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-02-65-AR11*bis*.1
Date: 16 November 2005
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **16 November 2005**

PROSECUTOR

v.

Željko MEJAKIĆ
Momčilo GRUBAN
Dušan FUŠTAR
Duško KNEŽEVIĆ

DECISION ON JOINT DEFENSE MOTION TO ADMIT ADDITIONAL EVIDENCE BEFORE THE APPEALS CHAMBER PURSUANT TO RULE 115

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Mr. Branko Lukić for Momčilo Gruban
Mr. Theodore Scudder and Mr. Dragan Ivetić for Dušan Fuštar
Mrs. Slobodanka Nedić for Duško Knežević

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 ("International Tribunal") is seized of the "Joint Defense Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115" filed confidentially on 8 September 2005 ("Rule 115 Motion"), by Željko Mejakić, Momčilo Gruban, Dušan Fuštar, and Duško Knežević ("Appellants" and "Defence"), in which they seek the admission of additional documentary evidence. The "Prosecution Response in Opposition to 'Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115'" was filed confidentially on 14 September 2005 ("Prosecution's Response"). No reply was filed by the Defence.

I. BACKGROUND

2. On 20 July 2005, the Referral Bench composed by Judges Alphons Orie, O-Gon Kwon, and Kevin Parker, granted the Prosecution's request under Rule 11*bis* of the Rules of Procedure and Evidence ("Rules")[1] for referral of this case to the authorities of Bosnia and Herzegovina.[2] On 4 August 2005, the parties filed their notices of appeal against the Referral Decision.[3] The Prosecution and the Defence filed their appeal briefs on 5 and 19 August 2005, respectively. [4] On 29 August 2005, the Prosecution filed its Response to the Defence Appellants' Brief.[5] On 2 September 2005, the Defence filed its Reply to the Prosecution's Response to the Defence Appellants' Brief ("Defence Reply").[6] Following a decision rendered by the Appeals Chamber in the *Stanković* case,[7] the Prosecution withdrew its appeal on 19 September 2005.[8]

3. The Defence seeks the admission of additional evidence proffered with its Rule 115 Motion so that this evidence can be considered by the Appeals Chamber for the purposes of its appeal against the Referral Decision. Copies of the same documents now proffered as additional evidence on appeal were attached to the Defence Reply. However, following the rendering of the *Stanković*

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[1] IT/32/Rev.36, 8 August 2005.
[2] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Decision on Rule 11*bis* Referral (with Confidential Annex), 20 July 2005 ("Referral Decision").
[3] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-AR11*bis*.1, Prosecution's Notice of Appeal, 4 August 2005; Joint Defence Notice of Appeal, 4 August 2005 ("Defence Appellants' Brief").
[4] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-AR11*bis*.1, Prosecution's Appellant's Brief, 5 August 2005; Joint Defense Appellants' Brief in Support of Notice of Appeal, 19 August 2005.
[5] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-AR11*bis*.1, Prosecution's Response to "Joint Defense Appellants' Brief in Support of Notice of Appeal", 29 August 2005.
[6] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-AR11*bis*.1, Joint Defense Reply to the Prosecution's Response to Joint Defense Appellants' Brief in Support of Notice of Appeal, Confidential, 2 September 2005.
[7] *Prosecutor v. Radovan Stanković*, Case No.: IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005 ("*Stanković* Decision").
[8] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-AR11*bis*.1, Notice of Withdrawal of Appeals, 19 September 2005.

Decision — where the Appeals Chamber declined to consider new evidence submitted by the accused Radovan Stanković with his appeal brief[9] — the Defence filed a proper motion for the admission of such evidence under Rule 115 of the Rules.

4. The Defence argues that the Referral Decision relied upon evidence which: (i) "was never made part of the record" of the case; (ii) "was never given to the Defence" who consequently had no opportunity to review or challenge it; and (iii) "was erroneous or contradicted by other information."[10] The Defence further submits that the additional evidence proffered with its Rule 115 Motion, "could have been a decisive factor" in the Referral Decision and "would have resulted in a different decision" being taken by the Referral Bench.[11]

5. The evidence proffered with the Rule 115 Motion consists of: (i) an article published in the "Blic News Journal" ("Item1"); (ii) Mr. Dušan Fuštar's personal identification card ("Item 2"); (iii) Mr. Dušan Fuštar's birth certificate ("Item 3"); and (iv) a certificate confirming that Mr. Dušan Fuštar is registered in the Book of Citizens of Peoples Republic of Serbia in Backo Dobro Polje ("Item 4").

II. APPLICABLE LAW

A. Whether the Defence can bring a motion under Rule 115

6. The Appeals Chamber has held that an appeal pursuant to Rule 11*bis*(I) of the Rules is more akin to an interlocutory appeal, than to an appeal from judgement.[12] Previous decisions rendered by the Appeals Chamber indicate that Rule 115 of the Rules is to be applied to interlocutory appeals made pursuant to Rule 65 of the Rules where additional evidence is sought to be introduced on appeal.[13] In the *Stanković* Decision, the Appeals Chamber declined to consider evidence submitted by the accused because it was not part of the "record of the case" and had not been admitted under Rule 115 procedures.[14] This implies that in the course of an appeal pursuant to Rule 11*bis*(I) of the Rules, additional evidence may be admitted under Rule 115. Accordingly, following the previous practice concerning the application of Rule 115 in interlocutory appeals against decisions on

