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SCSL-04-15-A
(4807 - 4848)

4807

SPECIAL COURT FOR SIERRA LEONE
APPEALS CHAMBER

Before: Justice Renate Winter, Pre-Hearing Judge

Acting Registrar: Binta Mansaray

Date: 29 June 2009

THE PROSECUTOR against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-2004-15-A

PUBLIC

GBAO- REQUEST UNDER RULE 115 FOR ADDITIONAL EVIDENCE TO BE ADMITTED ON APPEAL

Office of the Prosecutor

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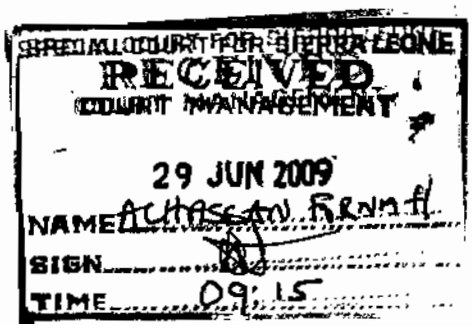

I. Introduction

1. The Defence for the Third Aecused, Augustine Gbao, hereby files a request pursuant to Rule 115[1] for new evidence to be allowed for the appeal proceedings. It requests the Pre-Hearing Judge to allow it to add one exhibit for the express limited purpose of challenging the veracity of TF1-314, whieh it submits is of fundamental importanee for the Appeals Chamber to effectively review certain aspeets of the Trial Chamber's findings in the RUF Judgement.[2]

II. Applicable Law

2. The present application is brought under Rule 115 of the Rules of Proeedure and Evidenee of the Special Court, which states:

> (A) A party may apply by motion to the Pre-Hearing Judge to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion shall clearly identify with precision the specific finding of faet made by the Trial Chamber to which the additional evidence is direeted. The motion shall also set out in full the reasons and supporting evidenee on whieh the party relies to establish that the proposed additional evidence was not available to it at trial. The motion shall be served on the other party and filed with the Registrar not later than the deadline for filing thc submissions in reply. Rebuttal material may be presented by any party affected by the motion.
>
> (B) Where the Pre-Hearing Judge finds that such additional evidence was not available at trial and is relevant and credible, he will determine if it eould have been a deeisive factor in reaching the decision at trial. Where it could have been such a factor, the Pre-Hearing Judge may authorise the presentation of sueh additional evidence and any rebuttal material.
>
> (C) The Appeals Chamber may review the Pre-Hearing Judge's decision with or without an oral hearing.

3. As the Appeals Chamber has not yet ruled on an application for additional evidence under Rule 115, an overview of the principles used in the ICTR and ICTY ean provide useful

[1] Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended 27 May 2008.
[2] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1234, Judgement (TC), 25 February 2009. ('Trial Judgement').

guidance, especially in view of the fact that the rules for the admission of additional evidence on appeal are nearly identical.[3]

4. In the *Tadic case*, the ICTY Appeals Chamber held that "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".[4]

5. The first issue, the 'availability' of the material, turns on the question whether due diligenee is required.[5] One exception to the requirement that the evidenee not be available

[3] Rule 115 of the ICTR RPE reads '(A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of faet made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, eogent reasons are shown for a delay. Rebuttal material may be presented by any party affected by the motion. Parties are permitted to file supplemental briefs on the impact of the additional evidenee within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material.
(B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 118.
(C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.
(D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant'. Rule 115 of the ICTY RPE reads '(A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay. Rebuttal material may be presented by any party affected by the motion. Parties are permitted to file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material.
(B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.
(C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.
(D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.'
[4] *Prosecutor v. Tadic*, Case No. IT-94-1-AR, Decision on the Appellant's Motion for Extension of Time Limit and Admission of Additional Evidence, 15 October 1998, para.34. ('*Tadic* Decision on Additional Evidence').
[5] *Id.* at para. 35.

