.

10. The Appellant submits that the Appeals Chamber "should adopt a liberal rather than restricted interpretation of Rule 115 and should be [slow] to rule out any additional evidence which, if not admitted might create doubts as to whether a miscarriage of justice has occurred"⁵. He contends that, to satisfy the requirement of "unavailability" pursuant to Rule 115, "it is sufficient to present new evidence which was not known to the Trial Chamber"⁶. He submits that the Appeals Chamber is empowered to admit any additional evidence without restriction under and in accordance with Article 25 of the Statute and Rule 115 of the Rules⁷, and that an appeal under those provisions is not restricted to issues of law or procedural error⁸.

2. Prosecution arguments

11. The Prosecution argues that the criteria under Rule 115 of the Rules relating to the question whether the additional evidence "was not available ... at the trial" should be construed narrowly. Article 25 of the Statute defines the criteria of Rule 115, and limits the scope of that Rule. The right of appeal, within the purview of Article 25, does not allow for trials *de novo*⁹. The Prosecution cites the Appeals Chamber's Judgement in *Prosecutor v. Erdemović*¹⁰ that the "appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing"¹¹.

⁵ *Ibid.*, para. 4.

⁶ Appellant's Response to the Cross-Appellant's Brief in relation to admission of additional evidence on appeal under Rule 115, *Prosecutor v. Tadić*, Case No. IT-94-1-A, 23 Mar. 1998, p. 5 ("Response").

⁷ Reply to Cross-Appellant's Response to Appellant's submissions since March 9, 1998 on the Motion for the presentation of additional evidence on appeal under Rule 115, *Prosecutor v. Tadić*, Case No. IT-94-1-A, 15 Jul. 1998, para. 2 ("Reply").

⁸ *Ibid.*, para. 4.

⁹ Memorandum of Law on the admissibility of new evidence under Rule 115, *Prosecutor v. Tadić*, Case No. IT-94-1-A, 21 Jan. 1998, para. 2 ("Memorandum of Law").

¹⁰ Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, 7 Oct. 1997 ("Erdemović Judgement").

¹¹ *Ibid.*, para. 115.

12. The Prosecution submits that the evidence sought to be admitted must satisfy one of the criteria under Article 25 of the Statute, namely:

- (a) an error on a question of law invalidating the decision; or
- (b) an error of fact which has occasioned a miscarriage of justice;

and that the Appellant must show that the evidence was unavailable at the time of trial and that it is in the interest of justice to admit it.

13. The Prosecution argues that the Appellant's Motion should not be granted unless

- (a) the evidence could not have been produced at trial through the exercise of due diligence;
- (b) the additional evidence, if proved, could have been a decisive factor in reaching a decision; and
- (c) the new evidence is credible (in the sense that there is a likelihood it can be proved)¹².

14. The Prosecution submits that

[g]enerally, appeals courts will not consider additional evidence . . . unless they determine that the evidence was unavailable at trial, that it is reliable and would be admissible evidence in the trial, and that there is a high probability the evidence would disprove or cast doubt on the findings of the court below.¹³

B. Due Diligence and Error of Counsel

15. In the most recent submissions in these proceedings, it is clear that, as it was put by the Appellant, the parties are not in substantial disagreement that the Defence "must, in practice, use all due diligence in gathering evidence on behalf of their client"¹⁴. However, there is disagreement between the parties about when the due diligence requirement applies and about whether alleged failure on the part of the Appellant's counsel to act with due diligence at trial can be relied upon by the Appellant in seeking leave to admit additional evidence.

¹² Cross-Appellant's Response to Appellant's submissions since 9 March 1998 on the Motion for the presentation of additional evidence on appeal under Rule 115, *Prosecutor v. Tadić*, Case No. IT-94-1-A, 8 Jun. 1998, para. 3 ("*Cross-Appellant's Response*").

¹³ Response to the Appellant's Motion entitled "Motion for the extension of the time limit", *Prosecutor v. Tadić*, Case No. IT-94-1-A, 20 Oct. 1997, para. 4.

¹⁴ Reply, *supra* n. 7, para. 33.

1. Appellant's arguments

16. In support of the submission that evidence "not available to it at trial" includes evidence "not adduced because of negligence" of the Appellant's lawyers at trial, the Appellant refers to Rule 119 of the Rules, which requires that, for a judgement to be reviewed on the basis of a new fact, that fact must not have been discoverable through the exercise of "due diligence". The Appellant contends that the omission of this term in Rule 115 shows that the requirement of due diligence does not apply under that Rule.

