IT-04-74-AR73.13
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12 January 2009

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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-AR73.13
		Date:	12 January 2009
		Original:	English

IN THE APPPEALS CHAMBER

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

Acting Registrar: **Mr. John Hocking**

Decision: **12 January 2009**

PROSECUTOR
v.
JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
and BERISLAV PUŠIĆ

PUBLIC

DECISION ON JADRANKO PRLIĆ'S CONSOLIDATED INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S ORDERS OF 6 AND 9 OCTOBER 2008 ON ADMISSION OF EVIDENCE

The Office of the Prosecutor:

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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 Tomašegović-Tomić and Mr. Dražen Plavec for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

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 by Jadranko Prlić ("Appellant") on 12 November 2008[1] against two orders rendered by Trial Chamber III ("Trial Chamber") denying the admission into evidence of certain materials tendered by the Appellant.[2] The Office of the Prosecutor ("Prosecution") filed its response on 24 November 2008.[3] The Appellant did not file a reply.

I. BACKGROUND

2. On the basis of its responsibility to ensure that the trial is conducted in a fair and expeditious manner, the Trial Chamber adopted guidelines for conducting the trial proceedings, including the admission of evidence.[4] These guidelines were subsequently revised on several occasions.[5] The latest version of the applicable guidelines reads in relevant parts:

> 27. The party wishing to tender an exhibit into evidence shall, in principle, do so through a witness who can attest to its reliability, relevance or probative value. The exhibit must be put to the witness in court.
>
> 35. Under the following conditions, the Defence team presenting its case may seize the Chamber of a written motion requesting the admission of exhibits which have not been put to a witness in court. The Defence team shall file this motion promptly, after the end of the presentation of evidence in respect of a given municipality or subject. [...][6]

The Trial Chamber also specified that the parties could subsequently challenge the admission of the tendered exhibits or excerpts.[7]

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[1] Jadranko Prlić's Consolidated Interlocutory Appeal Against the *Order Admitting Evidence Related to Witness Martin Raguž* and the *Order on Admission of Evidence Relating to Witness Zoran Perković*, 12 November 2008 ("Appeal").
[2] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Order Admitting Evidence Related to Witness Martin Raguž, 6 October 2008 and *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Order on Admission of Evidence Relating to Witness Zoran Perković, 9 October 2008 ("Raguž Order" and "Perković Order", respectively and "Impugned Orders" jointly).
[3] Prosecution Response to Jadranko Prlić's Consolidated Interlocutory Appeal Against the *Order Admitting Evidence Related to Witness Martin Raguž* and the *Order on Admission of Evidence Relating to Witness Zoran Perković*, 24 November 2008 ("Response").
[4] *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-PT, Decision Adopting Guidelines on Conduct of Trial Proceedings, 26 April 2006 ("26 April 2006 Guidelines"), pp. 6-8.
[5] *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006 ("28 April 2006 Guidelines"); *Prosecutor v. Jadranko Prlić et al.*, Case No IT-07-74-T, Decision on Admission of Evidence, 13 July 2006 ("13 July 2006 Guidelines"); *Prosecutor v. Jadranko Prlić et al.*, Case No IT-07-74-T, Decision Amending the Decision on the Admission of Evidence Dated 13 July 2006, 29 November 2006 ("29 November 2006 Guidelines"); *Prosecutor v. Jadranko Prlić et al.*, Case No IT-07-74-T, Decision Adopting Guidelines for the Presentation of Defence Evidence, 24 April 2008 ("24 April 2008 Guidelines").
[6] 24 April 2008 Guidelines, pp. 8-10 (footnotes omitted).
[7] 24 April 2008 Guidelines, paras 31, 35.