on trial is if its exclusion would lead to a miscarriage of justice.[6] In such case, the Appeals Chamber maintains an inherent power to admit such evidence.[7]

6. The requirement for the admission of evidence to be in the interests of justice was developed in the *Kupresic Case*, where the ICTY Appeals Chamber held that "[t]he 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 (or sentence) was unsafe".[8]

7. The ICTY Appeals Chamber also held that "only new evidence with the potential to demonstrate a miscarriage of justice should be admitted".[9] As a result, the party seeking to have the new evidence admitted should "specify clearly the impact the additional evidence could have upon the Trial Chamber's decision".[10] The central issue is whether that evidence 'could' have had an impact on the verdict, rather than whether it 'would probably' have done so".[11]

8. The ICTY Appeals Chamber also considered that, in applying these criteria, any doubt should be resolved in accordance with the principle *in dubio pro reo*: any doubt should be resolved in favour of the Appellant.[12]

9. When applying for admission of evidence on appeal, the burden of proof is on the appellant seeking to have the evidence admitted.[13]

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[6] *Prosecutor v. Jelisic*, Case No. IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 November 2000, para. 8; *also see Prosecutor v. Kupresic*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, para. 58. See paras. 250, 296, for application of this principle. ('*Kupresic* Appeal Judgement').
[7] *Id.*
[8] *Kupresic* Appeal Judgement, para. 52; *also see Tadic* Decision on Additional Evidence, para. 71.
[9] *Kupresic* Appeal Judgement, para. 61.
[10] *Id.* at para. 69.
[11] *Id.* at para. 68.
[12] *Tadic* Decision on Additional Evidence, para. 73.
[13] *Id.* at para. 52.

III. Additional Evidence Proposed

10. The document that the Defence would like to be added is part of the transcript of the testimonial evidence given by TF1-314 in the case against Charles Taylor at the Special Court.[14] In particular the Defence wishes pages 18702,[15] 18780 to 18783 to be admitted into evidence. It was disclosed to the Defence by the Prosecution on 27 October 2008, as part of its Rule 68 obligations. We suggest the document be admitted for the sole purpose of further challenging the credibility of this witness.

IV. Relationship of the Additional Evidence to the Findings in the RUF Judgement

11. TF1-314 testified in the RUF case on 2, 4 and 7 November 2005. She testified to being captured by the RUF in 1994 and remained with them thereafter, frequently bearing their children. The testimony from TF1-314 that was eventually relied upon by the Trial Chamber related to Counts 7-9 in Kailahun District and contributed to the ultimate convictions against Gbao as a member of the JCE.

12. The proposed additional exhibit relates solely to her credibility, as she admitted in the Taylor case to lying under oath in the RUF case.[16] It has been found in previous case-law that a witness who admits to lying under oath should have his/her testimony disregarded.[17]

13. The Gbao Defence argued in its final brief that TF1-314 lacked the requisite credibility to be relied upon by the Trial Chamber.[18] The Trial Chamber partly agreed with its position, finding that her testimony required corroboration when relating to Gbao's acts and conduct.[19] We suggest that this new evidence, coupled with the Trial Chamber's assessment that TF1-314 required corroboration for any testimony related to Gbao's acts and conduct, should serve to dismiss her testimony in its entirety.

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[14] *Prosecutor v. Taylor,* Case No. SCSL-03-01-T, Transcript of 20 October 2008, TF1-314.
[15] Especially lines 19-21.
[16] *Id.* p. 18782.
[17] *Prosecutor v. Seromba,* Case No. ICTR-2001-66-T, Judgement (TC), 13 December 2006, para. 92; *Prosecutor v. Nahimana, Barayagwiza and Ngeze,* Case No. ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003, para. 551; *Prosecutor v. Nahimana, Barayagwiza and Ngeze,* Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 820.
[18] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1208, Confidential Gbao-Final Trial Brief, 29 July 2008, paras. 428-61.
[19] Trial Judgement, para. 594.