17. The Appellant presents written statements of potential witnesses and documents which it alleges "were not accessible to the previous defense counsel of the accused" or "which the previous defense counsel was erroneously of the view that it [would] not help determine the truth, in spite of the request by the accused for this evidence to be presented"¹⁵. The Appellant, who has changed his counsel, states that this was the reason for the change¹⁶.

18. The Appellant submits that there is "no justification, in the interests of justice for not allowing the Accused to re-open proceedings when the reason why relevant, credible and potentially decisive evidence was not obtained was because of negligence by lawyers"¹⁷. The Appellant should not, it is argued, be made to suffer for this. A similar argument is also raised in respect of evidence not presented as a consequence of a defence strategy by the Appellant's counsel at the time of trial.

2. Prosecution arguments

19. The Prosecution argues that one of the tests for admission of additional evidence under Rule 115 of the Rules is that "the evidence could not have been discovered before the trial by the exercise of due diligence"¹⁸. The Prosecution submits that all jurisdictions which permit the admission of additional evidence require due diligence on behalf of the moving party¹⁹.

¹⁵ Appellant's Brief in relation to admission of additional evidence on appeal under Rule 115, *Prosecutor v. Tadić*, Case No. IT-94-1-A, 5 Feb. 1998, p. 2 ("*Rule 115 Brief*").

¹⁶ *Ibid.*

¹⁷ Reply, *supra* n. 7, para. 33.

¹⁸ Cross-Appellant's Response to the Appellant's motion entitled "Brief in relation to admission of additional evidence on appeal under Rule 115, *Prosecutor v. Tadić*", Case No. IT-94-1-A, 9 Mar. 1998, para. 2.

¹⁹ *Ibid.*

20. Furthermore, the Prosecution contends that

[a]lmost all of the proposed witnesses and evidence was available at trial or could have been discovered by the exercise of due diligence by the Trial Defence Counsel, and, therefore, fails the requirement of unavailability.²⁰

The Prosecution also argues:

While no burden of proof is placed on the defence, the defence must be under a corresponding obligation to exercise due diligence in ensuring that all evidence on which the defence seeks to rely is placed before the Trial Chamber at the time of the trial. A party cannot, by failing to discharge its own obligation of due diligence, provide itself with a grounds of appeal in the event of an adverse judgment.²¹

The Prosecution also states:

In determining whether the Appellant diligently sought to make the new testimony available at trial, the court should examine whether the Appellant took certain steps such as subpoenaing the witness or moving for a continuance or an adjournment in order to obtain the testimony.²²

C. The Interests of Justice

1. Appellant's arguments

21. The Appellant submits that the "interests of justice" require that additional evidence be such that it would probably change the result of the trial proceedings conducted before the Trial Chamber²³. In his view, that phrase represents a broad concept which includes any consideration necessary to ensure a fair trial, such as the need for the accused to feel that justice has been done through the presentation of evidence which bears upon his guilt or innocence²⁴.

²⁰ *Ibid.*, para. 6.

²¹ Cross-Appellant's Response, *supra* n. 12, para. 49.

²² Memorandum of Law, *supra* n. 9, para. 10.

²³ Response, *supra* n. 6, p. 6.

²⁴ Reply, *supra* n. 7, para. 24.

2. Prosecution arguments

22. The Prosecution submits that the condition relating to interests of justice is to be construed narrowly as follows:

- (a) the evidence must be relevant to a material issue;
- (b) the evidence must be credible;
- (c) the evidence, if proven to be true and credible, must be such that it would probably change the result if a new trial or appeal were granted²⁵.

In the view of the Prosecution, the principle of finality must be considered as being in the "interests of justice"; this principle would be undermined if either party could have proceedings reopened to hear the testimony of additional witnesses²⁶.

D. Rule 115 or Rule 119

1. Appellant's arguments

23. The Appellant submits that if the correct interpretation of Articles 25 and 26 of the Statute and Rules 115 and 119 to 122 of the Rules is that the presentation of the additional evidence which he proposes to introduce is properly a matter for review rather than appellate proceedings, this motion should be remitted to the Trial Chamber under Rule 122 as an application for review²⁷. It is, however, the Appellant's primary submission that the evidence he seeks to adduce is admissible under Rule 115.