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[9] *Stanković* Decision, para. 37.
[10] Rule 115 Motion, para. 5.
[11] *Ibid.*, para. 8.
[12] *Prosecutor v. Radovan Stanković*, Case No.: IT-96-23/2-AR11*bis*.1, Decision on Defence Application for Extension of Time to File Notice of Appeal, 9 June 2005, paras 14-16.
[13] *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Case No.: IT-99-37-AR65, Decision on Motion for Modification of Decision on Provisional Release And Motion to Admit Additional Evidence, 12 December 2002; *Prosecutor v. Vidoje Blagojević et al.*, Case No.: IT-02-53-AR65, Decision on Motion to Present Additional Evidence, 28 May 2002; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case Nos.: IT-03-69-AR65.1, IT-03-69-AR65.2, Decision on Prosecution's Application Under Rule 115 to Present Additional Evidence in its Appeal Against Provisional Release, 11 November 2004 ("*Stanišić and Simatović* 11 November 2004 Decision").

provisional release and pursuant to the *Stanković* Decision, the Appeals Chamber considers that the Defence is entitled to bring a motion pursuant to Rule 115 of the Rules in support of its appeal under Rule 11*bis*(I) of the Rules.

B. Requirements for the admission of additional evidence

7. Evidence is admissible under Rule 115 of the Rules if it was unavailable at trial, and if it is relevant, credible, and such that it could have been a decisive factor in reaching the decision at trial.[15] The burden of proof that these requirements are met, rests with the party applying for the admission of the additional evidence.[16]

Unavailability of the evidence at trial

8. In accordance with the jurisprudence of the Appeals Chamber, the party submitting the additional evidence on appeal must demonstrate that such evidence was not available at trial in any form,[17] and that it could not have been discovered through the exercise of due diligence.[18] In this respect, the moving party must provide a reasonable explanation as to why the evidence submitted was not available at trial[19] and must demonstrate that due diligence had been exercised at trial.[20] The Defence must show, *inter alia,* that it made "appropriate use of all mechanisms of protection

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[14] *Stanković* Decision, para. 37.
[15] Rule 115(B).
[16] *Prosecutor v. Duško Tadić,* Case No.: IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 16 October 1998 ("*Tadić* Rule 115 Decision"), para. 52.
[17] *See* Rule 115(B), *see also Prosecutor v. Radislav Krstić,* Case No.: IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Subpoenas Decision"), para. 4; *Prosecutor v. Radislav Krstić,* Case No.: IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003 ("*Krstić* Rule 115 Decision"), p. 3; *Juvénal Kajelijeli v. Prosecutor,* Case No.: ICTR-98-44A-A, Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004 ("*Kajelijeli* Rule 115 Decision"), para. 9; *Prosecutor v. Stanislav Galić,* Case No.: IT-98-29-A, Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, 21 March 2005 ("*Galić* Rule 115 Decision"), para. 9.
[18] *Tadić* Rule 115 Decision, paras 35- 45; *Prosecutor v. Kupreškić et al.*, Case No.: IT-95-16-A, Appeal Judgment, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement"), para. 50; *Prosecutor v. Hazim Delić*, Case No.: IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002 ("*Delić* Review Decision"), para. 10; *Krstić* Subpoenas Decision, para. 5; *Krstić* Rule 115 Decision, p. 3; *Prosecutor v. Tihomir Blaškić,* Case No.: IT-95-14-A, Decision on Evidence, 31 October 2003 ("*Blaškić* Rule 115 Decision"), p. 3; *Prosecutor v. Mladen Naletilić and Vinko Martinović,* Case No.: IT-98-34-A, Decision on Naletilić's Consolidated Motion to Present Additional Evidence, 20 October 2004 ("*Naletilić and Martinović* October 2004 Rule 115 Decision"), para. 10; *Kajelijeli* Rule 115 Decision, para. 9; *Galić* Rule 115 Decision, para. 9.
[19] *Tadić* Rule 115 Decision, para. 45.
[20] "Consequently, defence counsel is under a duty, when representing an accused, to act with competence, skill and diligence when investigating a potential defence on behalf of an accused. The duty also applies when gathering and presenting evidence before the Tribunal. The counsel would not be required to do everything conceivably possible in performing these tasks, but would be expected to act with *reasonable* diligence in discharging the duty." *Prosecutor v. Kupreškić et al.,* Case No.: IT-95-16-A, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, Condifential, 26 February 2001 ("*Kupreškić* February 2001 Decision") para. 15; *see also Tadić* Rule 115 Decision, para. 36.

and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of [the] [Appellants] before the [Referral Bench]."[21]

9. The Appeals Chamber has recognised an exception to the unavailability requirement, and thus has the power to admit additional evidence proffered on appeal which was available at trial in cases where gross negligence is shown to exist on the part of counsel at trial. [22] Accordingly, a party seeking the admission of additional evidence on appeal can satisfy the unavailability requirement by demonstrating that trial counsel was grossly negligent.[23]

Admissibility of evidence that was not available at trial

10. Where the Appeals Chamber is satisfied that the additional evidence proffered on appeal was unavailable at trial and could not have been discovered through the exercise of due diligence, the moving party must show that the evidence is relevant to a material issue,[24] credible,[25] and that it could have been a decisive factor in reaching the decision at trial.[26] In order to fulfil this third requirement, pursuant to the Appeals Chamber's jurisprudence, the moving party must show that the additional evidence *could* have had an impact on the verdict, *i.e.*, could have shown, in the case of a request by a defendant that the conviction was unsafe.[27] In making this determination, the Appeals Chamber will have to ascertain whether — considered in the context of the evidence which was given at trial and of that which was admitted on appeal, and not in isolation[28] — there is a realistic possibility that the verdict might have been different if the additional evidence had been before the Trial Chamber.[29] Finally it must be emphasized that the Appeals Chamber expects a party seeking the admission of additional evidence on appeal to "clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed"[30]