14. The new evidence, insofar as it casts doubts as to the credibility of TF1-314, relates to Grounds 5 and 6 of the Gbao's Appeal.[19] It also relates to the Trial Chamber's findings that terrorism, forced marriage and sexual slavery took place in Kailahun District and that Gbao was responsible for it under the Joint Criminal Enterprise mode of liability. In particular it is relevant to the following paragraphs, in the sense that should the Appeals Chamber take the new evidence into consideration and find that the Trial Chamber erred in finding TF1-314 was a credible witness, the findings based on her evidence should be dismissed: paragraphs 1406-1407, 1412, 1460-1461 (forced marriage), paragraph 1461 (Sexual slavery), paragraph 1475 (Outrages upon personal dignity), paragraphs 1618 and 1660 (ehild soldiers).

V. Evidence Not Available at Trial

15. The proposed evidence of TF1-314 is dated of 20 October 2008, or more than two months after the RUF case closed. The Prosecution disclosed it on 28 October 2008. The final briefs in the RUF case were filed on 29 July 2008. Oral arguments were heard on 4 and 5 August 2008.

16. The evidence came into existence after the RUF Trial had finished. Since it was not available at thc time of the trial, we submit it should now be admitted for the express limited purpose of challenging the veracity of the witness.

VI. Admission of the Evidence is in the Interests of Justice

17. The admission of the transeripts of TF1-314's testimony in the Taylor case has the potential impact, if the Appeals Chamber finds that her admission in that case to lying in the RUF Trial leads to her testimony being disregarded, of eontributing to reversing the convietions against Gbao under Counts 7-9 in Kailahun District.

18. This position is substantiated by the fact that the Trial Chamber only relied upon the testimony of two specific witnesses – TF1-314 and TF1-093 – to establish the widespread

[19] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-279, Confidential Appeal Brief for Augustine Gbao, 1 June 2009. ('Gbao Appellant Brief'). See also *Prosecutor v. Sesay, Kallon and Gbao, Case* No. SCSL-04-15-A-1253, Confidential Notice of Appeal for Augustine Gbao, 28 April 2009.

nature of crimes under Counts 7-9 in Kailahun Distriet. TF1-093's testimony required corroboration and was not corroborated. Other reasons leading to dismissal of TF1-093's testimony are covered in the Gbao Appeal Brief.[20] The remaining testimony of erimes committed under Counts 7-9 are of an unspecified nature and their suggested dismissal is thoroughly covered in the Gbao Appeal.[21]

19. Furthermorc, the evidence proposed has been given before Trial Chamber II of the Special Court for Sierra Leone and was subject to cross-examination and re-examination by the Prosecution at the Special Court.

V. Conclusion

20. The admission of the evidence of TF1-314 in the Taylor case has the potential of casting doubts as to certain convictions of the Trial Chamber under Counts 7-9 in Kailahun District. It is submitted that it is in the interests of justice for the Pre-Hearing Judge to admit the proposed additional evidence for the purposes of Appeal.

Done in Freetown, 29 June 2009
Counsel for Augustine Gbao,

John Cammegh

Scott Martin

[20] *See* Gbao Appellant Brief, paras 244 and 245.
[21] *Id.* at paras. 198-212, 246-50, 281-88.

Table of Authorities

I. Special Court for Sierra Leone

Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended 27 May 2008. Rule 15.

Prosecutor v. Sesay, Kallon and Gbao, Doc. No. SCSL-04-15-A-279, Confidential Appeal Brief for Augustine Gbao, 1 June 2009. Paragraphs 244 and 245.

Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-A-1253, Confidential Notice of Appeal for Augustine Gbao, 28 April 2009. Grounds 5 and 6.

Prosecutor v. Sesay, Kallon and Gbao, Doc. No. SCSL-04-15-T-1234, Judgement (TC), 25 February 2009. Paragraphs 593-594.

Prosecutor v. Taylor, Case No. SCSL-03-01-T, Transcript of 20 October 2008, TF1-314. Page 18782.