2. Prosecution arguments

24. The Prosecution submits that the standards for admission are the same, but that the discovery of a new fact after judgement is a matter for review under Article 26 of the Statute and Part Eight of the Rules, rather than appeal under Article 25 of the Statute and admission as additional evidence

²⁵ Memorandum of Law, *supra* n. 9, paras. 3-4.

²⁶ Cross-Appellant's Response, *supra* n. 12, para. 45.

²⁷ Reply, *supra* n. 7, para. 2.

under Rule 115 of the Rules²⁸. If the discovery of new evidence after trial were grounds both of appeal and review, there would be potential duplication of proceedings²⁹.

25. The Prosecution also argues that the Appellant cannot file notice of appeal and, at the same time, seek extension of time to search for additional evidence to support the appeal. The Prosecution asserts that, even if recourse to the review procedure is permissible, that provision allows a party to seek review on the basis of a new fact once it has been discovered, not to permit the party to preserve its right to appeal while still searching for the evidence to support the appeal³⁰.

²⁸ Cross-Appellant's Response, *supra* n. 12, para 3.

²⁹ *Ibid.*, para. 16.

³⁰ *Ibid.*

IV. APPLICABLE LAW

26. The relevant provisions of the Statute and the Rules are as follow:

Article 25

Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
 - (a) an error on a question of law invalidating the decision; or
 - (b) an error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Rule 115

Additional Evidence

- (A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing.
- (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

Rule 119
Request for Review

Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement.

Rule 122
Return of Case to Trial Chamber

If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion.

V. DISCUSSION

27. The Appeals Chamber will now consider the issues it regards as pertinent.

A. Distinction between Rule 115 and Rule 119

28. The parties are agreed that the Motion is to be treated as a motion for leave to admit additional evidence under Rule 115 of the Rules. However, in addition, or in the alternative, the Appellant asks that the Motion be treated as a motion for review of the Judgement on the basis of a "new fact" within the meaning of Rule 119 of the Rules, as read with the review provisions of Article 26 of the Statute. The Prosecution does not consider the Rule 119 procedure to be applicable.

29. The Appeals Chamber considers that there is a distinction between two provisions of the Statute and their related Rules, namely Article 25 of the Statute and Rule 115, and Article 26 of the Statute and Rule 119. The Chamber will address this issue first.

30. Review proceedings under Article 26 of the Statute and Rule 119 are different from appellate proceedings under Article 25 and Rule 115. Where an applicant seeks to present a new fact which becomes known only after trial, despite the exercise of due diligence during the trial in discovering it, Rule 119 is the governing provision. In such a case, the Appellant is not seeking to admit additional evidence of a fact that was considered at trial, but rather a new fact. The proper venue for a review application is the Chamber that rendered the final judgement; it is to that Chamber that the motion for review should be made. In this case, it is for the Trial Chamber to review the Judgement and determine whether the new fact, if proved, could have been a decisive factor in reaching a decision.

31. Rule 122 of the Rules, set out above, empowers the Appeals Chamber to "return the case to the Trial Chamber for disposition of the motion". The Appellant has brought his motion under Rule 115 for the reason that he considers that the matters presented can be treated as additional evidence under that Rule. In the course of the written arguments, he leaves it to the Appeals Chamber to deal with the matter as one raising new facts if the Chamber considers that new facts are raised. The Appellant has not, however, presented any convincing arguments of his own to support the view that

new facts are raised. The Appeals Chamber, for its part, considers it sufficient to say that it is not satisfied that new facts are raised.

32. The Appeals Chamber will, however, observe that a distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules. In the view of the Appeals Chamber, the alleged new fact evidence submitted by the Appellant is not evidence of a new fact; it is additional evidence of facts put in issue at the trial. Some of that additional evidence was not available at the trial. That being so, it is necessary to consider whether so much of that evidence as was not available at the trial is required by the interests of justice to be presented at the appeal. This is considered below.

B. The Requirements of Rule 115

33. The Appeals Chamber will now consider the basic tests of admissibility under Rule 115 of the Rules.

34. To be admissible under Rule 115 the material must meet two requirements: first, it must be shown that the material was not available at the trial and, second, if it was not available at trial, it must be shown that its admission is required by the interests of justice.