3. Witnesses Martin Raguž and Zoran Perković appeared before the Trial Chamber from 25 to 28 August 2008, and from 1 to 4 September 2008, respectively. Following their testimonies, the Appellant requested that a number of exhibits related thereto be admitted into evidence.[8] In its Impugned Orders, the Trial Chamber denied the admission of 42 exhibits tendered by the Appellant through Witness Raguž (18 of which by majority, Judge Jean-Claude Antonetti dissenting)[9] and two exhibits tendered by him through Witness Perković (decision taken by the same majority).[10] The main reasons for not admitting the documents were: (i) the exhibits lacked relevance and probative value, or (ii) the witness was unable to comment on the reliability or relevance of the exhibits, or (iii) the documents were not put to the witness in court.[11]

4. On 6 November 2008, the Trial Chamber granted the Appellant's request for certification of appeal against the Impugned Orders, underlying that it was "essential to guarantee a clearly identifiable, coherent practice in the matter of the admissibility of documents and that there [was] a need to know whether a minority judge may have a document admitted against the wishes of the majority and, as appropriate, the mode thereof".[12]

II. STANDARD OF REVIEW

5. It is well established that Trial Chambers exercise broad discretion in determining the admissibility of evidence.[13] The Appeals Chamber must thus accord deference to a Trial Chamber's decision in this respect.[14] The Appeals Chamber's examination is consequently limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error. The Appeals 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.[15]

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[8] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, 1 September 2008, T. 31607 and 8 September 2008, T. 32064 - 32065.
[9] Raguž Order, pp. 4-5 and Annex.
[10] Perković Order, p. 3 and Annex.
[11] Annexes to the Impugned Orders.
[12] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Requests for Certification to Appeal Two Decisions Filed by the Prlić Defence, dated 6 and 9 October 2008 Respectively, 6 November 2008 ("Certification Decision"), pp. 5-6.
[13] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008, para. 12 and references cited therein.
[14] *Id.*; see also *Prosecutor v. Zejnil Delalić, et al.*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 533; *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 19.
[15] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.11, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Decision on the Direct Examination of Witnesses Dated 26 June 2008, 11 September 2008, para. 5 and reference cited therein.

III. DISCUSSION

A. Arguments of the Parties

6. The Appellant argues that the Trial Chamber erred in law and abused its discretion in refusing to admit the documents in question, and presents three grounds of appeal seeking reversal of the Impugned Orders.

7. In his first ground of appeal, the Appellant submits that pursuant to Rule 89 (C) of the Rules of Procedure and Evidence ("Rules"), a Chamber may admit any relevant evidence which it deems to have probative value. According to the Appellant "[i]t should not [...] be possible to categorically declare a document to be irrelevant at this stage in the trial, when not all facts are yet in evidence."[16] He adds that if the Trial Chamber had doubts as to the relevance of any tendered document, it should have requested clarifications from the Appellant before rejecting them.[17] The Appellant stresses that by denying the admission of the tendered documents, the Trial Chamber made a premature final determination of the relevance of the evidence, thus abusing its discretion.[18]

8. The Appellant argues under his second ground of appeal that the Trial Chamber abused its discretion by not following its own practice and the established guidelines,[19] according to which, after the examination of a witness, a party seeking the admission of the documents presented with that witness were to "give to the Trial Chamber in court on the next hearing day following the close of the witness's testimony a list of the documents it seeks to admit."[20] He emphasizes that exhibits tendered into evidence by either party after having been put to a witness, have never been rejected by the Trial Chamber on the ground of relevance, which was only required to be shown under 24 April 2008 Guideline 9 dealing with the admission of documentary evidence not put to a witness.[21] The Appellant adds that the Trial Chamber has previously indicated to the parties that "determinations of relevance would be made at the end of trial".[22]

9. Finally, the Appellant asserts in his third ground of appeal that the Impugned Orders violated his fundamental rights pursuant to Article 21 of the Statute of the Tribunal ("Statute") by preventing him from rebutting the Prosecution's case and from making an effective record for the

[16] Appeal, para. 8.
[17] *Ibid.*, para. 12.
[18] *Ibid.*, para. 11.
[19] *Ibid.*, para. 12 citing 13 July 2006 Guidelines and 24 April 2008 Guidelines.
[20] Appeal, para. 13 referring to 24 April 2008 Guideline 8.
[21] Appeal, para. 13.

