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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-74-AR73.6
	Date:	23 November 2007
	Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Hans Holthuis**

Decision of: **23 November 2007**

PROSECUTOR
v.
Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

Public

DECISION ON APPEALS AGAINST DECISION ADMITTING TRANSCRIPT OF JADRANKO PRLIĆ'S QUESTIONING INTO EVIDENCE

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Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seized of two appeals, respectively filed confidentially by Jadranko Prlić and publicly by Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, and Berislav Pušić against the "Decision on Request for Admission of the Statement of Jadranko Prlić" ("Impugned Decision") issued by Trial Chamber II ("Trial Chamber").

I. PROCEDURAL HISTORY

2. On 13 and 14 December 2001, Jadranko Prlić was questioned as a suspect[1] – in the presence of his then counsel Ćamil Salahović – by representatives of the Office of the Prosecutor ("Prosecution") in the Netherlands, after he contacted them with a request to be interviewed.[2] The questioning was audio-recorded pursuant to Rule 43. According to the Prosecution, the questioning was also video-recorded.[3] Prlić received the warnings required by Rule 42.[4]

3. On 28 March 2007, the Prosecution requested admission into the trial record of the December 2001 Transcript,[5] both for its substantive content and in order to confront other witnesses in the case.[6] On 5 April 2007, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, and Berislav Pušić ("Joint Defence") filed a Joint Response requesting the Trial Chamber to reject the Prosecution Motion ("Joint Defence Response").[7] Prlić also filed an objection to the admission of the December 2001 Transcript on 12 and 13 April 2007 ("Prlić Response").[8]

4. On 22 August 2007, the Trial Chamber admitted into evidence the December 2001 Transcript pursuant to Rule 89(C), essentially considering that its probative value was not substantially outweighed by the need to ensure a fair trial.[9]

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[1] Rule 2 of the Tribunal's Rules of Procedure and Evidence ("Rules" or, individually, "Rule"); see also Prosecution Motion for Admission into Evidence of the Statement of the Accused Jadranko Prlić, 28 March 2007, paras 9 ff. and Exhibit P09078 ("December 2001 Transcript"), p. 2. The Appeals Chamber considers that, although the parties refer to Prlić's "Statement", it is more appropriate to describe the document in question as a transcript of Prlić's recorded questioning by the Prosecution in December 2001.
[2] December 2001 Transcript, pp. 1-6.
[3] Prosecution Motion for Admission into Evidence of the Statement of the Accused Jadranko Prlić, 28 March 2007 ("Prosecution Motion"), para. 14.
[4] December 2001 Transcript, pp. 1-2.
[5] Prosecution Motion, paras 1-6.
[6] Prosecution Motion, paras 1, 18.
[7] Response of the Accused Stojić, Praljak, Petković, Ćorić and Pušić to Prosecution Motion for Admission into Evidence of the Statement of the Accused Jadranko Prlić, 5 April 2007.
[8] Jadranko Prlić's Response to Prosecution's Motion for Admission into Evidence of the Statement of the Accused Jadranko Prlić and Leave To exceed the Word Count, 12 April 2007 and Corrigendum, 13 April 2007.
[9] Impugned Decision, para. 32

5. On 31 August 2007, the Joint Defence filed a request for reconsideration or, in the alternative, for certification of the Impugned Decision,[10] while Prlić filed his request for certification on 5 September 2007.[11] The Prosecution did not file any response.[12]

6. On 8 October 2007, the Trial Chamber issued its "*Décision portant sur la demande de réexamen et de certification d'appel de la décision portant admission de la déclaration de Jadranko Prlić*", in which it rejected the request for reconsideration advanced by the Joint Defence[13] and granted both requests for certification pursuant to Rule 73(B).[14]

7. On 15 October 2007, Prlić as well as the Joint Defence filed their appeals against the Impugned Decision ("Prlić Appeal"[15] and "Joint Defence Appeal",[16] respectively). On 25 October, the Prosecution filed its response ("Prosecution Response").[17] On 31 October, Prlić filed a confidential reply to the Prosecution Response ("Prlić Reply").[18]

II. STANDARD OF REVIEW

8. Trial Chambers exercise broad discretion as regards admission of evidence.[19] In this context, the Appeals Chamber notes that it is seized only with the issue of the admission of evidence: the substantial assessment of the evidence is for the Trial Chamber, subject to an appeal – if any – against the Trial Chamber's judgement and will be properly done when the trial record is complete. Considering that this type of decision must therefore be given a margin of deference, the Appeals Chamber will reverse such decisions only when an abuse of such discretion is established. The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's

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[10] Request of the Accused Stojić, Praljak, Petković, Ćorić and Pušić for Reconsideration, Alternatively for Certification for Appeal of Decision of Trial Chamber to Admit Statement of Jadranko Prlić, 29 August 2007.
[11] *Demande de Jadranko Prlić visant à faire certifier l'appel envisagé contre la Décision portant sur la demande d'admission de la déclaration de Jadranko Prlić*, 5 September 2007.
[12] On the procedural history, see in general *Décision portant sur la demande de réexamen et de certification d'appel de la décision portant admission de la déclaration de Jadranko Prlić*, 8 October 2007, paras 2-5.
[13] Certification Decision, paras 11-17.
[14] Certification Decision, para. 18 and *Corrigendum à la Décision portant sur la demande de réexamen et de certification d'appel de la décision portant admission de la déclaration de Jadranko Prlić*, 22 October 2007.
[15] Jadranko Prlić's Interlocutory Appeal Against the Decision on Request for Admission of the Statement of Jadranko Prlić, 15 October 2007, filed confidentially.
[16] Notice of Appeal by 5 Accused Stojić, Praljak, Petković, Ćorić and Pušić Against Trial Chamber Decision 22 August 2007 Admitting Statement of Jadranko Prlić, 15 October 2007.
[17] Prosecution Consolidated Response Regarding Admission of Prlić's Suspect Statement, 25 October 2007.
[18] Jadranko Prlić's Reply to the Prosecution's Consolidated Response Regarding Admission of Prlić's Suspect Statement, 30 October 2007, filed confidentially.
[19] *Delalić et al.* Appeal Judgement, para. 533. See also: *Halilović* Appeal Judgement, para. 38; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.5, 21, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, 18 September 2000.