35. The first issue, the "availability" of the material, turns on the question whether due diligence is required. This is addressed in the following section of this Decision. As to the second requirement, it is clear from the structure of Rule 115 that "the interests of justice" do not empower the Appeals Chamber to authorise the presentation of additional evidence if it was available to the moving party at the trial. Such an interpretation is supported by the principle of finality. Naturally, the principle of finality must be balanced against the need to avoid a miscarriage of justice; when there could be a miscarriage, the principle of finality will not operate to prevent the admission of additional evidence that was not available at trial, if that evidence would assist in the determination of guilt or innocence. It is obvious, however, that, if evidence is admitted on appeal even though it was available at trial, the principle of finality would lose much of the value which it has in any sensible system of administering justice. It is only to the extent that the Appeals Chamber is satisfied

that the additional evidence in question was not available at trial that it will be necessary to consider whether the admission of the evidence is required by the interests of justice.

C. The Requirement for Due Diligence

36. Rule 115 (A) provides that a "party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial". That relates to appeals. Rule 119 enables a party to seek a review "[w]here a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence". The Appellant submits that the reference to "diligence" in the latter but not in the former means that diligence is not required under Rule 115. However, whilst the Rules can illustrate the meaning of the Statute under which they are made, they cannot vary the Statute. If there is a variance, it is the Statute which prevails. But, for the reasons explained below, there is no variance in this case. In the view of the Appeals Chamber, there is a requirement for the exercise of due diligence by a party moving under Rule 115.

37. Article 25, paragraph 1, of the Statute provides for appeals on two grounds, namely, "an error on a question of law invalidating the decision" and "an error of fact which has occasioned a miscarriage of justice". The first error is clearly an error committed by the Trial Chamber. That, in principle, would seem to be also the case with the second error. But it is difficult to see how the Trial Chamber may be said to have committed an error of fact where the basis of the error lies in additional evidence which, through no fault of the Trial Chamber, was not presented to it. Where evidence was sought to be presented to the Trial Chamber but was wrongly excluded by it, there is no need for recourse to the provisions relating to the production of additional evidence to the Appeals Chamber; there the Trial Chamber would have committed an error appealable in the ordinary way.

38. It is only by construing the reference to "an error of fact" as meaning objectively an incorrectness of fact disclosed by relevant material, whether or not erroneously excluded by the Trial Chamber, that additional material may be admitted. Such an extension of the concept of an "error of fact" as being not restricted to an error committed by the Trial Chamber may be required by justice; but justice would also require the accused to show why the additional evidence could not be

presented to the Trial Chamber in exercise of the rights expressly given to him by the Statute. It would be right to hold that the purpose of the Statute in giving those rights was that the accused should exercise due diligence in utilising them. This would exclude cases in which the failure to exercise those rights was due to lack of diligence.

39. Under Article 21, paragraph 4, of the Statute, an accused person is entitled at his trial "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing". He is also entitled "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Article 22 of the Statute provides for protection of victims and witnesses while Article 29 requires States, as a matter of law, to cooperate with the International Tribunal in the investigation and prosecution of accused persons. That applies in relation to material sought by either party.

40. The compulsory and protective machinery of the International Tribunal may not always be able to give total assurance that witnesses will be both available and protected if necessary. That is all the more reason why the machinery at the disposal of the International Tribunal should be used. A party seeking leave to present additional evidence should show that it has sought protection for witnesses from the Trial Chamber where appropriate, and that it has requested the Trial Chamber to utilise its powers to compel witnesses to testify if appropriate. Any difficulties, including those arising from intimidation or inability to locate witnesses, should be brought to the attention of the Trial Chamber.

41. An application pursuant to Rule 115 is part of the appellate proceedings before the Appeals Chamber. Arguments as to whether, in some countries, an appeal is by way of rehearing and, if so, to what extent, do not affect the fact that, so far as the Statute is concerned, an appeal does not involve a trial *de novo*³¹.

42. By the time proceedings have reached the Appeals Chamber, evidence relevant to the culpability of the accused has already been submitted to a Trial Chamber to enable it to reach a verdict and a sentence, if he is found guilty. From the judgement of the Trial Chamber there lies an appeal to the Appeals Chamber. The corrective nature of that procedure alone suggests that there is

³¹ See Erdemović Judgement, *supra* n. 10, para. 15.

some limitation to any additional evidentiary material sought to be presented to the Appeals Chamber; otherwise, the unrestricted admission of such material would amount to a fresh trial. Further, additional evidence should not be admitted lightly at the appellate stage, considering that Rule 119 provides a remedy in circumstances in which new facts are discovered after the trial.