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[21] *Tadić* Rule 115 Decision, para. 47; *Kupreškić et al.* Appeal Judgement, para. 50.
[22] *Tadić* Rule 115 Decision, para. 50; *Kupreškić* February 2001 Decision, para. 16; *Prosecutor v. Kupreskić et al.*, Case No.: IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, Confidential, 11 April 2001 ("*Kupreškić* April 2001 Decision"), para. 23; *Kupreškić et al.* Appeal Judgement, para. 51.
[23] *Kupreškić* February 2001 Decision, para. 16; *Kupreškić* April 2001 Decision, paras 23, 24; *see also Prosecutor v. Momir Nikolić,* Case No.: IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, Public Redacted Version, 9 December 2004 ("*Nikolić* Rule 115 Decision"), para. 22.
[24] The new evidence must relate to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence. *See Kupreškić et al.* Appeal Judgement, para. 62.
[25] That is, reasonably capable of belief or reliance, such that there is nothing inherently unbelievable or incredible about it. *See Kupreškić et al.* Appeal Judgement, para. 63.
[26] Rule 115(B).
[27] *See Kupreškić et al.* Appeal Judgement, para. 68; *Krstić* Rule 115 Decision, p. 3; *Blaškić* Rule 115 Decision, p.3; *Naletilić and Martinović* October 2004 Rule 115 Decision, para. 11; *Kajelijeli* Rule 115 Decision, para. 10; *Galić* Rule 115 Decision, para. 14.
[28] *Kupreškić* April 2001 Decision, para. 8; *Kupreškić et al.* Appeal Judgement, paras 66, 75; *Krstić* Rule 115 Decision, p. 4; *Blaškić* Rule 115 Decision, p. 3; *Naletilić and Martinović* October 2004 Rule 115 Decision, para. 11.
[29] *Prosecutor v. Milomir Stakić,* Case No.: IT-97-24-A, Confidential Decision on Stakić's Rule 115 Motion to Admit Additional Evidence on Appeal, 25 January 2005, para. 6 ("*Stakić* Rule 115 Decision").
[30] Rule 115(A).

and the impact the proffered evidence could have had upon the Trial Chamber's decision, or else, the moving party runs the risk of the evidence being rejected without consideration.[31]

Admissibility of evidence that was available at trial

11. The Appeals Chamber maintains an inherent power to admit new evidence on appeal which does not satisfy the requirements of due diligence and unavailability, only in the most exceptional circumstances, namely, to avoid a miscarriage of justice.[32]

12. Where the Appeals Chamber considers that the evidence sought to be admitted on appeal was available at trial or could have been discovered through the exercise of due diligence, the moving party is required to undertake the additional burden of establishing that the exclusion of the additional evidence *would* lead to a miscarriage of justice,[33] in that, if it had been presented at trial it would have affected the decision.[34] The Appeals Chamber has emphasized on several occasions that the purpose of this heightened standard is to ensure the finality of judgements and the application of maximum effort by counsel at trial to obtain and present the relevant evidence.[35]

13. The Appeals Chamber will consider the parties' submissions in turn and ascertain whether the evidence proffered meets the requirements set out above.

III. SUBMISSIONS OF THE PARTIES AND DISCUSSION

A. Evidence concerning detention conditions in Zenica prison

Item 1, Annex 1

14. Item 1 proffered by the Appellants as Annex 1, is an article dated 8 July 2005, published in the "Blic News Journal" in Petar, Republika Srpska, and entitled: "Helsinki Committee for Human Rights Warning: Lives of Zenica Inmates Still Endangered." The article, which presents an account

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[31] *Kupreškić et al.* Appeal Judgement, para. 69.
[32] *Prosecutor v. Goran Jelisić,* Case No.: IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 November 2000, p. 3; *Kupreškić* February 2001 Decision, para. 18; *see also Kupreškić et al.* Appeal Judgement, para. 58 which summarizes the development of the "miscarriage of justice exception" under the jurisprudence of Appeals Chamber of the International Tribunal and the International Criminal Tribunal for Rwanda.
[33] *Jean Bosco Barayagwiza v. Prosecutor,* Case No.: ICTR-97-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, paras 65, 66; *Laurent Semanza v. Prosecutor,* Case No.: ICTR-97-20-A, Decision, 31 May 2000, paras 41, 44; *Delić* Review Decision, para. 15; *Krstić* Subpoenas Decision, para. 16; *Prosecutor v. Radislav Krstić,* Case No.: IT-98-33-A, Reasons for the Decisions on Applications for Admission of Additional Evidence on Appeal, 6 April 2004 ("*Krstić* Reasons"), para. 12; *Kajelijeli* Rule 115 Decision, para. 11.
[34] *Krstić* Rule 115 Decision, p. 4; *Blaškić* Rule 115 Decision, p. 3; *Naletilić and Martinović* October 2004 Rule 115 Decision, para. 12; *Kajelijeli* Rule 115 Decision, para. 11; *Stanišić and Simatović* 11 November 2004 Decision, para. 8; *Galić* Rule 115 Decision, para. 14.
[35] *Krstić* Reasons, para. 12; *Naletilić and Martinović* October 2004 Decision, para. 12; *Kajelijeli* Rule 115 Decision, para. 11; *Nikolić* Rule 115 Decision, para 24; *Galić* Rule 115 Decision, para. 17.

of the detention conditions of four inmates in the Zenica prison, appears to be based on a press conference with Miodrag Stojanović.[36] According to the account provided by these four inmates — Milorad Rodic, Ivan Bakovic, Vladimir Pusara and Zoran Knežević — they had been denied access to the phone, and were not allowed to go out for a walk, read newspapers, or access the canteen. Furthermore, the article quotes one of the four inmates stating that Bosniak prisoners enjoyed better prison labour conditions and, unlike the other non-Bosniak prisoners, were allowed to use personal computers.