discretion. The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[20]

9. The question before the Appeals Chamber is thus not whether it agrees with a decision but whether the Trial Chamber has correctly exercised its discretion in reaching this decision.[21] For the Appeals Chamber to intervene in a discretionary decision of a Trial Chamber, it must be demonstrated that the Trial Chamber has committed a "discernible error" resulting in prejudice.

III. DISCUSSION

A. Introduction

10. Prlić submits that, by admitting the December 2001 Transcript, the Trial Chamber failed to recognize the existence of a conflict of interest between him and his then Counsel Ćamil Salahović and erred by finding that, at the time Prlić spoke to the Prosecution, his rights as guaranteed by the Tribunal's Statute ("Statute") and the Rules were respected.[22] The Joint Defence focuses its grounds of appeal on the alleged breach of the right of the other five accused "to examine, or have examined, the witnesses against" them, pursuant to Article 21(4)(e) of the Statute. The Appeals Chamber will discuss these two appeals in turn.

B. Conflict of interest

1. Introduction

11. Prlić's arguments on appeal are all essentially devoted to arguing a conflict of interest between him and his Counsel in December 2001. On the assumption that Counsel did not effectively represent him during the Prosecution's questioning in December 2001 due to this conflict of interest, Prlić then argues that, despite appearances, his fundamental procedural rights set forth in Rules 42 and 43 were effectively violated. Due to the lack of effective legal assistance, Prlić argues that he "cannot be held to have understood" the potential consequences of subjecting himself to questioning by the Prosecution, rather than remaining silent.[23] Prlić alleges that the Trial Chamber erred in its interpretation of the law on conflict of interest;[24] reached a wrong conclusion

[20] *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on the Request of the United States of America for Review, 12 May 2006, para. 6.
[21] *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4.
[22] Prlić Appeal, p. 1.
[23] Prlić Appeal, paras 47-51, 54 and Prlić Reply, para. 19.
[24] Prlić Appeal, paras 15, 28, 39-40.

of fact;[25] and abused its discretion by reaching a conclusion that violates Prlić's fundamental rights.[26] Since the Prosecution denies any conflict of interest, it rejects the suggestion that Rule 42 was breached.[27]

12. Prlić and the Prosecution are in agreement that the applicable standard in relation to a conflict of interest is whether, by reason of certain circumstances, representation by a specific attorney prejudices, or could prejudice, the interest of the client or the wider interests of justice.[28]

2. Relevant background

13. The Appeals Chamber notes at the outset that, in September 2005, during the pre-trial phase of these proceedings, Prlić had already alleged a conflict of interest with Ćamil Salahović, his Counsel at the time of the questioning.[29] Prlić raised this alleged conflict of interest when attempting to suppress the December 2001 Transcript, which had not however yet been tendered as evidence by the Prosecution.[30]

14. In his Motion to Suppress Statement, Prlić specifically argued that the Prosecution should have known that Salahović was a well-known and important activist in Bosnia and Herzegovina's Party of Democratic Action (*Stranka Demokratske Akcije* – "SDA"), a predominantly "Muslim" party, in Mostar between 1992 and 1993. Prlić referred, in this respect, to minutes of that the SDA's meetings as well as reports of various bodies and organizations, apparently showing that Salahović was a known local politician representing "Muslim" interests, and was also a member of the Croatian Defence Council (*Hrvatsko Vijece Obrane* – "HVO").[31]

15. On 14 March 2006, the Trial Chamber dealing with pre-trial matters denied Prlić's Motion to Suppress Statement essentially because Prlić had failed to substantiate the purported conflict of interest or the alleged prejudice it had caused. Moreover, according to the Trial Chamber, Prlić had only shown that Counsel at the time, Salahović, *could* be a witness, as opposed to *likely* being a

[25] Prlić Appeal, paras 23-25.
[26] Prlić Appeal, paras 35, 47-51, 54.
[27] Prosecution Response, para. 44.
[28] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.2, Decision on Ivan Čermak's Interlocutory Appeal against the Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadraska Sloković, 29 June 2007, para. 16 ("*Gotovina* Decision of 29 June 2007"). This decision, as well as others expressing the same principle, is quoted and referenced in the Prlić Appeal (para. 22) and implicitly recognized in the Prosecution Response (see, *e.g.*, paras 13-18).
[29] The attorney representing Prlić during the trial proceedings was permanently appointed by the Deputy Registrar only on 4 August 2005. See Decision [on appointment and remuneration of Counsel], 4 August 2005.
[30] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-PT, Jadranko Prlić's Motion to Suppress Statement ("Motion to Suppress Statement"), 16 September 2005.
[31] Motion to Suppress Statement, fns 10-17.

necessary witness in his trial.[32] Consequently, the Trial Chamber concluded that, "other than pointing out that Salahović was involved in SDA politics, of which he [Prlić] was fully cognisant at the time of the questioning and claiming that Salahović did not inform Prlić of his ethical obligations and duties as a lawyer", Prlić did not demonstrate that he was, or could have been, prejudiced by his Counsel's personal interests.[33]

16. When the Prosecution decided to tender the December 2001 Transcript into evidence, the conflict of interest issue arose once again.[34] At this point, Prlić reiterated that Salahović was an important representative of the Muslim community associated with the HVO during the Indictment period,[35] clarifying that Prlić and Salahović "were both important actors of the same dramatic political and social events" and had been – at different times – on the same political side as well as representatives of opposing political views.[36]

17. The Trial Chamber relied on the Pre-Trial Decision on Statement of 14 March 2006, noting that Prlić had not referred to it, and just briefly referred to the fact that he had "offered nothing new in this connection" ("*n'a soulevé aucun élément nouveau à cet égard*" in the French original).[37] It granted the Prosecution Motion *inter alia* on this basis.