43. Consideration may be given to the consequences of the opposite holding that additional evidence may be presented to the Appeals Chamber even where, through lack of diligence, it was not presented to the Trial Chamber though available. The Prosecutor can appeal from an acquittal. She may seek to reverse the acquittal on the basis of an error of fact disclosed by additional evidence. If the additional evidence was available to her but not presented to the Trial Chamber through lack of diligence, the accused is in effect being tried a second time. In substance, the *non bis in idem* prohibition is breached.

44. The Appeals Chamber therefore finds that the position under the Statute is as indicated above and cannot be cut down by reference to any apparent discrepancy in the wording of Rules 115 and 119 of the Rules. The word "apparent" is used because, on a proper construction, Rule 115 is to be read in the light of the Statute; it is therefore subject to requirements of the Statute which have the effect of imposing a duty to be reasonably diligent. Where evidence is known to an accused person, but he fails through lack of diligence to secure it for the Trial Chamber to consider, he is of his own volition declining to make use of his entitlements under the Statute and of the machinery placed thereunder at his disposal; he certainly cannot complain of unfairness.

45. In summary, additional evidence is not admissible under Rule 115 in the absence of a reasonable explanation as to why it was not available at trial. Such an explanation must include compliance with the requirement that the moving party exercised due diligence. This conclusion is consistent with the Statute and with the jurisprudence of many countries; it is not, however, dependent on that jurisprudence.

D. Diligence in Relation to the Responsibilities of Counsel

46. The concept of due diligence must now be considered in relation to the responsibilities of counsel.

47. Due diligence is a necessary quality of counsel who defend accused persons before the International Tribunal. The unavailability of additional evidence must not result from the lack of due diligence on the part of the counsel who undertook the defence of the accused. As stated above, the requirement of due diligence includes the 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.

48. Thus, due diligence is both a matter of criminal procedure regarding admissibility of evidence, and a matter of professional conduct of lawyers. In the context of the Statute and the Rules, unless gross negligence is shown to exist in the conduct of either Prosecution or Defence counsel, due diligence will be presumed.

49. In this case, the parties agree that due diligence might have been lacking in respect of certain evidence which was not presented at trial because of the decision of the Defence team to withhold it³². The Appeals Chamber is not, however, satisfied that there was gross professional negligence leading to a reasonable doubt as to whether a miscarriage of justice resulted. Accordingly, evidence so withheld is not admissible under Rule 115 of the Rules.

50. The Appeals Chamber considers it right to add that no counsel can be criticised for lack of due diligence in exhausting all available courses of action, if that counsel makes a reasoned determination that the material in question is irrelevant to the matter in hand, even if that determination turns out to be incorrect. Counsel may have chosen not to present the evidence at trial because of his litigation strategy or because of the view taken by him of the probative value of the evidence. The determination which the Chamber has to make, except in cases where there is evidence of gross negligence, is whether the evidence was available at the time of trial. Subject to that exception, counsel's decision not to call evidence at trial does not serve to make it unavailable.

F. Availability of Specific Categories of the Proposed Additional Evidence

51. The Defence called 40 witnesses at the trial, including the Appellant. It now seeks to call more than 80 witnesses and to present documentary material. It is entitled to do so if it satisfies the

³² See also Reply, *supra* n. 7, para. 33.

applicable requirements. Accordingly, the Appeals Chamber will now consider whether the requirements of Rule 115 have been satisfied in relation to the various categories of evidence put forward by the Appellant.

1. Burden of proof

52. A preliminary matter of a general nature concerns the burden of proof. The question at issue in this Motion is whether the Appellant is entitled to a right given to him by the appeal process which he has invoked. It is for him to establish his entitlement to the right which he claims. Accordingly, it is for the Appellant to prove the elements of the entitlement.

53. In the absence of any explanation as to why certain items now sought to be admitted were not available at trial, the Appeals Chamber finds that the Appellant has failed to discharge his burden of proof in respect of these items to its satisfaction. Specific issues will be considered later in relation to particular legal criteria which are applicable. At this stage, the Appeals Chamber determines that the burden of proof has not been discharged in relation to the following potential witnesses: Vinka Andić, Zeljko Meakić (or Mejakić), Nada Balaban, Gradan (or Drgan) Kontić, Mirko Groarać, Dragan Lukić, Murudif (or Muradin) Mrkalj, Goran Janković, Njegoslav (or Negoslav) Tadić, Milovan Tadić, Dr. Kotromanović, Muradif Aleksić, Branko Drazić, Jadranka Gavranic, Mijodrag Kostić, Milan Kovačević (now deceased), Slobodan Kuruzović, Dragan Lukić, Muradin Mrkalj, Pero Mrkalj, Mevlud Semenović, Mijatović Vaso (or Mijatović Vasa) and Drago Prcac. The testimony of these potential witnesses will therefore not be admitted. For the same reasons, the documentary evidence listed in Annexes 1, 2, 5, 6, 7, 8, 9, 10, 11, 14, 17, 20, 21, 22, 23, 24, 25, 26, 27, 30 and 31, I, II/4, II/5 and II/6 and the video-tapes numbered AB 1-16 and AB 18 and 19, will not be considered further. The Appeals Chamber has made considerable efforts to try to identify from the lengthy filings of the parties those witnesses in respect of whom specific arguments have been raised. Any witnesses or material not specifically referred to in this Decision are also rejected for failure to meet the burden of proof.