Prosecutor v. Sesay, Kallon and Gbao, Doc. No. SCSL-04-15-T-1208, Confidential Gbao-Final Trial Brief, 29 July 2008. Paragraphs 428-61.

II. International Criminal Tribunal for Rwauda

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

Prosecutor v. Seromba, Case No. ICTR-2001-66-T, Judgement (TC), 13 December 2006. Paragraph 92.

Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-T, Judgement and Sentenee (TC), 3 December 2003. Paragraph 551.

Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007. Paragraph 820.

III. International Criminal Tribunal for the Former Yugoslavia

Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.

Prosecutor v. Kupresic, Case No. IT-95-16-A, Judgement (AC), 23 October 2001. Paragraphs 44, 52, 58, 61, 68, 69, 250 and 296.

Prosecutor v. Jelisic, Case No. IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 November 2000. Paragraph 8.

Prosecutor v. Tadic, Case No. IT-94-1-AR, Decision on the Appellant's Motion for Extension of Time Limit and Admission of Additional Evidence, 15 October 1998. Paragraphs 34, 35, 52, 71 and 73.

Annex I

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Excerpt of TF1-314's Evidence in the Taylor Trial Where the Witness Admitted to Lying in the RUF Trial

Prosecutor v. Taylor, Case No. SCSL-03-01-T, Transcript of 20 October 2008, TF1-314, pages 18702, 18780-18783.

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

MONDAY, 20 OCTOBER 2008
9:30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Al Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Sidney Thompson
For the Registry:	Ms Rachel Irura
For the Prosecution:	Mr Nicholas Koumjian Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Terry Munyard Mr Morris Anyah

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A. It was not 2000.
Q. When was it?
A. Well, I cannot recall the year now, but I don't know if it was in 2000 or not. I cannot recall the year now.
15:44:13 Q. Now, after that first interview did you begin having confidence in the people who were asking you questions about your experience?
A. No, I still had fear. In fact the other time they even went to look for me and I hid. I said maybe there was trouble,
15:44:30 so I hid.
Q. Now, do you remember telling me this earlier this morning, that you'd carried a gun on those two food finding missions?
A. Yes.
Q. And if we now have a look, please, behind divider 2, the
15:45:12 last bullet point on that page: "I fought during the war in surrounding villages of Buedu. We were doing food finding and I carried a gun. I fired a gun." Is that true?
A. Yes.
Q. And that is something you said again on oath before this
15:45:51 Court this morning, isn't it?
A. Yes.
Q. So help me, please. Let's go behind divider 5. Why did you say on 26 of October 2005: "During the food finding missions the witness was not armed as stated in the interview notes of 30
15:46:25 June 2004". Why did you say that?
A. I did not say that. I said we went on the food finding missions and I had a gun, I said that. But I did not say this other one, that I did not have a gun.
Q. So how does it come about that on 26 October 2005, somebody

writes down something which totally contradicts what you told us today? Can you help us as to how that came about?

A. Well, sometimes it was the way questions would be asked of you, that was the way you could respond to them. Maybe if it was the way that question you asked it, if it was that same way the question was asked then you would answer it that same way. But you know there are so many people asking me questions. So this person would come and ask you a question a different way and some other person else may come and ask you a question a different way. So that was how attention could get confused and how I just responded to the questions the way they were asked of me.

MR GRIFFITHS: I'm slightly confused, Madam President. Could I have of a moment to check a reference, please?

Yes. Could we go, please, behind divider 7, page 43. This was on a previous occasion when you were asked the question. Line 1:

"Q. Did you tell the Prosecution that you had gone on food finding and carried a gun and fired it?

A. No. I only told her that I was taught how to fire a gun."

Do you remember saying that on a previous occasion?

A. Yes.

Q. So now we have you repeating what you'd said on 26 October 2005, that you had not in fact had a gun when you went on food finding missions. So which of them is right? Did you have a gun or didn't you?