3. Analysis

(a) Duty of loyalty

18. Article 14 of the Code of Professional Conduct for Counsel Appearing before the International Tribunal[38] addresses the duties of counsel in ensuring that conflicts of interest do not arise as well as counsel's responsibilities if such conflicts do emerge. The relevant portion of Article 14 of the Code of Conduct states that:

> (A) Counsel owes a duty of loyalty to a client. [...]
>
> (B) Counsel shall exercise all care to ensure that no conflict of interest arises. [...]
>
> (D) Counsel or his firm shall not represent a client with respect to a matter if:
>
> > (i) such representation will be, or may reasonably be expected to be, adversely affected by representation of another client;

[32] *Prosecutor v. Jadranko Prlić et al.*, IT-04-74-PT, Decision on Prlić's Motion to Suppress Statement, 14 March 2006 ("Pre-Trial Decision on Statement"), paras 17, 19-21.
[33] Pre-Trial Decision on Statement, para. 17.
[34] Prlić Response, paras 6 ff.
[35] Prlić Response, para. 11.
[36] Prlić Response, para. 12.
[37] Impugned Decision, para. 30.
[38] IT/125 Rev. 2, Code of Professional Conduct for Counsel Appearing Before the International Tribunal (last amended on 29 June 2006) ("Code of Conduct").

> (ii) representation of another client will be, or may reasonably be expected to be, adversely affected by such representation;
>
> (iii) the matter is the same or substantially related to another matter in which counsel or his firm had formerly represented another client ("former client"), and the interests of the client are materially adverse to the interests of the former client; [...].
>
> (E) Where a conflict of interest does arise, counsel shall:
>
> (i) promptly and fully inform each potentially affected present and former client of the nature and extent of the conflict; and
>
> (ii) either:
>
> (1) take all steps necessary to remove the conflict; or
>
> (2) obtain the full and informed consent of all potentially affected present and former clients to continue the representation unless such consent is likely to irreversibly prejudice the administration of justice.

19. The Appeals Chamber has further elaborated that a conflict of interest arises "where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice".[39]

20. To effectively establish a conflict of interest, Prlić must point to ways in which Ćamil Salahović did prejudice, or could have prejudiced, his interests.[40] In his appeal, Prlić lists the various (mainly political) activities of Salahović to demonstrate that his lawyer was involved in SDA politics during the indictment period and beyond.[41] Salahović's involvement in such activities was allegedly incompatible with Prlić's interests, as their personal and political views were, at the time relevant to the Indictment, in mutual opposition.[42] Prlić then argues that Salahović's failure to advise him of the potential conflict of interest effectively deprived him of his right to counsel.[43]

21. The Appeals Chamber has stated that

> where a Chamber can reasonably expect that, due to a conflict of interest, a counsel "may be reluctant to pursue a line of defence, to adduce certain items in evidence, or to plead certain mitigating factors at the sentencing stage [...]", it can no longer presume that counsel has fulfilled his or her professional obligations under the Code of Conduct.[44]

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[39] *Gotovina* Decision of 29 June 2007, para. 16 citing *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.1, Decision on Appeal by Bruno Stokić Against Trial Chamber's Decision on Request for Appointment of Counsel, 24 November 2004 (*Stojić* Decision), para. 22. The substance of the arguments of the parties relate to actual versus potential prejudice to the accused (Prlić Appeal, paras 39-43; Prlić Reply, paras 9 and 17; Prosecution Response, paras 37-41). The Appeals Chamber considers that the Trial Chamber simply required a particularized showing of how Prlić's Counsel failed in fulfilling his professional and ethical obligations.
[40] *Stojić* Decision.
[41] Prlić Appeal, para. 23.
[42] Prlić Appeal, para. 16.
[43] Prlić Appeal, paras 26, 29-32.
[44] *Gotovina* Decision of 29 June 2007, para. 23.

A mere listing of evidentiary documents and witness statements as proof of Salahović's political activity does not however suffice to establish prejudice to Prlić's interests. The Prlić Appeal does not generally connect Salahović's interests and activities to actual or potential conflicts of interest with his client. In particular, Prlić does not provide examples of how he was potentially or actually prejudiced by the alleged conflict of interest. He does not show any basis for a potential or actual risk that Salahović's political and personal activities would "limit the choice of defence strategies"[45] in relation to Prlić's case.

22. The Prlić Appeal does not, in other words, remedy the lack of specificity that plagued his Motion to Suppress Statement during the pre-trial stage of the proceedings. It only reiterates the claim that Salahović's political activities and interests were in opposition to those of Prlić.[46] Despite the fact that some new material proffered does describe Salahović's participation in events covered by the indictment in this case,[47] the appeal again neglects to specify how these opposing interests did, or were reasonably expected to, adversely effect Salahović's representation of Prlić.[48]

23. The only clear allegation in this respect is that the conflict of interest prevented Counsel from providing Prlić with unbiased and impartial legal advice concerning the December 2001 Transcript. This advice, Prlić argues, would have been, "beyond doubt", that of refusing to answer questions posed by the Prosecution.[49] However, even in this instance, Prlić falls short of claiming that Salahović's, again unspecified, conduct as Counsel had any actual or potential impact – one way or the other – on his decision to approach the Prosecution and be questioned.