Trial Judgement and a potential appeal.[23] He also submits that the Impugned Orders infringe his right to be treated equally under Article 21(1) of the Statute as "a more lenient approach to the admission of evidence was taken during the Prosecution's case."[24] Further, the Appellant submits that his right to a fair hearing under Article 21(2) of the Statute and the right to be presumed innocent until proven guilty guaranteed by Article 21(3) of the Statute have been violated by denying the admission of evidence which should have been deliberated upon in determining his guilt or innocence at the end of the trial.[25] Finally, the Appellant argues that a majority vote disallowing the admission of an exhibit should not prevent a minority judge from considering it when deliberating and preparing the judgement.[26]

10. The Prosecution submits that the Appeal should be dismissed in its entirety, given that the Trial Chamber committed no discernible error and that the Appellant suffered no procedural unfairness or breach of his rights.[27] It first argues that the Appeal exceeds the scope certified for appeal, which only concerns the non-admission of 20 documents by a majority decision, and not the remainder of the documents the admission of which was rejected by the Trial Chamber unanimously.[28] In this regard, it submits that the Appeal should be remanded to the Trial Chamber in order to clarify the issue certified for appeal, and that if the Appeals Chamber were to review the substance thereof, consideration should only be given to the majority's decision to deny the admission of the 20 tendered documents.[29]

11. Responding to the Appellant's first ground of appeal, the Prosecution notes that only 13 documents out of 42 were rejected on the sole basis of lack of relevance, ten of them falling outside the geographical scope of the Indictment.[30] It further argues that it is possible and necessary for a Trial Chamber to assess the indicia of relevance of the tendered material on an ongoing basis, as opposed to the assessment at the end of trial when a final decision is made with regards to relevance, probative value and weight to be attached to the evidence.[31] In particular, a Trial Chamber may conclude that the tendered material is irrelevant where it "does not touch upon matters in the indictment, or where some nominal relevance is outweighed by other considerations,

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[22] *Ibid.*, para. 14 citing T. 16 February 2006, pp. 406-407 and *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-07-74-T, Order to Admit Evidence Regarding Witness Nicholas J. Miller, 1 November 2007 ("Order of 1 November 2007"), p. 4.
[23] Appeal, para. 17.
[24] *Ibid.*, para. 18.
[25] *Ibid.*, para. 19.
[26] *Ibid.*, paras 8 and 19 referring to the Dissenting Opinions of Judge Jean-Claude Antonetti attached to the Impugned Orders.
[27] Response, paras 3, 52.
[28] *Ibid.*, para. 1.
[29] *Ibid.*, paras 3-7, 16.
[30] *Ibid.*, paras 22-23.

such as foundation, credibility, etc."[32] It finally adds that the Appellant's argument concerning the absence of the opportunity for him to clarify the issues of relevance is bound to fail because the Trial Chamber did question the relevance of certain documents during the testimony of Witness Raguž.[33]

12. With regard to the Appellant's second ground of appeal, the Prosecution submits that the Impugned Orders are consistent with all the relevant Guidelines adopted by the Trial Chamber throughout the trial, as well as with the Trial Chamber's other decisions and the Tribunal's jurisprudence on this matter. More specifically, the Prosecution notes that 24 April 2008 Guideline 8 does establish "some threshold basis for determining the document's relevance"[34] and certain material tendered into evidence has previously been rejected as not relevant.[35]

13. In addressing the third ground of appeal, the Prosecution submits that the Appellant's argument concerning the unequal treatment must fail because certain material tendered by the Prosecution has previously been rejected by the Trial Chamber on the same grounds.[36] Similarly, the Prosecution argues, the Trial Chamber has treated the Appellant equally to the other accused.[37] Furthermore, the Prosecution submits that a Trial Chamber may decline to admit evidence if it, at least by a majority decision, estimates that the proffered material does not satisfy the criteria of Rule 89 of the Rules.[38] It stresses that the judgement at the conclusion of a trial must be made on the basis of "a single body of admitted evidence which can be argued by the parties and considered by the Trial Chamber in reaching a judgement."[39] With regard to prejudice, the Prosecution submits that the Appellant has not shown that he has suffered any.[40] It points out that other venues are available, such as tendering the material through another witness[41] or lodging an appeal demonstrating that the Trial Chamber committed a discernible error.[42] The Prosecution finally adds that the purpose of admission of evidence may not simply be the need for the parties to use this