A. Well, I held a gun when we went on the food finding mission. I held a gun when we went on the food finding mission. It was the person who wrote it must have made this mistake.

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Q. No, no, but here you were being asked questions in a different situation altogether to that where you were being asked questions by an investigator. And all I'm trying to get your assistance with is when you were asked that particular question on 4 November 2005 why did you say no for a second time?
A. I forgot. But I had a gun.
Q. How could you forget having a gun as a child?
A. I was afraid. In fact even when I went to the Court - even when they had given me confidence I was still afraid. That's why I said I did not have a gun. I just thought that afterwards they would still go and arrest me. But I actually had a gun.
Q. So did you on two occasions deliberately lie and say you didn't have a gun because you were frightened of being arrested?
A. Yes. I thought that if anybody admitted having a gun that person would be arrested. That was the fear that I had.
Q. Now, you know before you started giving evidence today you took an oath to tell the truth and nothing but the truth. Do you remember that?
A. Yes.
Q. Did you understand the importance of that oath?
A. Yes, I do.
Q. And you held the Bible whilst you did it, didn't you?
A. Yes.
Q. Because you appreciated it was a solemn oath you were taking?
A. Yes, and I was risking my life.
Q. And do you remember taking a similar oath on a previous occasion?
A. Yes.

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Q. And when you took the oath on that previous occasion, did you take it seriously?
A. Yes, very seriously.
Q. So tell me: Why then did you tell a lie and say you didn't
15:52:56 have a gun?
A. I was afraid. I was afraid because I had - I had first said it in the statement but later I had the fear. That's why I did not say it.
Q. So just so that we fully understand, on a previous
15:53:17 occasion, despite taking an oath on the Bible to tell the truth, you lied?
A. Well, that was up to me because I don't think I will come here to take an oath on the Bible and put my life at stake, because if you take an oath on the Bible it has to do with God
15:53:43 and my life. So I know that when I came here and took the Bible with my right hand and if I tell a lie afterwards, that that would affect me.
Q. But you did precisely that on a previous occasion in November 2005. Why did you do that?
15:54:03 A. I have said because I was frightened. I had a fear in me. Even now, as I am here, I still have fear in me.
Q. So through fear on a previous occasion in November 2005 you deliberately told a lie even though you had taken an oath, is that right?
15:54:25 A. Yes.
Q. Now you feared the Kamajors as being cannibals, didn't you?
A. While we were in the bush?
Q. Yes, you heard that the Kamajors ate people, didn't you?
A. Yes, if you attempted to escape.

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.

DU[KO TADI]

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

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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 Du{ko Tadi} ("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 Judgment[1]. 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 parties[2].

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.

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[1] Opinion and Judgment, *Prosecutor v. Tadi}*, Case No. IT-94-1-T, 7 May 1997 (*"Judgement"*).
[2] Transcript, *Prosecutor v. Tadi}*, Case No. IT-94-1-A, 22 Jan. 1998, pp. 104-111.

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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 whieh the Proseeution responded on 9 Mareh 1998.

6. On 23 Mareh 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 1998[3]. 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 prineipal 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 oceurred[4].

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 evidenee 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. Tadi}*, 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 Drlja~a (now deceased) and/or Mi{o Dani~i};

(b) the circumstances that the trial defenee team

(i) ehose not to call witnesses available to it (sometimes despite the request of the Appellant to do so);

(ii) did not have access to the evidenee now sought to be addueed;

(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 misearriage of justice has occurred"[5]. He eontends 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 evidencc without restriction under and in aceordance with Article 25 of the Statute and Rule 115 of the Rules[7], and that an appeal under those provisions is not restricted to issues of law or procedural error[8].

2. Prosecution arguments

11. The Prosecution argues that the eriteria 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. Erdemovi}*[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].