24. While the reasoning of the Trial Chamber on this issue is succinct,[50] it does not follow that relevant elements were unduly disregarded. Indeed, Prlić had already shown in September 2005 that a divergence on personal and political views might have ensued at the time of the questioning; the Trial Chamber concluded, however, that such a divergence did not create a legal conflict of interest.[51] Even the additional material brought at the trial stage on possible personal and political disagreements between Prlić and Salahović did not convince the Trial Chamber that a conflict of

[45] *Gotovina* Decision of 29 June 2007, para. 28. *Cf.* also *Prosecutor v. Ante Gotovina*, Cases Nos. IT-01-45-AR73.1, IT-03-73-AR73.1 and IT-03-73-AR.73.2, Decision on Interlocutory Appeals against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006 ("*Gotovina* Decision of 25 October 2006"), para. 28.
[46] Prlić Response, paras 11-12. See also Prlić Appeal, paras 23-26.
[47] Prlić Response, paras 11-12. See also Prlić Appeal, paras 52-53 and Prlić Reply, paras 20-21.
[48] *Cf. Gotovina* Decision of 29 June 2007, para. 24 as well as *Prosecutor v. Ante Gotovina et al.*, IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct, 4 May 2007, paras 22-24.
[49] Prlić Appeal, paras 44-45. See also Prosecution Response, paras 42-43.
[50] See *supra*, note 37 and accompanying text.
[51] Pre-Trial Decision on Statement, para. 17.

interest existed. In practice, it is unclear how the defence strategy could be influenced by the fact that Salahović was Prlić's counsel.[52]

25. The Appeals Chamber therefore finds that it fell within the Trial Chamber's discretion to conclude that, in light of the circumstances of the case and the acquaintance of the two individuals in question, their divergence of political and personal views in the indictment period would not adversely affect Salahović's professional judgement and amount, as such, to the legal conflict of interest posited by Prlić at the time of the questioning. Prlić Appeal in this respect is therefore dismissed.

26. Prlić also claims that, at the time of the questioning, he was unable to perceive the existence of a conflict of interest. This, by itself, amounted to prejudice.[53] Prlić stresses that he did not benefit from an explanation of the material risks of the proposed course of conduct (*i.e.*, the questioning by the Prosecution) or the available alternatives.[54] Even assuming that the standard posited by Prlić is correct, this circular reasoning fails to sufficiently substantiate his claim that a conflict existed such that it had the potential to prejudice Prlić's interests. Thus, without linking the differing political and personal interests and activities with any actual or potential effects these differences would have on Salahović's "duty of loyalty to ... put [the interests of justice] before his own",[55] a trier of fact could reasonably find that no conflict of interest was established. Prlić Appeal in this respect is therefore dismissed.

(b) Counsel as witness

27. According to Prlić, the circumstances at the time of the questioning were also such that his Counsel at the time should have understood, and thus notified him, that he would likely be a necessary witness in the ensuing case.[56]

28. Article 26 of the Code of Conduct further provides that, subject to three exceptions, "[c]ounsel shall not act as an advocate in a proceeding in which counsel is likely to be a necessary witness".[57]

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[52] See, in this respect, *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004, para. 15.
[53] Prlić Appeal, para. 46.
[54] Prlić Reply, para. 12.
[55] Code of Conduct, Article 14(A).
[56] Prlić Appeal, para. 26, with reference in general to the arguments on conflict discussed above. See also Prosecution Response, paras 20-23 and Prlić Reply, para. 11.
[57] Code of Conduct, Article 26.

29. The Appeals Chamber notes, in this respect, that the questioning of Prlić took place in December 2001, while the indictment in this case was issued only on 4 March 2004 and unsealed on 2 April of that year. At the time of the questioning, the investigators were only able to provide Prlić with a list of general questions reflecting the nature of subjects which were of interest to the Prosecution, and not specific questions they wished to have answered.[58] Considering these circumstances, and even assuming that Salahović knew about the subject-matter interest of the Prosecution when the questioning began, the Appeals Chamber concludes that, on the basis of the facts before it, a trier of fact could reasonably conclude that there was, at that stage, no likelihood that Salahović would become a witness.[59] Thus, this part of the Prlić Appeal is also rejected. As a consequence, the Appeals Chamber further dismisses Prlić's arguments related to the fact that the alleged conflict of interest would have affected not just him, but the administration of justice as a whole.[60]

30. Having dismissed the Prlić Appeal, which was limited to the issue of conflict of interest, the Appeals Chamber concludes that the Trial Chamber did not err in admitting the December 2001 Transcript as evidence in relation to Prlić.

C. The December 2001 Transcript admitted into evidence and its value

1. Introduction

31. The Appeals Chamber now turns to the issue of whether the Trial Chamber erred, as the Joint Defence argues, in admitting the December 2001 Transcript as evidence also against Prlić's co-accused in these proceedings.

32. The Joint Defence appeals the Impugned Decision by specifically attacking four of its key findings as erroneous, "either because they are strictly and technically incorrect or because they involve an artificial and unrealistic view and are therefore wrong in substance".[61]

33. The four allegedly erroneous key findings of the Impugned Decision are, according to the Joint Defence: (a) the admission of the December 2001 Transcript would not make Prlić a Prosecution witness; (b) the admission of the December 2001 Transcript would not violate the right to cross-examination of the co-accused; (c) the admission of the December 2001 Transcript under

[58] Motion to Suppress Statement, para. 2.
[59] *Cf. Gotovina* Decision of 25 October 2006, paras 31-33.
[60] Prlić Appeal, para. 38; see also Prosecution Response, para. 37.
[61] Joint Defence Appeal, para. 3.