[31] *Ibid.*, paras 30-32, 35-36.
[32] *Ibid.*, para. 36.
[33] *Ibid.*, para. 26.
[34] *Ibid.*, para. 24.
[35] *Ibid.*, para. 28.
[36] *Ibid.*, paras 24, 40-49.
[37] *Ibid.*, paras 39-43.
[38] *Ibid.*, para. 18.
[39] *Id.*
[40] *Ibid.*, para. 51.
[41] *Id.*
[42] *Ibid.*, para. 19.

evidence in their closing arguments, in which case the parties' exhibit lists would have been admitted *in toto*.[43]

B. Analysis

1. Scope of Appeal

14. The Appeals Chamber understands the Appellant to challenge the Impugned Orders with respect to 38 documents that the Trial Chamber refused to admit into evidence.[44] The Appeals Chamber agrees with the Prosecution that the Certification Decision is not clear as to whether the scope of the appeal is limited to the documents not admitted by the majority or encompasses all the non-admitted material. The Appellant's requests for certification clearly referred to all 44 documents that the Trial Chamber refused to admit in its Impugned Orders.[45] The disposition of the Certification Decision grants these requests without any apparent limitation to the sought scope of appeal.[46] However, the Certification Decision also explicitly states that "the mode of admitting 18 exhibits in the Order of 6 October 2008 and two exhibits in the Order of 9 October 2008 involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial".[47] Having analyzed the Certification Decision as a whole, the Appeals Chamber is convinced that the Trial Chamber certified the appeal only with respect to the documents the admission of which was denied by the majority. Therefore, it will only examine the Appeal with respect to those 20 documents.[48]

2. Applicable Law

15. The Appeals Chamber recalls that, while Rule 89 of the Rules grants Trial Chambers a broad discretion in assessing admissibility of evidence they deem relevant, this discretion is not unlimited, considering that the test to be met before ruling evidence inadmissible is rigorous.[49] A

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[43] *Ibid.*, paras 20, 38, 50.
[44] The Appellant specified that his Appeal does not relate to four of the 42 rejected documents, because, as the Trial Chamber noted, they had indeed not been put to the witness in court (Appeal, fn. 2).
[45] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Request for Certification to Appeal under Rule 73(B) Against the *Ordonnance portant sur l'admission d'éléments de preuve relatifs au témoin Martin Raguž*, 6 October 2008, 13 October 2008, paras 8, 10; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Request for Certification to Appeal under Rule 73(B) Against the *Ordonnance portant sur l'admission d'éléments de preuve relatifs au témoin Zoran Perković*, 9 October 2008, Regarding 1D00317 & 1D00811, 14 October 2008, paras 11-12.
[46] Certification Decision, p. 6.
[47] *Id.*
[48] 1D00268, 1D00282, 1D00300, 1D00853, 1D01157, 1D01523, 1D01803, 1D01831, 1D01832, 1D01833, 1D01834, 1D01836, 1D01837, 1D02303, 1D02531, 1D02532, 1D02534, 1D02541, 1D00317, 1D00811.
[49] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008 ("*Popović* Decision of 30 January

piece of evidence may be so lacking in terms of the indicia of reliability that it is not probative and is therefore inadmissible. This principle should not be interpreted to mean that definite proof of reliability must necessarily be shown for evidence to be admissible. *Prima facie* proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.[50] This indicium of reliability is in turn "a factor in the assessment of its relevance and probative value".[51] Furthermore, as the Appeals Chamber has held, "evidence is admissible only if it is relevant and [...] it is relevant only if it has probative value".[52] The determination as to whether the proffered material conforms to the criteria of Rule 89 has to be made on a case-by-case basis.[53]

3. First Ground of Appeal

16. The Appeals Chamber understands the Appellant to argue that the admission of materials tendered into evidence during the trial cannot be denied for lack of relevance, especially where the Trial Chamber did not seek further clarifications on the matter.[54] At the outset, the Appeals Chamber notes that, among the 20 rejected documents concerned by this Appeal, only 11 were not admitted for the sole reason of being irrelevant to the allegations in the Indictment.[55]

17. The Appellant's submission according to which relevance can only be assessed after conclusion of the trial contradicts the logic of Rule 89(C) of the Rules which refers to relevance as one of the main criteria of *admissibility* of evidence throughout the trial.[56] This submission therefore stands to be rejected. The evaluation of relevance at the stage of admissibility of evidence has been defined by the Appeals Chamber as a consideration of "whether the proposed evidence

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2008"), para. 22; *Georges Anderson Nderubumwe Rutaganda v. Prosecutor,* Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement"), para. 33.