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[5] *Ibid.*, para. 4.
[6] Appellant's Respouse to the Cross-Appellant's Brief in relation to admission of additional evideuce on appeal under Rule 115, *Prosecutor v. Tadi}*, 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 evidenee on appeal under Rule 115, *Prosecutor v. Tadi}*, 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. Tadi}*, Case No. IT-94-1-A, 21 Jan. 1998, para. 2 ("*Memorandum of Law*").
[10] Judgement, *Prosecutor* v. *Erdemovi}*, Case No. IT-96-22-A, 7 Oct. 1997 ("*Erdemovi} 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 evidenee eould not have been produeed at trial through the exercise of due diligence;
(b) the additional evidenee, if proved, could have been a deeisive factor in reaching a decision; and
(c) the new evidenee is eredible (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 evidenee 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, usc 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.

1. Appellant's arguments

[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. Tadi}*. 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. Tadi}*. Case No. IT-94-1-A, 20 Oct. 1997, para. 4.
[14] Reply, *supra n. 7*, para. 33.

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 change[16].

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 party[19].

20. Furthermore, the Prosecution contends that

[15] Appellant's Brief in relation to admissiou of additional evidence on appeal under Rule 115, *Prosecutor v. Tadi}*, 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, *Prasecutor v. Tadi}*. Case No. IT-94-1-A, 9 Mar. 1998, para. 2.
[19] *Ibid.*

> [a]lmost all of the proposed witnesses and evidenee 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 eorresponding 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 continuancc 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 changc the result of the trial proceedings conducted before thc Trial Chamber[23]. In his view, that phrase represents a broad concept which ineludes any consideration nccessary to ensure a fair trial, such as the need for the accused to feel that justice has been donc through the presentation of evidence which bears upon his guilt or innocence[24].

2. Prosecution arguments

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

(a) the evidence must be relevant to a material issue;

(b) the evidence must be credible;

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[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.

(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 granted[25].

In the view of the Prosecution, the prineiple 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 thc testimony of additional witnesses[26].

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 review[27]. 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 under Rule 115 of the Rules[28]. If the discovery of new evidence after trial were grounds both of appeal and review, there would be potential duplication of proceedings[29].

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

[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.
[28] Cross-Appellant's Response, *supra n. 12*, para 3.
[29] *Ibid.*, para. 16.

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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 appeal[30].

[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

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Request for Review

Where a new faet has been diseovered whieh was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and eould not have been discovered through the exercise of due diligenee, 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 suffieient 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 whieh 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 evidenee 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 aceused 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 aecused 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 thc Trial Chamber to utilise its powers to compel witnesses to testify if appropriate. Any difficulties, including those arising from intimidation or inability to locatc 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 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.

[31] *See* Erdemovi} Judgement, *supra n. 10*, para. 15.

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 it[32]. 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 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

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

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 partieular legal criteria which are applicable. At this stage, the Appeals Chamber determines that the burden of proof has not been diseharged in relation to the following potential witnesses: Vinka Andi}, Zeljko Meaki} (or Mejaki}), Nada Balaban, Gradan (or Drgan) Konti}, Mirko Groara}, Dragan Luki}, Murudif (or Muradin) Mrkalj, Goran Jankovi}, Njegoslav (or Negoslav) Tadi}, Milovan Tadi}, Dr. Kotromanovi}, Muradif Aleksi}, Branko Drazi}, Jadranka Gavrani}, Mijodrag Kosti}, Milan Kova~evi} (now deceased), Slobodan Kuruzovi}, Dragan Luki}, Muradin Mrkalj, Pero Mrkalj, Mevlud Semenovi}, Mijatovi} Vaso (or Mijativi} 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 Sajci}, 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 exeeption, 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 Sajci}. Ljubica Sajci} is an interpreter who would testify as to the content of an interview with one Milorad Tadi} for which Ljubica Sajci} 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,

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the evidence of Milorad Tadi}. But his evidenee 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 munieipality of Prijedor[33]. 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 trial[34]. 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 whieh the Defence was unaware

57. This eategory includes the testimony of potential witnesses Ernad Be{irevi}, Sasa Mari}, Vlado Krckovski, Vinka Gaji}, Slobodan Zrni}, Drago Pesevi}, Slobodan Malbasi}, Zivko Pusa}, Vladimir Mari}, Mile Ratkovi}, Mladen Zgonjanin and Dragoje Cavi}, together with witness XX and his medical records. Certain of these individuals are said to have been at the battlefront at the time of the trial or to have been aetively avoiding contact with the authorities. Others were simply unknown to the Defcnce 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.