Rule 89(C) would not "evade the admission criteria of Rule 92*bis*"; (d) the co-accused bear the burden of proving that the December 2001 Transcript contained false allegations against them.[62]

2. Relevant background

34. The Trial Chamber, having established that the Rules do not contain an explicit provision dealing with admission of an accused's statement in relation to other co-accused in a joint trial, proceeded to analyse the legal question under the "general provisions" of Rules 89(C) and 89(D):[63]

> A Chamber may admit any relevant evidence which it deems to have probative value.
>
> A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

The conclusion that the December 2001 Transcript's probative value is not substantially outweighed by the need to ensure a fair trial was also premised on the finding that Prlić's questioning had taken place according to the procedure enshrined in Rules 42 and 43 and that the December 2001 Transcript could therefore be admitted in Prlić's trial, including for use against his co-accused, if it was relevant and had probative value.[64]

35. The Trial Chamber further noted that the probative value of the December 2001 Transcript would be greatly increased if Prlić were to decide to exercise his right to testify at trial, since the parties and the Chamber would then be able to cross-examine and question him.[65] It however emphasized that material going to the proof of the acts or conduct of an accused and which was not be subject to cross-examination could not be relied upon in convicting that accused unless corroborated by other evidence.[66]

36. The contentious issue on appeal is whether the December 2001 Transcript should be admitted (and, if so, under which conditions) in proceedings, such as the present ones, where the questioned person is one of several co-accused in a joint trial.[67] The reasoning of the Trial Chamber and the arguments of the Joint Defence against that reasoning therefore relate to the appropriate balance of the competing interests at stake in such a scenario.

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[62] Joint Defence Appeal, para. 2.
[63] Impugned Decision, paras 19-22, 24-31 (on Rule 89(C)) and 32 (on Rule 89(D)).
[64] Impugned Decision, para. 12, referring to the case-law of the Tribunal on this issue.
[65] Impugned Decision, paras 33-34.
[66] Impugned Decision, para. 18.
[67] The Appeals Chamber notes that this case did not result, as in other cases before this Tribunal, from a request of joinder of previously separate proceedings – the operative indictment dated 2 March 2004 (and filed two days later) already listed all six co-accused.

3. Analysis

(a) Prlić as a Prosecution witness

37. According to the Joint Defence, a "fundamental and generally recognized rule of law" is that an accused presently on trial is not a competent witness against his co-accused while he remains an accused himself.[68] The invocation of this rule is premised on the assumption that, if the December 2001 Transcript is admitted in this case, Prlić would become, for all practical purposes, a Prosecution witness.

38. In this respect, the Appeals Chamber agrees that, under the Tribunal's law, the Prosecution may not summon an accused as a witness in his own case, due to the special protection he enjoys.[69] The Appeals Chamber however notes that the Prosecution is not attempting to call Prlić as a witness in this trial. A request to admit a transcript of a suspect's questioning into the trial record cannot be equated with a request to add the person in question to the Prosecution's witness list. Witnesses, under the Tribunal's rules, are generally questioned by the parties in court after having made a solemn declaration; they may be subjected to cross-examination by the opposing party, as well as to questions from the bench. In particular, judges are thus in a position to observe a witness's demeanour while he gives evidence.[70] On the other hand, written evidence such as the December 2001 Transcript, although strictly speaking evidence stemming from the declarations of an individual, is not the "testimony" of that person.

(b) Violation of the right to cross-examination

(i) General issues

39. A further issue raised by the Joint Defence is that, assuming Prlić does not elect to testify as a witness in his own case pursuant to Rule 85(C), none of the other five co-accused in the instant proceedings will be able to cross-examine the person whose questioning was the basis of the December 2001 Transcript (*i.e.*, Prlić himself). This would render it impossible for them, jointly or individually, to challenge the content of the December 2001 Transcript.

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[68] Joint Defence Appeal, paras 6-7. The Joint Defence compares the present situation to that arising under Rule 92*bis*, which explicitly mentions "evidence of a *witness* in the form of a written statement" (emphasis added).
[69] Rule 85(A). See also *Galić* Appeal Judgement, paras 17- 18 and *Kvočka et al.* Appeal Judgement, para. 125.
[70] See, *inter alia*, Rules 85(B) and 90. The issues raised by Rules 92*bis* and 92*quater* are discussed below; suffice it to say here that, in these cases, cross-examination by the opposing party is allowed (where possible) and that evidence on the acts and conduct of the accused constitutes a ground to exclude such statements from the proceedings. Moreover, the Appeals Chamber has already noted the difference between statements admitted pursuant to Rule 92*bis* and others. See *Prosecutor v. Stanislav Galić*, Case No IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C) ("*Galić* Decision"), 7 June 2002, para. 31.

40. The Rules do not provide explicitly for the case of a transcript of the questioning of a suspect to be admitted into evidence in the trial of that person and other accused. A Chamber is therefore called in such a case to apply rules of evidence that "will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".[71] This is a delicate exercise for, while the system under which the Tribunal's rules of evidence operates is predominantly adversarial, the jurisprudence – and the Rules themselves – have recognized from the beginning the necessity, and desirability, of certain features which do not accord with a strictly adversarial criminal procedure.

41. One of the central tenets of the procedure before the Tribunal is the right of all accused to a fair and public hearing.[72] While such a hearing generally entails the examination of evidence against the accused, this principle is not absolute.[73] In fact, there are various provisions that, by balancing the rights of the accused against other relevant interests, safeguard the overall fairness of the proceedings. The Appeals Chamber recalls that this is a complex feat, since under the cloak of "fairness", a court may be led to construe troublesome curtailments of the rights of the accused in specific instances, which in turn might impact on fundamental rights of the accused. Trial Chambers are called to be vigilant and effective in protecting these rights.