[50] *Popović* Decision of 30 January 2008, para. 22 citing *Prosecutor v. André Ntagerura et al.,* Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 22; *Rutaganda* Appeal Judgement, paras 33 and 266; *Prosecutor v. Zejnil Delalić et al.,* Case No. IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 5 March 1998 ("*Delalić* Decision of 5 March 1998"), para. 20; *Prosecutor v. Dario Kordić et al.,* Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000 ("*Kordić* Decision of 21 July 2000"), para. 24 and *Prosecutor v. Dario Kordić et al.,* Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, 18 September 2000, para. 24.

[51] *Prosecutor* v. *Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela",* Case No. IT-98-34-A, Appeal Judgement, 3 May 2006, para. 402 citing *Delalić* Decision of 5 March 1998, paras 17, 20, 25 and *Kordić* Decision of 21 July 2000.

[52] *Prosecutor v. Stanislav Galić,* Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis* (C), 7 June 2002, paras 31, 35.

[53] *Popović* Decision of 30 January 2008, para. 22.

[54] See *supra*, para. 7.

[55] 1D00268, 1D00282, 1D00300, 1D00853, 1D01157, 1D01523, 1D02303, 1D02531, 1D02532, 1D02564, 1D02541.

[56] Rule 89(C) of the Rules: "A Chamber may admit any relevant evidence which it deems to have probative value".

sought to be admitted relates to a material issue".[57] When the relevance is assessed during the course of a trial, the material issues of the case are found in the indictment.[58] The Appeals Chamber is further of the view that it is for the party tendering the material to show that it has the required indicia of relevance in order to be admissible under Rule 89(C) of the Rules. Finally, the criteria for admission of evidence are cumulative, which means that the given evidence cannot be admitted if all the criteria are not fulfilled. Therefore, the Appellant's argument that the Trial Chamber could not reject the admission on the sole basis that the tendered material lacked relevance, without inviting him to clarify the issue, cannot prosper.

18. The Appeals Chamber notes that the Impugned Orders lack specific reasoning as to why the rejected documents were found to be irrelevant to the Indictment. The Appeals Chamber recalls that a Trial Chamber must provide reasoning in support of its findings on the substantive considerations relevant for a decision.[59] On the other hand, while the Appellant suggests that he could have explained why the documents are relevant, if prompted by the Trial Chamber before rendering the Impugned Orders, in his Appeal he makes no attempt to show their relevance.[60] In these circumstances, and bearing in mind the deference due to the Trial Chamber, the Appeals Chamber concludes that the Appellant has not demonstrated any discernible error in the Trial Chamber's conclusions in this regard.

19. With respect to the nine remaining documents falling within the scope of the Appeal, the Appeals Chamber notes that they were rejected on the ground that the witnesses could not comment on the reliability, relevance or probative value of the exhibits.[61] Under the first ground of appeal, the Appellant does not present any arguments with respect to the Trial Chamber's alleged errors in

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[57] *Ferdinand Nahimana et al. v. The Prosecutor,* Case No. ICTR-99-52-A, Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence Pursuant to Rule 115, 12 January 2007, paras 7, 13, 18-20.

[58] *Cf. The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004, para. 12: "The Trial Chamber has the discretion under Rule 89(C) to admit any evidence which it deems to have probative value, to the extent that it may be relevant to the proof of other allegations specifically pleaded in the Indictment".

[59] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Following Trial Chamber's Decision on Remand and Further Certification, 11 May 2007, para. 25; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007, para. 18.