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 Deeision whether it would be in the interests of justice to admit this evidence.

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[33] Rule 115 Brief, *supra n. 15.*

[34] *See, e.g.,* Response, pp. 16 – 18.

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 evidenee they were unable to produee. The material under this heading may be divided into three sub-eategories: 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 loeated 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 eategory, namely, D.D., Miroslav Kvocka, Mladen Radi} 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 indieted 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 Omarska[35]. The three named witnesses eould have been discovered at the time of trial from the public indictment coneerning events at the Omarska camp, events that were clearly relevant to the eharges 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 evidenee of sueh 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 sueh coereive measures as were at the disposal of the International Tribunal. Therefore, it eannot 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 inelude witness D.J. (and the Annex of 15 photographs), D.S., D.B., Bosko Dragicevi}, Dusan Babi}, D.V., Vaso Mijatovi}, P.Q., Bosana (or Bozana) Grahova}, Stoja Coprka, Milos Preradovi}, Brane Bolta, Mile Cavi}, Milan Vlacina, Milan Andji}, D.T.Z., D.R.M., Mladen Majki}, Dusan (or Dule) Jankovi}, Milorad Tadi}, Simo Kevi} 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 Sari}, D.O., and Milan Grgi}. The Appellant claims that all three of these witnesses had fled abroad and could not be located. In view of the diffieulties 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 Cviji}, Srdjan Staletovi}, Dara Jankovi}, Slaviea Tadi}, Pero Curguz, Radoslavka Vidovi}, Risto Voki}, Mladen Tadi}, Mira Tadi} (on matters other than those on which she did testify), Ostoja Trebova}, Slavko Svraka and Dragan Radakovi}. In addition, the Appellant seeks to admit the expert evidence of Dr. Dusan Dunji}, 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

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

did so reluctantly[36]. 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 Opaci}

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 Judgement[37].

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.

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 Be{irevi}, Sasa Mari}, Vlado Krckovski, Vinka Gaji}, Slobidan Zmi}, Drago Pesevi}, Slobodan Malbasi}, Zivko Pusa}, Vladimir Mari}, Mile Ratkovi}, Mladen Zgonjanin, Dragoje Cavi} and witness XX, together with his medical records;
- the confidential document from the United States Department of State;
- witnesses Milka Sari}, D.O., and Milan Grgi}.

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[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.

In relation to these items and, for thc reasons given in paragraph 61 above, the evidence of witness D.D., it will aeeordingly be neeessary to consider the operation of the eriteria 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 misearriage of justice" within the meaning of Artiele 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 oceasioned 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 sueh 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 eriteria, 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 elearly the prineiple does suggest a limit to the admissibility of additional evidenee 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.

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

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]

BEFORE THE APPEALS CHAMBER

Before:
Judge Mohamed Shahabuddeen, Presiding
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Patricia Wald
Judge Fausto Pocar

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
15 November 2000

PROSECUTOR

v.