2. Material not in existence at the time of the trial

54. This category includes the testimony of potential witness Ljubica Sajčić, and the documents contained in Annexes 3, 4, 19, 28, 32 and 34, none of which was in existence at the time of the trial. However, on closer examination, the Appeals Chamber is satisfied that, with one exception, all of

the information referred to in this material was available to the Defence at the time of trial and therefore cannot now be admitted.

55. Take, for example, the statement of Ljubica Sajčić. Ljubica Sajčić is an interpreter who would testify as to the content of an interview with one Milorad Tadić for which Ljubica Sajčić acted as interpreter. The interview covered events in Kozarac in May 1992 and at Omarska from June to August 1992. What is being sought in substance is "authorisation" to present, through her, the evidence of Milorad Tadić. But his evidence was in existence at the time of trial. The Appeals Chamber is not satisfied that the Appellant has discharged the burden of proving that he exercised due diligence in seeking out and compelling the attendance of this person as a witness at the trial.

56. The exception referred to above relates to Annex 34. This contains various details of voter registration figures, including a document giving OSCE voter registration details for the 1997 Municipality Elections, which is said to show that there was no reduction in the number of eligible voters in the municipality of Prijedor³³. Clearly, this document was not available at the time of the trial. It appears that the Appellant is seeking to rely on this document to establish that the ethnic composition of the region did not change in the way that it appeared at trial³⁴. It follows that the OSCE records of 1997 constitute additional evidence not available at the time of trial. It thus passes the first limb of Rule 115. Its admission before the Appeals Chamber then falls to be determined under Rule 115 (B) and will be discussed with other material in this category later in this Decision.

3. Material which existed at trial but of which the Defence was unaware

57. This category includes the testimony of potential witnesses Ernad Beširević, Sasa Marić, Vlado Krckovski, Vinka Gajić, Slobodan Zrnić, Drago Pesević, Slobodan Malbasić, Zivko Pusać, Vladimir Marić, Mile Ratković, Mladen Zgonjanin and Dragoje Cavić, together with witness XX and his medical records. Certain of these individuals are said to have been at the battlefield at the time of the trial or to have been actively avoiding contact with the authorities. Others were simply unknown to the Defence and did not come forward at the time, while some have come forward as a result of information obtained under a Binding Order of the Appeals Chamber issued to the Republika Srpska on 2 February 1998. One item, a confidential document from the United States Department of State, was only disclosed by the Prosecution to the Appellant on 21 April 1998.

³³ Rule 115 Brief, *supra* n. 15.

³⁴ See, e.g., Response, pp. 16 – 18.

58. The Appeals Chamber is mindful of the difficulties of conducting investigations in the conditions relevant to this case. It appreciates that some witnesses, who were unknown to the Defence, would not volunteer themselves and indeed might not have been aware of the trial. While the Defence is required to use due diligence to identify and seek out witnesses, there are limits to this obligation. The Appeals Chamber finds that the Appellant has provided sufficient indication that these witnesses and materials were unknown to the Defence, despite the exercise of due diligence, and thus not available at the time of trial and will examine in a later part of this Decision whether it would be in the interests of justice to admit this evidence.

4. Material which the Appellant was unable to adduce at trial

59. This category relates to witnesses of whom the Defence was aware at the time of trial but whose evidence they were unable to produce. The material under this heading may be divided into three sub-categories: witnesses who were unwilling or unable to come forward at the trial stage, for example, witnesses who were imprisoned at the time; witnesses alleged to have been intimidated; and potential witnesses who could not be located at the time of trial.