(a) Submissions

15. The Defence states that Item 1 is relevant, credible, and that it was not available at the time the Rule 11*bis* hearing took place.[37] The Defence further submits that Item 1 "illustrates the error made by the Referral [B]ench in determining whether the detention facilities and practices in the jurisdiction of Bosnia-Herzegovina are such as to support the concept of a fair trial and thus supportive of the referral." [38]

16. The Prosecution submits that the Defence has failed to: (i) show that Item 1 was not available during the Rule 11*bis* proceedings since the article is dated 8 July 2005, and the Referral Decision was rendered on 20 July 2005, and (ii) advance any arguments concerning the exercise of due diligence and its efforts to obtain Item 1.[39] The Prosecution further submits that Item 1 is unreliable since "the article claims to convey a warning from the Helsinki Committee for Human Rights" but the Defence failed to produce the actual report of the Helsinki Committee for Human Rights.[40] The Prosecution notes that Item 1 refers to isolated incidents apparently limited to the Zenica prison, which have no relevance to the overall legal and prison system in Bosnia and Herzegovina and thus, "it is not relevant to the issues before the Referral Bench."[41] Moreover, the Prosecution contends that isolated incidents of the kind referred to in Item 1 are not probative of any problem within the detention system in Bosnia and Herzegovina as a whole.[42] Finally, the Prosecution concludes that even if Item 1 had been admitted during the Rule 11*bis* hearing stage, "it could not have made any difference to the outcome of the [Referral Decision]."[43] Item 1 "would

[36] Item 1 states that Miodrag Stojanović is "the attorney at law with the Helsinki Committee."
[37] Rule 115 Motion, paras 16, 17.
[38] *Ibid.*, para. 9.
[39] Prosecution's Response, para. 7.
[40] *Ibid.*, paras 7, 10.
[41] *Ibid.*, para. 10.
[42] *Ibid.*, para. 14.
[43] *Ibid.*, para. 12.

[not] have affected the [Referral Decision] as [it] is not probative as to the issues before the Referral Bench [and its exclusion] could not result in a miscarriage of justice."[44]

(b) Discussion

17. As a preliminary matter, the Appeals Chamber observes that, when a motion under Rule 115 of the Rules is brought in connection with an appeal pursuant to Rule 11*bis*(I) of the Rules, the time period that elapses between the Prosecution's request for referral and the issuance of a decision granting or denying this request, is to be considered as the equivalent of the trial stage for the purposes of the unavailability requirement contained in Rule 115(B) of the Rules.[45]

18. The Appeals Chamber observes that Item 1 became publicly available twelve days before the Referral Decision was rendered. No explanations have been provided regarding the exact time when the article became available to the Defence, thus the logical assumption is that it became available to the Defence upon publication on 8 July 2005. The Defence simply states that Item 1 "is a news report based upon a Helsinki [Committee for Human Rights] report that did not come out until shortly after the Referral Decision was rendered. Thus it was previously unavailable to the Defense, even though it is highly relevant and probative on the issues that were discussed in the Referral Decision."[46] No further explanation is provided by the Defence regarding its reasons for not seeking leave before the Referral Bench to file supplemental submissions with respect to this evidence that it considered highly relevant. Accordingly, the Appeals Chamber considers that the Defence has failed to show what reasonable steps it took at the Rule 11*bis* proceedings stage in the exercise of due diligence to obtain either Item 1 or the report by the Helsinki Committee for Human Rights.

19. In addition, the Appeals Chamber notes that the Defence has failed to produce the report by the Helsinki Committee for Human Rights upon which Item 1 is supposed to be based. The English translation of Item 1 contains no specific reference which indicates the date when the said report became available to the public. The Appeals Chamber agrees with the Prosecution that the only references to the Helsinki Committee for Human Rights are contained in the title of the article and in the introductory paragraph which identifies Miodrag Stojanović as an attorney at law with the Helsinki Committee for Human Rights.[47] Unless the existence of exceptional circumstances — *i.e.*, gross negligence and miscarriage of justice — has been demonstrated, the admissibility of additional evidence on appeal would depend on the non-availability of the evidence at trial in spite

[44] *Ibid.*, para. 13.
[45] Such time period will be referred to as the "Rule 11*bis* proceedings stage" in the present decision.
[46] Rule 115 Motion, para. 9.

of the exercise of due diligence, and consequently "the moving party is required to provide *detailed* submissions as to this issue."[48] The Appeals Chamber is not satisfied that detailed submissions in relation to the requirement of non-availability of Item 1 at the Rule 11*bis* proceedings stage have been made by the Defence.[49]

20. In light of the foregoing, the Appeals Chamber finds that the Defence has not demonstrated that Item 1 was unavailable at the Rule 11*bis* proceedings stage and that it could not have been obtained through the exercise of due diligence.