(ii) Analogies with Rules 92*bis* and 92*quater*

42. In striving to assess the spirit of the Statute in this matter, both parties have drawn the attention of the Appeals Chamber to Rules 92*bis* and 92*quater*, which allow for the admission of written evidence and which might therefore be able to provide guidance on the issue at hand.[74] The Joint Defence in particular attacks the Trial Chamber's conclusion that transcripts of questionings taken pursuant to Rules 42 and 43 are more reliable than Rule 92*bis* statements. In the circumstances of the case – where the questioning took place in the presence of Counsel – introduction of such a statement would actually increase the risks for the Joint Defence because of the combined effect of the interests of the Prosecution and Prlić at the expense of the other co-accused. The Joint Defence also opposes the assumption underlying the Impugned Decision according to which Rules 42 and 43 are designed to introduce a suspect's statements into evidence once the trial starts.[75]

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[71] Rule 89(B).
[72] Article 21(2) of the Statute.
[73] See, *e.g.*, *Prosecutor v. Žejnil Delalic et al.*, Case No. IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 22.
[74] Joint Defence Appeal, paras 9-13, 15; Prosecution Response, paras 45-50, 53-61, 64.
[75] Joint Defence Appeal, para. 14.

43. The Appeals Chamber considers the analysis of Rule 92*bis* inapposite to the present situation. Rule 92*bis* provides an answer to a question different, both in aim and in scope, from the one posed by the present situation. While one of the purposes of Rule 92*bis* is to place some restrictions on the admissibility of hearsay evidence,[76] its general aim at the time of its introduction was to make trials more expeditious, while not preventing examination and cross-examination of the witness as such.[77] Rule 92*bis* even states that a Trial Chamber "may dispense" with the attendance of a witness in person – thus providing a clear indication that there is a choice to be made, in order to properly balance the interests to an expeditious trial with the rights of the accused.[78]

44. Moreover, as the Trial Chamber correctly noted, the transcript of a questioning taken pursuant to Rules 42 and 43 is not a "statement" according to Rule 92*bis*.[79] A recorded questioning includes, by definition, all questions, all answers, every pause and request for clarifications by all attendees. The parties and the Judges also have the possibility to listen to the audio recording itself, which might provide additional guidance in the understanding of the overall demeanor of the questioned person as well as of those questioning him. The danger that the Prosecution uses this type of questioning to "craft" evidence against the (other) accused persons at trial as argued by the Joint Defence is, in such instances, reduced to a minimum. In this sense, a recorded questioning may be considered more reliable than a statement prepared and then admitted under Rule 92*bis*.

45. Information gathered by the Prosecution from a witness who is not, at the same time, a suspect, will generally be compiled on the basis of questions and answers as an evidence-gathering exercise in order to be used at trial. The three safeguards enshrined in Rule 92*bis* (B) serve precisely the purpose of limiting errors and misunderstandings in this exercise. Conversely, the questioning of a suspect pursuant to Rules 42 and 43 affords stringent safeguards in order to protect the questioned individual's right not to incriminate himself.[80] Thus, the suspect is motivated to be more circumspect in his responses and, while he might wish to try and shift the blame to other individuals if he considers himself in a difficult position,[81] he will certainly bear in mind that the Prosecution has, at its disposal, a variety of sources to check the accuracy of his words. In other words, and bearing in mind the different purpose behind the questioning of a suspect as opposed to

[76] *Galić* Decision, para. 31.
[77] See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 September 2003, paras 15-18.
[78] See also *Galić* Decision, paras 28-30. In this respect, the Appeals Chamber notes that the Joint Defence did identify portions of the December 2001 Transcript which would go to the acts and conduct of the various co-accused (Joint Defence Appeal, para. 18, referring to Joint Response, Annex).
[79] Impugned Decision, paras 26-28.
[80] See, for example, *Halilović* Appeal Judgement, especially paras 36-40, on the reliability of a summarized statement and Rules 42 and 43.
[81] Joint Defence Appeal, para. 16.

the gathering of a witness statement by the Prosecution, in cases similar to the one under review here there is undoubtedly less concern about a "collaborative effort" between the suspect and the Prosecution, than in cases where the Prosecution approaches a prospective witness. Of course, this does not say much about the veracity of the answers and explanations provided by the suspect who was being questioned – but this is not determinative of the issue, in this case.

46. Additionally, a document such as the December 2001 Transcript, after a suspect has become an accused, does not merely provide the judges in his case with a written summary of the answers of a person about whom they know nothing. In the normal course of events, during the proceedings those judges will hear evidence on the individual who was questioned and, by the end of the trial, they will therefore be able – and required – to put the questioning in context in order to assess it in light of the rest of the information received. This does not happen with witness statements, which are based on evidence proffered by an individual about whom the trier of fact knows little, even considering the possibility that he be called for cross-examination.

47. A trier of fact is of course called upon to carefully consider the context in which the suspect was questioned. Nonetheless, a transcript of a suspect questioning is different from a statement introduced at trial pursuant to Rule 92*bis*. This shows that there are substantial differences between the transcript of a questioning conducted according to Rules 42 and 43 and a statement prepared with a view to introducing it into the trial proceedings pursuant to Rule 92*bis*.