60. First, then, there is the category of potential witnesses who were simply unwilling to come forward at the trial stage but are now willing to do so at the appeal stage. There are four witnesses in this category, namely, D.D., Miroslav Kvočka, Mladen Radić and one other witness, whose name the Appellant has asked to be kept confidential. The Appellant claims that this witness was unavailable at the time of trial due to imprisonment. All four had been indicted at the time of trial, the last three in connection with events at the Omarska camp; the first, namely D.D., whose identity is unknown to the Chamber, is acknowledged to have been employed at Omarska³⁵. The three named witnesses could have been discovered at the time of trial from the public indictment concerning events at the Omarska camp, events that were clearly relevant to the charges against the Appellant. No evidence has been submitted to the Appeals Chamber to indicate that any request was made to the Trial Chamber for the issue of subpoenas to compel the attendance of these witnesses. Despite the obvious practical difficulties in obtaining the evidence of such witnesses, a party cannot later seek to have such material admitted as additional evidence unavailable at trial unless it has raised the issue with the Trial Chamber at the time. As discussed above, the requirement of due diligence is not satisfied where there is insufficient attempt to invoke such coercive measures as were

³⁵ Rule 115 Brief, *supra* n. 15, p. 11.

at the disposal of the International Tribunal. Therefore, it cannot be said that the evidence of these three witnesses was not available at trial.

61. The Appeals Chamber is unable to determine whether the evidence of witness D.D. was available at trial or not, as it does not know his true identity. The Chamber will therefore assume that this evidence was not available and will consider in a later part of this Decision whether it would be in the interests of justice to admit such evidence.

62. The second category is a substantial one. It relates to potential witnesses who were known to the Defence at the time of trial but who are said to have been intimidated by persons in authority in the former Yugoslavia. These include witness D.J. (and the Annex of 15 photographs), D.S., D.B., Bosko Dragicević, Dusan Babić, D.V., Vaso Mijatović, P.Q., Bosana (or Bozana) Grahovac, Stoja Coprka, Milos Preradović, Brane Bolta, Mile Cavić, Milan Vlacina, Milan Andjić, D.T.Z., D.R.M., Mladen Majkić, Dusan (or Dule) Janković, Milorad Tadić, Simo Kević and D.S.D. Again, in the absence of any evidence to demonstrate that attempts were made to obtain such protection for these witnesses as the International Tribunal could offer, the Appeals Chamber finds that reasonable diligence was not exercised. Consequently, the testimony of these witnesses cannot be said to have been unavailable at trial.

63. The third category concerns potential witnesses who were known to the Defence but who could not be located at the time of trial. They include Milka Sarić, D.O., and Milan Grgić. The Appellant claims that all three of these witnesses had fled abroad and could not be located. In view of the difficulties facing defence counsel in locating such witnesses, the Appeals Chamber finds that the Appellant has provided sufficient indication that these witnesses were not available at the time of trial. The Appeals Chamber will examine in a later part of this Decision whether it would be in the interests of justice to admit their evidence.

6. Material not called by Defence counsel

64. This large category of items includes the testimony of potential witnesses Miroslav Cvijić, Srdjan Staletović, Dara Janković, Slavica Tadić, Pero Curguz, Radoslavka Vidović, Risto Vokić, Mladen Tadić, Mira Tadić (on matters other than those on which she did testify), Ostoja Trebovac, Slavko Svraka and Dragan Radaković. In addition, the Appellant seeks to admit the expert evidence of Dr. Dusan Dunjić, which was obtained prior to trial, plus substantial amounts of documentary

evidence under this category, including Annexes 12, 13, 15, 16, 18, 29, 33, 35 and II/3, together with video-tape AB17.

65. As indicated above, when evidence was not called because of the advice of defence counsel in charge at the time, it cannot be right for the Appeals Chamber to admit additional evidence in such a case, even if it were to disagree with the advice given by counsel. The unity of identity between client and counsel is indispensable to the workings of the International Tribunal. If counsel acted despite the wishes of the Appellant, in the absence of protest at the time, and barring special circumstances which do not appear, the latter must be taken to have acquiesced, even if he did so reluctantly³⁶. An exception applies where there is some lurking doubt that injustice may have been caused to the accused by gross professional incompetence. Such a case has not been made out by the Appellant. Consequently, it cannot be said that the witnesses and material were not available to the Appellant despite the exercise of due diligence.

66. Also in this category are the 11 expert witnesses whom the Appellant would now like to call. One, Thomas Deichmann, testified at trial. Barring exceptional circumstances, which are not made out in this case, it is difficult to think of circumstances which would show that expert witnesses were not available to be called at trial despite the exercise of reasonable diligence. The evidence of these experts, and the related documents in Annexes 36, 37, II/1a, II/1b and II/2, cannot be said to have been unavailable at trial for the purposes of Rule 115.