21. The question that remains is whether the Defence has discharged the additional burden of establishing that the exclusion of Item 1 would lead to a miscarriage of justice, in that if it had been presented before the Referral Bench during the Rule 11*bis* proceedings stage, it would have affected the Referral Decision. The Defence has not expressly relied on the miscarriage of justice exception and therefore no submissions have been made to that effect. The Defence simply states that the items proffered with its Rule 115 Motion "could have been a decisive factor in the decision of the Referral Bench and would have resulted in a different decision than that which was rendered on 20 July 2005."[50]

22. In accordance with the Rules and the Practice Direction, a Rule 115 Motion shall not only "clearly identify with precision the specific finding of fact made by the Trial Chamber [in this case the Referral Bench] to which the additional evidence is directed",[51] but also "identify clearly the relationship of the evidence to the pertinent grounds of appeal it raises."[52] The Appeals Chamber is not satisfied that the Defence has complied with these requirements. The Rule 115 Motion contains no reasoned analysis of the inferences to be drawn from the evidence proffered. First, the Defence states that, in general terms, the additional evidence proffered will show that the Referral Bench erred in concluding that "the judicial structures in Bosnia- Herzegovina are fully capable of providing a fair trial for [the Appellants] and preserving their right to their current paid defense counsel and defence teams." [53] Second, the Defence attaches an Annex entitled: "Document Description From Annex 1 and 2" which lists, for each document proffered as additional evidence, a string of paragraphs from the Referral Decision "containing findings by the [Referral Bench] to

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[47] *See* Prosecution's Response, para. 10.
[48] *Kajelijeli* Rule 115 Decision, para. 15 (emphasis added).
[49] *See* Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, para. 11 (c) ("Practice Direction").
[50] Rule 115 Motion, para. 8.
[51] Rule 115(A).
[52] Practice Direction, para. 11(b); *see Prosecutor v. Mladen Naletilić and Vinko Martinović,* Case No.: IT-98-34-A, Decision on Naletilić's Motion for Leave to File His Second Motion to Present Additional Evidence Pursuant to Rule 115, 27 January 2005, p. 4.
[53] Rule 115 Motion, para. 12.

which the additional evidence is directed."[54] This manner of pleading is not helpful since it leaves the Appeals Chamber with the task of drawing the inferences itself and making the case for the Defence.[55]

23. The Appeals Chamber is therefore not satisfied that the Defence has discharged the additional burden of establishing that the exclusion of Item 1 would lead to a miscarriage of justice, in that if it had been presented before the Referral Bench, during the Rule 11*bis* proceedings stage, the Referral Decision would have been different. However, in the interest of justice the Appeals Chamber will exercise its discretion to consider whether the exclusion of this evidence would lead to a miscarriage of justice.

24. Annex 3 to the Rule 115 Motion lists paragraphs 63, 107 and 108 as being "Paragraphs of [the] Referral Decision Affected" by Item 1.[56] Paragraph 63 is contained within section IV. D. of the Referral Decision entitled: "Applicable Substantive Law." Within this section, the Referral Decision touches upon the applicability of provisions from the 2003 Criminal Code of Bosnia and Herzegovina, to the extent necessary to satisfy itself that if the case were to be referred to Bosnia and Herzegovina, there would exist an adequate legal framework which criminalizes the alleged conduct of the Appellants, and which also provides for appropriate punishment.[57] Paragraph 63 of the Referral Decision, which addresses specifically the applicability of Articles 4(1), 4(2) and 4a of the 2003 Criminal Code of Bosnia and Herzegovina, holds that, should the case be referred, it would be for the State Court of Bosnia and Herzegovina to determine the law applicable to each of the criminal acts allegedly committed by the Appellants, and concludes that the Referral Bench is satisfied that Bosnia and Herzegovina has appropriate provisions to address the criminal acts charged against the Appellants, as well as an adequate penalty structure.

25. Paragraphs 107 and 108 are contained within section IV. E. (v) entitled: "Detention of the Accused." Paragraph 107 deals with the parties' submissions on this issue. Paragraph 108 reads as follows:

> There is no factual support offered for the Defence's general submission that the "sorely inadequate general prison system in BiH" and the lack of a prison for those accused of war crimes should be a bar to a referral. A high security detention unit has been established and that it is expected to be in operation under the guidance of international experts. In addition, detainee and prisoner treatment is appropriately regulated by statute.[58]

[54] Rule 115 Motion, para. 19 referring to Annex 3.
[55] *See Stakić* Rule 115 Decision, paras 11, 12.
[56] Rule 115 Motion, Annex 3 (1).
[57] *See* Referral Decision, para. 43.
[58] *Ibid.*, para. 108 (footnotes omitted).

26. Item 1 does not render these findings unsafe as it is an account of isolated incidents which occurred in the Zenica prison. As such, it does not rebut evidence presented before the Referral Bench that a detention facility has been built on the grounds of the Court of Bosnia and Herzegovina, which is to accommodate persons whose cases are transferred under Rule 11*bis* of the Rules, operating in accordance with European and international standards of detention.[59] Moreover, Item 1 does not support the proposition that "the judicial structures in Bosnia-Herzegovina are [not] fully capable of providing a fair trial for [the Appellants]."[60] In addition, the Appeals Chamber notes that the Defence had provided the Referral Bench with a report authored by the Organisation for Security and Co-operation in Europe concerning the prosecution and trial of war crimes cases in Bosnia and Herzegovina;[61] this evidence purported to show that the Defence's arguments "illustrate a true picture of the uncertainties and flaws evident in the BiH legal system."[62] Through the OSCE Report, the Referral Bench was provided with a comprehensive analysis of criminal proceedings before the domestic courts in Bosnia and Herzegovina and thus, Item 1 would have been of limited value had it been tendered as evidence at the Rule 11*bis* proceedings stage. In light of the foregoing, the Appeals Chamber is not satisfied that Item 1 would have affected the Referral Decision.