GORAN JELISIC

DECISION ON REQUEST TO ADMIT ADDITIONAL EVIDENCE

The Office of the Prosecutor:

Mr. Upawausa Yapa

Counsel for Goran Jelisic:

Mr. Jovan Babic
Mr. Michael Greaves

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 ("the International Tribunal" and "the Appeals Chamber" respectively),

BEING SEISED OF "The Defence's Brief for the Presentation od (sie) the Additional Evidence", filed by the Defence on 8 September 2000 ("the Defenee Motion"), in whieh the Appellant seeks an order allowing the admission of the following additional evidence in accordance with Rules 107 and 115 of the Rules of Procedure and Evidence ("the Rules"):

1. An expert's report from Mrs. Ljiljana Mijovic, professor at the Police Academy in Banja Luka and research assistant at the law school in Banja Luka, with respect to the Defendant's rank in the police hierarchy and powers deriving from this rank ("the Expert's Report"); and
2. A report and/or testimony from Mr. Timothy MeFadden, Commanding Officer of the UN Detention Unit, with respect to the overall behaviour of the accused as a detainee ("the Detention Report");

NOTING thc various filings in thc case, in particular Trial Chamber I's written "Judgement" against Goran Jelisic, issued on 14 December 1999 ("the written Judgement"), and the "Prosecution Response to the Defence's Brief for the Presentation of the Additional Evidence", filed on 18 September 2000;

CONSIDERING that Rulc 107 of the Rules extends the application of the Rules that govern proceedings in the Trial Chambers to proceedings in the Appeals Chamber *mutatis mutandis*, but that such extension does not apply as the presentation of evidence on appeal is governed by Rule 115;

NOTING that, to be admissible under Rule 115 of the Rules, evidence 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;

NOTING that, with respect to the Expert's Report, the Defence submits that it did not present this evidence at trial because it thought that "no further insisting had been necessary", as the place of the Defendant in the police hierarchy had been sufficiently pleaded in "The Agreement on the Factual Grounds for Pleading Guilty of Goran Jelisic";

CONSIDERING that this does not show that the evidence was unavailable at the trial and that, consequently, it is not necessary to consider whether the admission of this evidence would be required in the interests of justice pursuant to Rule 115(B) of the Rules;

CONSIDERING HOWEVER that the Appeals Chamber maintains an inherent power to admit such evidence even if it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice;

CONSIDERING that the exclusion of the Expert's Report would not lead to a miscarriage of justice, regard being had to a reasonable presumption that the substance of the matters raised in the Report was before the Trial Chamber;

CONSIDERING that the second issue raised in the Defence Motion, that of the overall behaviour of the Defendant as a detainee, was addressed by the Trial Chamber;[1]

NOTING that the Detention Report pertains to the Defendant's behaviour before and after the written Judgement and sentence handed down therein;

CONSIDERING that those parts of the Detention Report which relate to the Defendant's behaviour prior to sentencing were available within the meaning of Rule 115(A) of the Rules, and that exclusion of evidence on this issue would not lead to a miscarriage of justice, regard being had to a reasonable presumption that the substance of the matters raised in the Report was before the Trial Chamber;

CONSIDERING HOWEVER that those aspects of the Detention Report which concern the Defendant's post-sentencing behaviour were unavailable at the time of trial, and that it is, therefore, necessary to establish whether their admission is required by the interests of justice pursuant to Rule 115(B) of the Rules;

CONSIDERING that the admission of evidence is in the interests of justiee if it is relevant to a material issue, if it is credible and if it is such that it would probably show that the conviction or sentence was unsafe;

CONSIDERING that the Appeals Chamber may review a sentenee handed down by a Trial Chamber where that Trial Chamber has erred in the exercise of the discretion conferred upon it with respect to sentencing by the Statute of the International Tribunal and the Rules;

CONSIDERING that the Defendant's post-sentence behaviour could be neither relevant to any issue before the Trial Chamber nor capable of being considered by it and, therefore, cannot show that the Trial Chamber committed any error in the exercise of its discretion;

FINDING that it has not been shown that it is in the interests of justice to admit the Detention Report as additional evidence;

HEREBY DISMISSES THE DEFENCE MOTION.

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

Mohamed Shahabuddeen
Presiding

Dated this fifteenth day of November 2000
At The Hague,
The Netherlands.

[Seal of tbe Tribunal]

1. Judgement, *The Prosecutor v. Jelisic*, Case No. IT-95-10-A, 14 December 1999, para 127.