[60] The Appellant merely speaks, in the context of his third ground of appeal, about potential dangers of excluding the evidence that may reveal itself relevant to the issues of joint criminal enterprise (Appeal, para. 19 citing the Dissenting Opinion to Raguž Order, pp. 14-15). As the only example, the Appellant claims that "the movement of displaced persons and refugees is central to the issue of whether there was a common plan to commit ethnic cleansing or reverse ethnic cleansing. Mr. Raguž worked in the HVO Office for Refugees and Displaced Persons and several of the documents put to him deal with the movement of refugees and displaced persons." However, this apparently refers to documents 1D01833 and 1D01836 which were rejected because the witness was not able to comment on their reliability, relevance and probative value, and not on the sole ground of lack of relevance.

this evaluation, apart from some general submissions according to which the final assessment of the relevance, reliability or probative value should be done at the end of the trial rather then during its course.[62] The Appeals Chamber reiterates that these are the established criteria of admissibility of evidence and emphasizes that they should not be confused with the assessment of the evidence performed at the stage of deliberations on the judgement.[63] Absent any showing of a specific error on the part of the Trial Chamber, the Appeals Chamber will not entertain this ground of appeal further.

20. In light of the above, the first ground of appeal is dismissed.

4. Second Ground of Appeal

21. Having reviewed the relevant guidelines adopted and updated by the Trial Chamber as the trial progressed, the Appeals Chamber notes that the criterion of relevance has inevitably been included in them since the 26 April 2006 Guidelines, underlining that "the [Trial] Chamber will be rigorous in its application of Rule 89(C) and the requirements of relevance and probative value".[64] The Appeals Chamber further finds that the Appellant misconstrues the 24 April 2008 Guideline 8 in arguing that it requires "to simply give to the Trial Chamber in court on the next hearing day following the close of the witness's testimony a list of the documents it seeks to admit".[65] In fact, and as recalled above, this guideline clearly states that the exhibit must be put to a witness so that he or she "can attest to its reliability, relevance or probative value".[66] Consequently, if a witness is unable to comment on these criteria, it is open to the Trial Chamber not to admit the tendered material if it cannot satisfy itself of the relevance and/or probative value of the material. Just because the Trial Chamber in the past may not have rejected evidence for the sole reason that it lacked relevance does not mean that it cannot do so in the future.

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[61] Annexes to the Impugned Orders.
[62] Appeal, para. 10. Under the third ground of appeal, the Appellant also claims that "[t]he documents that were denied by the Impugned Orders [...] are documents which the witnesses were familiar with at the time, and which deal with the very subject matters that the witness were involved in, namely refugees, in the case of Mr. Raguž, and Livno municipality, in the case of Mr. Perković" (Appeal, para. 18). However, this unsubstantiated argument cannot be sufficient to challenge the Trial Chamber's decision not to admit specific documents on the above-mentioned ground(s).
[63] *Cf. The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible, 2 July 2004, para. 15.
[64] 26 April 2006 Guidelines, para. 8; 28 April 2006 Guidelines, para. 8; 13 July 2006 Guidelines, p. 4; 29 November 2006 Guidelines, pp. 4-5; 24 April 2008 Guidelines, paras 27, 35.
[65] Appeal, para. 13.
[66] 24 April 2008 Guidelines, para. 27.

22. With respect to the Appellant's references to the previous statements made by the Pre-Trial and Trial Chambers in relation to the admission of evidence,[67] the Appeals Chamber similarly finds that the Appellant misconstrues them. Indeed, the Trial Chamber explained that the *final* assessment of the relevance, reliability and probative value of the *admitted* exhibits (*i.e.* weight to be given to the evidence on the record) would be performed at the end of the trial. This can in no way be interpreted as suggesting that the criteria for *admissibility of tendered material* may not be assessed during the trial when ruling on the admission. Moreover, when admitting the documents into evidence – subject to the assessment of weight to be given to them at a later stage – the Trial Chamber explicitly concluded that they bore "sufficient indicia of relevance, probative value and reliability",[68] thus consistently applying the criteria of Rule 89 of the Rules.

23. In light of the above, the Appeals Chamber concludes that the Appellant has not shown any discernible error of the Trial Chamber in this regard and accordingly dismisses the second ground of appeal.