(c) Conclusion

27. The Appeals Chamber has examined Item 1 in the context of the evidence presented before the Referral Bench and not in isolation.[63] Given the findings of the Referral Bench made on the evidence before it, the Appeals Chamber considers that, for the reasons set out above, Item 1 is not evidence which would have affected the Referral Decision, and its exclusion would not lead to a miscarriage of justice. The Appeals Chamber concludes that the Defence has failed to show that Item 1 was not available at the Rule 11*bis* proceedings stage and could have been a decisive factor in reaching the Referral Decision. The Appeals Chamber also finds that Item 1 would not have affected the Referral Decision had it been presented before the Referral Bench. Therefore the Defence request for admission of Item 1 is denied.

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[59] *Prosecutor v. Mejakić et al.*, Case No.: IT-02-65-PT, "Response by the Government of Bosnia and Herzegovina (BiH) to Questions Posed by the Specially Appointed Chamber in its Decision for Further Information in the Context of the Prosecutor's Request Under Rule 11 *bis* of 9 February 2005", 25 February 2005, p. 4.
[60] Rule 115 Motion, para. 12.
[61] *See Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Further Supplemental Response Made Jointly on Behalf of all the Accused in Opposition to the Prosecution's Submission Pursuant to Rule 11*bis*, 31 March 2005, Item A, "War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles, March 2005, OSCE, Human Rights Department, Mission to Bosnia and Herzegovina" ("OSCE Report").
[62] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Further Supplemental Response Made Jointly on Behalf of all the Accused in Opposition to the Prosecution's Submission Pursuant to Rule 11*bis*, 31 March 2005, para. 5.
[63] *Kupreškić* 11 April 2001 Decision, para. 8; *Nikolić* Rule 115 Decision, para. 25; *Galić* Rule 115 Decision, para. 20.

B. Evidence concerning Mr. Dušan Fuštar

Items 2, 3 and 4, Annex 2

28. Item 2 proffered by the Appellants as Annex 2, is Mr. Dušan Fuštar's personal identification card issued by the Socialist Federal Republic of Yugoslavia [*sic*], on 1 July 1998. Item 3 is Mr. Dušan Fuštar's birth certificate issued by the Socialist Federative Republic of Yugoslavia, Socialist Republic of Serbia, Municipality of Vrbas, Local Office of Backo Dobro Polje, on 11 July 1970. Item 4 is a certificate issued by the Municipality of Vrbas, Local Office of Backo Dobro Polje, on 24 October 1972, to attest that Mr. Dušan Fuštar and his sons, Jovan and Dragan Fuštar, are registered in the Book of Citizens of Peoples Republic of Serbia in Backo Dobro Polje.

(a) Submissions

29. The Defence submits that Items 2, 3 and 4 are relevant, credible, and that they were not available at the time the Rule 11*bis* hearings took place.[64] The Defence asserts that the Referral Decision "exhibits errors relating to the status of Dušan Fuštar's citizenship, despite the clear and unequivocal statements made on the record."[65] The Defence further submits that since Items 2, 3 and 4 demonstrate that Mr. Dušan Fuštar was born in Serbia and that his name remained on the records as a citizen of the Republic of Serbia, "the Referral Bench's contrary assertions in the Referral Decision constitute errors of fact, which lead the Referral Bench to make errors of law in the application of the citizenship issue, thus invalidating the decision."[66]

30. The Prosecution submits that since Items 2, 3 and 4 which are documents "evidencing vital statistics," are part of a person's dossier and "would normally be readily available,"[67] the Defence has failed to establish their unavailability during the Rule 11*bis* proceedings stage.[68] In addition, the Prosecution contends that this evidence is only relevant in that it supports Mr. Dušan Fuštar's claim to Serbian citizenship, nonetheless, it submits that, "the citizenship of an accused is not one of the enumerated bases for the designation of a state to which referral may be ordered."[69] The Prosecution takes no position concerning the credibility of these documents because it considers them to be irrelevant[70] and submits that their exclusion could not result in a miscarriage of justice.[71]

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[64] Rule 115 Motion, paras 16, 17.
[65] *Ibid.*, para. 10.
[66] *Ibid.*
[67] Prosecution's Response, para. 9.
[68] *Ibid.*
[69] *Ibid.*, para. 11.
[70] *Ibid.*
[71] *Ibid.*, para. 13.