7. Testimony of Dragan Opacic

67. The Appellant also seeks to recall this witness, who originally testified as witness L for the Prosecution. The testimony of this witness was discredited, largely as a result of the efforts of the Defence counsel at the time, and the Prosecution asked the Trial Chamber to disregard the evidence in its entirety. The matter is also dealt with in the Judgement³⁷.

68. The evidence of this witness was available to the Appellant at trial and therefore it cannot be admitted as additional evidence under Rule 115.

³⁶ The Directive on Assignment of Defence Counsel, IT/73/Rev. 5, provides for an accused person who is dissatisfied with his counsel to seek redress. Such redress includes requesting withdrawal of defence counsel and assignment of new counsel (*see* Article 20).

³⁷ Judgement, *supra* n. 1, paras. 353-54.

G. Interests of Justice

69. As mentioned above, the Appeals Chamber finds that the following items were not available at trial within the meaning of Rule 115 (A):

- OSCE voting registration details for Municipality Elections in autumn 1997;
- witnesses Ernad Beširević, Sasa Marić, Vlado Krckovski, Vinka Gajić, Slobidan Zrnić, Drago Pesević, Slobodan Malbasić, Zivko Pusać, Vladimir Marić, Mile Ratković, Mladen Zgonjanin, Dragoje Cavić and witness XX, together with his medical records;
- the confidential document from the United States Department of State;
- witnesses Milka Sarić, D.O., and Milan Grgić.

In relation to these items and, for the reasons given in paragraph 61 above, the evidence of witness D.D., it will accordingly be necessary to consider the operation of the criteria relating to the interests of justice.

70. If the Appeals Chamber at this stage authorises the presentation of additional evidence, it will be for the Chamber at a later stage to decide whether the evidence discloses an "error of fact which has occasioned a miscarriage of justice" within the meaning of Article 25, paragraph 1(b), of the Statute. At this stage, the Chamber cannot pre-empt this decision by definitively deciding that the proposed evidence does or does not disclose "an error of fact which has occasioned a miscarriage of justice".

71. The task of the Appeals Chamber at this stage is to apply the somewhat more flexible formula of Rule 115 of the Rules, which requires the Chamber to "authorise the presentation of such evidence if it considers that the interests of justice so require". For the purposes of this case, the Chamber considers that the interests of justice require admission only if:

- (a) the evidence is relevant to a material issue;
- (b) the evidence is credible; and
- (c) the evidence is such that it would probably show that the conviction was unsafe.

72. The Appeals Chamber would only add that, in applying these criteria, account has to be taken of the principle of finality of decisions. As mentioned above, the principle would not operate to prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice. But clearly the principle does suggest a limit to the admissibility of additional evidence at the appellate stage.

73. The Appeals Chamber also considers that, in applying these criteria, any doubt should be resolved in favour of the Appellant in accordance with the principle *in dubio pro reo*.

74. However, even taking that principle into account, the Appeals Chamber is not satisfied that any material which was not available at trial is required by the interests of justice to be presented at the hearing of the appeal. The Chamber does not consider that it is necessary to give details of the application of the criteria in relation to each of the various pieces of evidence. The importance of avoiding the risk of prejudgement in relation to other aspects of the case is also evident.

VI. DISPOSITION

FOR THE FOREGOING REASONS, the Appeals Chamber unanimously dismisses the Motion.

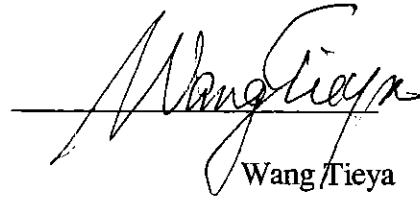
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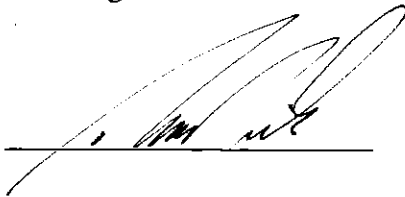
Mohamed Shahabuddeen
Presiding



Antonio Cassese
Judge



Wang Tieya
Judge



Rafael Nieto-Navia
Judge



Florence Mdepele Mwchande Mumba
Judge

Dated this fifteenth day of October 1998
At The Hague
The Netherlands

[Seal of the Tribunal]