48. As for Rule 92*quater*, the Appeals Chamber also finds that this provision is not precisely on point. It is true that this Rule provides for a mechanism to allow for the admission of written evidence when the person giving the statement is unavailable – but this is so because the individual in question is objectively unable to attend a court hearing, either because he is deceased or because of physical or mental impairment. In the case at hand, however, the witness is theoretically able to attend – as shown by the fact that he can choose to testify – but is not required to do so in order to protect his own fundamental rights. In this sense, his rights are weighed *ex ante* against the other interests involved and actually form part of wider considerations falling within the "interests of justice". It is true, however, as the Prosecution submits,[82] that Rule 92*quater* does provide an example of a provision explicitly allowing for the admission into evidence of a statement – even regarding the acts and conduct of the accused – where cross-examination is impossible.

49. In light of the above, the Appeals Chamber therefore finds that the Tribunal's Rules provide only scant guidance for the issue at hand. The Appeals Chamber therefore also considers the

[82] Prosecution Response, para. 61.

arguments by the Joint Defence according to which the Impugned Decision would "evade the admission criteria of Rule 92*bis*" moot.[83]

(iii) Spirit of the Statute and general principles

50. In construing the "spirit of the Statute and the general principles of law" pursuant to Rule 89(B), the Appeals Chamber will also note that, due to the nature of the issue at hand, domestic legal systems do not provide much guidance. In a very broad sense, in systems that allow an accused to testify in his own trial under a solemn declaration – and not merely expressing himself as an accused – a document such as the December 2001 Transcript would be inadmissible because it could not be tested by cross-examination.[84] On the contrary, those systems where declarations gathered in the pre-trial stages according to certain procedures may be admitted in writing at trial are also the ones that generally do not allow accused persons to testify as witnesses in their own trials – they may be questioned, not in a manner equivalent to an examination under a solemn declaration.[85] Thus, no discernible "general principle" may be inferred from domestic practice in this area.

51. The Appeals Chamber of this Tribunal has however found some guidance in principles expressed by the European Court of Human Rights ("ECtHR") on admissibility and evaluation of evidence. This is so because – even considering that, of course, the Tribunal is not bound by the jurisprudence of that body – the ECtHR deals with cases from a multitude of different jurisdictions applying a variety of different procedural rules through the prism of a provision (Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms) which is very similar to Article 21 of the Statute.[86]

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[83] Joint Defence Appeal, paras 11-17.

[84] See, for example: *Cruz v. New York*, 481 US 186, 189-190 (1987) and *Lilly v. Virginia*, 527 US 116 (1999), 139 (United States of America); *R. v. Mazza* (1978), 40 C.C.C. (2d) 134 (S.C.C.) and *R. v. Deol, Gill and Randev* (1981), 58 C.C.C. (2d) 524 (Alta.C.A.) (Canada); *R v. Gunewardene* [1951] 2 KB 600 and *Lobban v. R*, [1995] 2 All ER 602 (England).

[85] See, for example: Code de procédure pénale, articles 105, 113(7), 180, and 181 (France); Strafprozeßordnung (Code of Criminal Procedure), Sections 198-206, 245, 252(1)(3) and Oberster Gerichshof, 12Os26/89 of 30 March 1989, paras 152-153 (Austria); Strafprozeßordnung (Code of Criminal Procedure), Sections 245, 254(1) *mutatis mutandis*, 255a as regards an audio- and videotape *mutatis mutandis* (Germany). *See in particular* Bundesgerichtshof [BGH] [Federal Supreme Court of Justice] 14 May 1969, Entscheidungen des Bundesgerichtshofs in Strafsachen [BGHSt] 32, 372 (374). The case of Italy is more complex, as Articles 210, 500, 511, 513 and 514 of the Code of Criminal Procedure effectively prevent admission into evidence of previous statements by the co-accused, unless the questioning took place at the presence of the counsel of the accused, or when the accused cannot be questioned in court because dead, objectively unable to attend, or does not appear in court due to subornation.

[86] Caution should also be exercised in referring to ECtHR precedents in relation to issues of admissibility of evidence because, as that Court itself recognized, the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them; the task of the Court under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. See, among others, *Van Mechelen et al. v. the Netherlands*, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-

52. The Appeals Chamber has already held that the right to cross-examination is not absolute.[87] It further noted that

> application of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the victims of the offences charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community) [...] Seen in this way, it is difficult to see how a trial could ever be considered fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.[88]

Of even more relevance for the issue at hand, since the Tribunal's first cases, the jurisprudence has been constant in holding that, under the Tribunal's system, a statement of a person made otherwise than in the proceedings in which it is tendered, whether orally by a witness or in writing is not inadmissible, in particular when the source of hearsay is known and subject to potential evaluation by a Chamber.[89] In particular, the Appeals Chamber found that Trial Chambers have a wide discretion in admitting hearsay evidence, although establishing the reliability of this type of evidence is of paramount importance when hearsay evidence is admitted as substantive evidence in order to prove the truth of its contents.[90]

53. A different matter is, of course, what weight a trier of fact is allowed to give to evidence not subjected to the testing of cross-examination. It is in this matter that the jurisprudence of the ECtHR is valuable, as it has authoritatively stated the principle that "all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence."[91] Unacceptable infringements of the rights of the defence, in this sense, occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial.[92] The ECtHR applied this reasoning to the statement of a co-accused in pre-trial proceedings in a case where neither the applicant nor his lawyer had been given the opportunity to question the co-accused at

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III, p. 711, para. 50, and *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgements and Decisions* 1996-II, p. 470, para. 67. The case law of the ECtHR is retrievable at http://www.echr.coe.int. The Appeals Chamber also notes that all the States on the territory of the former Yugoslavia have ratified the European Convention of Human Rights and Fundamental Freedoms of 4 November 1950 (213 UNTS 221, CETS 005), retrievable at *http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm*.

[87] *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006 ("*Martić* Decision"), para. 12.

[88] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999 ("*Aleksovski* Decision on Admissibility of Evidence"), para. 25, cited with approval in *Martić* Decision, para. 13.