(b) Discussion

31. The Appeals Chamber is not satisfied that despite "clear and unequivocal statements made on the record [concerning Mr. Dušan Fuštar's citizenship]", the Referral Decision contains errors of law and fact as alleged by the Defence.[72] The Referral Decision provides a clear account of the Defence submissions in this respect, and thus it concludes as follows:

> It is contended that this is especially pertinent as some of the Accused are citizens of Serbia and Montenegro.[73]
>
> Insofar as the Defence submits that grounds of nationality support its case being referred to Serbia and Montenegro, the submissions have been inconsistent. They included: [...] "the Accused Dušan Fuštar also was previously a citizen of Federal Yugoslavia (Serbia and Montenegro)"; all the Accused are "citizens of Serbia and Montenegro"; and Dušan Fuštar was never a citizen of Bosnia and Herzegovina. These Defence submissions were not clarified by Serbia and Montenegro's submissions, which included: Momčilo Gruban, Dušan Fuštar and Duško Knežević are nationals of Serbia and Montenegro...[74]
>
> With respect to Dušan Fuštar, the Defence submits that "having been born in the Republic of Serbia, having never denounced that citizenship, and having never accepted any other citizenship, he is best described as a natural-born citizen of Serbia and Montenegro."[75]
>
> Perhaps with the exception of Dušan Fuštar, all appear to have been born in Bosnia and Herzegovina...[76]

32. The Appeals Chamber considers that Items 2, 3 and 4 which were issued seven, thirty- five and almost thirty-three years before the Referral Decision was rendered, respectively, contain information, which appears to be publicly available at the Municipality of Vrbas, Local Office at Backo Dobro Polje.

33. As stated earlier in the present decision, the admissibility of additional evidence on appeal depends on the non-availability of the evidence at trial in spite of the exercise of due diligence, and the Defence was therefore required to provide detailed submissions as to this issue.[77] The Defence however, simply asserts that Items 2, 3 and 4 "were [...] unavailable to the defense until after the Rule [11*bis*] decision was rendered, and touch on a topic that the Defense believed had been

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[72] Rule 115 Motion, para. 10.
[73] Referral Decision, para. 28 referring to *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Joint Supplemental Submission by the Defence Teams of All the Named Accused in Opposition of the Prosecution's Motion Under Rule 11*bis*, 18 March 2005, para. 110; and Rule 11*bis* Hearing, 3 and 4 March 2005 ("Rule 11*bis* Hearing") T. 162-170.
[74] Referral Decision, para. 34 (footnotes omitted) referring to *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Joint Defence Response to the Prosecution's Motion Under Rule 11 *bis*, Confidential, 18 October 2004, para. 72; Corrigendum to 22 February 2005 Joint Defence Response to the Trial Chamber Decision for Further Information in the Context of the Prosecution's Request Under Rule 11*bis*, Confidential, 25 February 2005, p. 19; Joint Supplemental Submission by the Defence Teams of All the Named Accused in Opposition of the Prosecution's Motion Under Rule 11*bis*, 18 March 2005, p. 35; Rule 11*bis* Hearing, T. 278; and Serbia and Montenegro's Submission in the Proceedings Under Rule 11 *bis*, 17 January 2005, para. 7.
[75] Referral Decision, para. 37 (footnote omitted).
[76] *Ibid*, para. 38.

sufficiently covered by its submissions and the statements of representatives from Serbia-Montenegro."[78] In light of the fact that no submissions have been provided to substantiate the claim that the identity documents of Mr. Fuštar were only available to the Defence after the Referral Decision had been issued, the Appeals Chamber finds that the Defence has failed to show what reasonable steps it took at the Rule 11*bis* proceedings stage in the exercise of due diligence to obtain Items 2, 3 and 4.

34. Moreover, the Appeals Chamber notes that the issue of Mr. Dušan Fuštar's citizenship and nationality was discussed in the Defence's submissions before the Referral Bench[79] and during the Rule 11*bis* hearing.[80] Consequently, the Appeals Chamber is not satisfied that this proposed evidence was not available to the Defence in any form[81] for presentation to the Referral Bench during the Rule 11*bis* proceedings stage, and stresses that the appeal process is not designed for the purpose of allowing the parties to remedy their own failings or oversights during trial.[82]

35. In light of the foregoing, and bearing in mind that the prohibition on a party from adducing evidence that was available to it at trial means that the party must put forward its best possible case at trial and not hold back evidence in reserve until the appeal,[83] the Appeals Chamber finds that the Defence has failed to show that Items 2, 3 and 4 were unavailable at the Rule 11*bis* proceedings stage and that they could not have been obtained through the exercise of due diligence.

36. The question that remains is whether the Defence has discharged the additional burden of establishing that the exclusion of Items 2, 3 and 4 would lead to a miscarriage of justice, in that if they had been presented before the Referral Bench during the Rule 11*bis* proceedings stage, they would have affected the Referral Decision. The Defence has not expressly relied on the miscarriage of justice exception; it simply states that the Items proffered with its Rule 115 Motion "could have

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[77] *See supra* para. 19.
[78] Rule 115 Motion, para. 10.
[79] *See supra* para. 31.
[80] *See* the following submission made by Mr. Theodore Scudder at the Rule 11*bis* Hearing: "The Defendant Dušan Fuštar was born in Serbia and had gone back to Serbia just before he surrendered himself," T. 148; *see also* the following submission made by Mr. Dragan Ivetić at the same hearing: "...the accused who surrendered directly to the UN and directly to the Serbia and Montenegro authorities and who are all citizens of Serbia and Montenegro – my client who was never a Bosnian citizen - had certain rights afforded to them by the Tribunal...," T. 278.
[81] *Krstić* Subpoenas Decision, para. 4; *Krstić* Rule 115 Decision, p. 3.
[82] *Prosecutor v. Dražen Erdemović*, Case No.: IT-96-22-A, Appeal Judgement, 7 October 1997, para. 15; *Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A, Appeal Judgement, 15 July 1999, para. 55; *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 20; *Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga"*, Case No.: IT-96-21-A, Appeal Judgement, 20 February 2001, para. 724; *Kupreškić et al.* Appeal Judgement, para. 408.
[83] *Kupreškić* February 2001 Decision, para. 15.

been a decisive factor in the decision of the Referral Bench and would have resulted in a different decision than that which was rendered on 20 July 2005."[84]

37. The Appeals Chamber considers that the Defence has failed to identify with sufficient clarity and precision the specific findings of fact to which this additional evidence is directed, and its relationship to the relevant grounds of appeal raised, as required by the Rules and the Practice Direction.[85]

38. The Appeals Chamber is therefore not satisfied that the Defence has discharged the additional burden of establishing that the exclusion of Items 2, 3 and 4 would lead to a miscarriage of justice, in that if they had been presented before the Referral Bench during the Rule 11*bis* proceedings stage, the Referral Decision would have been different. However, in the interest of justice the Appeals Chamber will exercise its discretion to consider whether the exclusion of this evidence would lead to a miscarriage of justice.