5. Third Ground of Appeal

24. The Appellant first argues that the Impugned Orders violate his "right to put on a defence [...] by both denying him the right to present evidence to rebut the Prosecution's case and to make an effective record for the Trial Judgement and for any possible appeal".[69] Apart from referring to the Dissenting Opinion attached to the Raguž Order, this claim is unsubstantiated. In these circumstances, the Appeals Chamber agrees with the Prosecution in that the Appellant's approach seems to mean that there should be no limitation on admitting material into evidence. Yet, such limitations exist in the form the abovementioned well-established criteria for admission of evidence, which the Appellant does not appear to challenge *per se*.

25. Second, the Appellant evokes his right to be treated equally under Article 21(1) of the Statute, arguing that the Prosecution benefited from "a more lenient approach" to the admission of materials tendered by it during its case, and that the other accused before the Tribunal are treated differently.[70] In light of the Prosecution's arguments in response, the Appeals Chamber is not convinced by this allegation.[71] As recalled above, the assessment of admissibility criteria must be done on a case-by-case basis with respect to each tendered document. Moreover, the Appellant

[67] Appeal, para. 14.
[68] Order of 1 November 2007, p. 4.
[69] Appeal, para. 17.
[70] *Ibid.*, para. 18.
[71] Response, paras 42-49.

again simply reiterates that the Trial Chamber erred in deciding that the tendered documents were not relevant before "it has heard all the evidence".[72] This argument has already been disposed of above[73] and is of no relevance to the allegations of unequal treatment.

26. Third, with respect to the Appellant's allegations of violation of his rights under Articles 21(2) and 21(3) of the Statute, the Appeals Chamber again notes that the bulk of the Appellant's arguments in this regard concerns the fact that the decision to disallow the admission of the tendered material was allegedly premature. As stated above, the Appellant has not shown any error of the Trial Chamber in applying the criteria for admission of evidence and there is thus no need to address this issue here.

27. Finally, under this ground of appeal, the Appellant raises the issue that the admission of the tendered material was denied by the majority of the Trial Chamber and not unanimously, thus denying the dissenting Judge the possibility to refer to those materials when providing the reasons for his judgement.[74] The Appeals Chamber recalls that decisions and judgements are issued by a Trial Chamber as the body authorized to do so. In accordance with Article 23(2) of the Statute and Rule 87(A) of the Rules, judgements, and by logical implication other decisions, are rendered by a majority of the Judges assigned to a case. This has been the consistent practice of the Tribunal. The binding effect of judgements or decisions does not depend on whether they were rendered unanimously or by a majority. Whenever a Chamber renders a decision in accordance with the Statute, the decision is that of the Chamber and not merely a bundle of opinions of individual judges.[75] Therefore, provided that the majority's decision is not shown to be erroneous, an accused or an appellant cannot claim any violation of his or her fair trial rights based on the fact that the minority Judge(s) reached a different conclusion. In this case, the Trial Chamber decided, albeit by majority, not to admit certain documents tendered into evidence. The effect of this decision is such that these documents do not form part of the record. Several venues are open for the Appellant to challenge this decision, including motions for reconsideration and/or review, interlocutory appeal or appeal on the merits. However, if such challenges fail, the parties and the Judges are bound to refer themselves to the record of the case. The suggestion that all tendered materials be admitted into evidence for the sake of forming an exhaustive record contradicts the logic of having admissibility criteria and would not be beneficial to the effective administration of justice.

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[72] Appeal, para. 18.
[73] *Supra*, paras 17, 19, 22.
[74] Appeal, paras 17, 19; see also the Certification Decision, pp. 5-6.
[75] *Cf.* International Court of Justice, *South West Africa*, Second Phase, Judgement of 18 July 1966, Dissenting Opinion of Judge Jessup, *I.C.J.* Reports 1966, p. 325, fn. 1.

28. In addition, the Appeals Chamber concludes that the Appellant failed to demonstrate any prejudice resulting from the Impugned Orders. In particular, it agrees with the Prosecution that the rejection of the proffered materials by the Impugned Orders does not preclude the Appellant from tendering them at a later stage and/or through a different witness and thus have another opportunity to show that they fulfill the criteria set forth by Rule 89 of the Rules.

29. Consequently, the third ground of appeal is dismissed.

IV. DISPOSITION

30. 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 12th day of January 2009,

At The Hague, The Netherlands.

Judge Andrésia Vaz, Presiding

[Seal of the Tribunal]