39. Annex 3 to the Rule 115 Motion lists paragraphs 28 to 32, 34, 35, 37, 38, and 40 to 42 as being "Paragraphs of [the] Referral Decision Affected" by Items 2, 3 and 4.[86] Paragraphs 28 to 32 are contained within section IV. B. of the Referral Decision entitled: "Application of Rule 11*bis* in Light of the Laws of Extradition." Within this section, the Referral Bench concludes that the laws governing extradition do not apply to prevent the referral of the Appellants' case pursuant to Rule 11*bis* of the Rules because, as well as the initial transfer of the Appellants to the International Tribunal, their transfer to the State authorities under the said provision is not the result of an agreement between the State and the International Tribunal. The Appeals Chamber agrees with the Referral Bench and recalls that the obligation upon States to cooperate with the International Tribunal and comply with its orders arises from Chapter VII of the United Nations Charter, and therefore a State cannot impose conditions on the transfer of an accused, or invoke the rule of specialty or non-transfer concerning its nationals.[87] Accordingly, the Appeals Chamber considers that Items 2, 3 and 4 do not render the findings in paragraphs 29 to 32 of the Referral Decision unsafe.

40. Paragraphs 34, 35, 37, 38, and 40 to 42 are contained within section IV. C. of the Referral Decision entitled: "Determination of the State of Referral." Within this section, the Referral Bench: (i) notes the inconsistency of the Defence's submissions in support of the proposition that grounds of nationality call for the referral of the Appellants' case to Serbia and Montenegro; (ii) notes the

[84] Rule 115 Motion, para. 8.
[85] *See supra* para. 22.
[86] Rule 115 Motion, Annex 3 (2), (3) and (4).
[87] Referral Decision, paras 31, 32.

further submissions of the parties regarding the nationality of the Appellants; (iii) concludes that citizenship has no significant relevance to the determination of the State to which referral should be ordered; (iv) notes that neither the Defence nor Serbia and Montenegro are in a position to request the referral of the Appellants' case to Serbia and Montenegro pursuant to Rule 11*bis* of the Rules; and (v) concludes that regardless of the citizenship of the Appellants, Bosnia and Herzegovina has a significantly greater nexus with each of their cases.

41. The Appeals Chamber recalls that the Referral Bench concluded that "[p]erhaps with the exception of Dušan Fuštar, all [the Appellants] appear to have been born in Bosnia and Herzegovina."[88] This conclusion illustrates that the Defence's submissions concerning Mr. Dušan Fuštar's nationality were properly considered by the Referral Bench. Nonetheless, when reaching its final determination, the Referral Bench found that:

> ...it does not appear that citizenship has a significant relevance to the determination of the issue to which State should referral be ordered. That is so *even if* it had been established, which is not the case, that all Accused are now citizens of Serbia and Montenegro.[89]
>
> Having regard to the circumstances of the case, the arguments in favour of referral *proprio motu* to Serbia and Montenegro are comparatively of little weight.[90]
>
> The Referral Bench is persuaded [...] that Bosnia and Herzegovina has a significantly greater nexus with the trial of each of these Accused for the offences alleged against them than Serbia and Montenegro.[91]

The Appeals Chamber notes that even though citizenship of an accused is not listed in Rule 11*bis*(A) of the Rules, in the particular circumstances of each case, it is within the discretion of a Referral Bench to consider all the facts before it – including the citizenship of the accused – in reaching a determination on the question as to which State a case should be referred.

(c) Conclusion

42. The Appeals Chamber has examined Items 2, 3 and 4 in the context of the evidence presented before the Referral Bench and not in isolation.[92] Given the findings of the Referral Bench made on the evidence before it, the Appeals Chamber considers that, for the reasons set out above, Items 2, 3 and 4 are not evidence which would have affected the Referral Decision, and their exclusion would not lead to a miscarriage of justice. The Appeals Chamber concludes that the Defence has failed to show that Items 2, 3 and 4 were not available at the Rule 11*bis* proceedings

[88] *Ibid.*, para. 38.
[89] *Ibid.*, para. 38 (emphasis added).
[90] *Ibid.*, para. 41.
[91] *Ibid.*, para. 42.
[92] *Kupreškić* April 2001 Decision, para. 8; *Nikolić* Rule 115 Decision, para. 25; *Galić* Rule 115 Decision, para. 20.

stage and could have been a decisive factor in reaching the Referral Decision. The Appeals Chamber also finds that these items would not have affected the Referral Decision had they been presented before the Referral Bench. Therefore the Defence request for admission of Items 2, 3 and 4 is denied.

IV. DISPOSITION

43. The Rule 115 Motion is **DISMISSED** in its entirety.

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

Done this sixteenth day of November 2005,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding

[Seal of the International Tribunal]