[89] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, paras 5, 7, 15, 18-19; *Aleksovski* Decision on Admissibility of Evidence, paras 14-15; *Kordić and Čerkez* Appeal Judgement, paras 280-284.

[90] *Aleksovski* Decision on Admissibility of Evidence, para. 15.

[91] *A.M. v. Italy*, no. 37019/97, para. 25, ECHR 1999-IX.

[92] Apart from the *A.M.* case, see also *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, paras 43-44 and *Unterpertinger v. Austria*, judgment of 24 November 1986, Series A no. 110, pp. 14-15, paras 31-33.

any stage of the proceedings.[93] The Appeals Chamber has already had occasion to elaborate on the fact that these principles serve as guidelines before the Tribunal.[94]

54. The Joint Defence further contests the Trial Chamber's conclusion that they had not shown where the December 2001 Transcript contained false accusations.[95] According to the Prosecution, arguments related to weight or the content of the December 2001 Transcript should be disregarded at this time, since the veracity of its content is not something to be considered at the admissibility stage. The Appeals Chamber understands the Impugned Decision to mean that the Trial Chamber in this case did not find *prima facie* elements that would make the December 2001 Transcript patently unreliable and therefore devoid of any probative value.[96]

(iv) Conclusion on the right to cross-examination

55. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in finding that the December 2001 Transcript could be introduced into evidence even if the co-accused might not be able to cross-examine Prlić on it, since as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination.

(c) Constraints on admission of evidence

56. The Joint Defence finally remarks on the issue of the admission of evidence as opposed to its assessment (or weight), averring that the "extremely liberal approach" to admission of evidence adopted by the Trial Chamber throughout the proceedings is not suited to all circumstances. In particular, the Joint Defence suggests that a more rigorous approach – one with "definite constraints" – should be used in admitting written evidence related to the acts and conduct of the accused.[97]

57. The Appeals Chamber notes that the Trial Chamber did refer to the principle according to which untested evidence relating to the acts and conduct of the accused may be admitted into the trial record, but must be corroborated by other evidence in order to form, if it comes to that, a basis for a conviction of an accused.[98] This principle is undoubtedly premised on the recognition that professional judges are better able to weigh evidence and consider it in its proper context than

[93] *Lucà v. Italy*, no. 33354/96, paras 39-45, ECHR 2001-II.
[94] *Martić* Decision, para. 20 and cited references.
[95] Joint Defence Appeal, paras 18-19.
[96] See, for example, *Brđanin* Appeal Judgement, para. 40.
[97] Joint Defence Appeal, paras 20-22. See also Prosecution Response, paras 62-65.
[98] Impugned Decision, para. 18. On the contrary, evidence that could be subject to cross-examination at trial does not require corroboration under Tribunal's law (*Aleksovski* Appeal Judgement, paras 62-63).

members of a jury. Furthermore, as opposed to a jury's verdict, professional judges have to write a reasoned decision, which is subject to appeal.

58. The Appeals Chamber needs however to clarify a fundamental issue in this respect. The principle of fairness, expressed by the ECtHR and adopted by the Tribunal, that a conviction may not be based solely or in a decisive manner on the deposition of an individual whom the accused has had no opportunity to examine[99] is not equivalent to the restriction that material related to the acts and conduct of the accused is inadmissible except through "live" testimony.[100] The former principle is both wider and narrower in scope.

59. On the one hand, "acts and conduct" of the accused have been interpreted extensively in the jurisprudence of the Tribunal.[101] The scope of the principle expressed above, however, appears to cover more than just this material: it clearly applies to any "critical element" of the Prosecution case,[102] that is, to any fact which is indispensable for a conviction (including those used as an aggravating circumstance in sentencing).[103] These are, in fact, the findings that a trier of fact has to reach beyond reasonable doubt. It would run counter to the principles of fairness discussed above to allow a conviction based on evidence of this kind without sufficient corroboration. In other words, the scope of the rule that sufficient corroboration is necessary has to be expanded to cover evidence beyond that relating to the acts and conduct of the accused *stricto sensu*.

60. On the other hand, a transcript of the questioning of an accused might contain evidence of his acts and conduct that do not relate to the allegations in the case at hand and may not, as such, form any basis for his conviction.

61. In light of the above, and taking into account this clarification, the Appeals Chamber finds that the Trial Chamber did not err in distinguishing between the admission of the December 2001 Transcript and its evaluation in light of the whole of the trial record.

(d) Conclusion

62. The Appeals Chamber finds that the Trial Chamber, in light of its careful balancing exercise about the probative value of the December 2001 Transcript and the potential prejudice to the co-accused due to its admission, has not misinterpreted or misapplied the governing law in admitting the December 2001 Transcript based in the case before it. This does not mean that a trier of fact

[99] *A.M. v. Italy*, *supra*, note 91.
[100] Rule 92*bis*.
[101] See, in general, *Galić* Decision.
[102] *Prosecutor v. Duško Sikirica et al.*, Case No. IT-95-8-T, Decision on Prosecution's Application to Admit Transcripts under Rule 92*bis*, 23 May 2001, paras 4, 8, 11.

would always abuse its discretion in limiting, or even denying, the admission of certain statements of a co-accused in light of Rules 89 and 95 and depending on the circumstances of the case.[104] Indeed, the Appeals Chamber considers that should new facts be established during the remainder of the trial, the Trial Chamber, having heard the parties, is free to revise its own or the Appeals Chamber's previous decision when assessing the entirety of the evidence before it.

63. The Joint Defence has also not shown that the Trial Chamber based its conclusion on a patently incorrect conclusion of fact or that the decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.

IV. DISPOSITION

In light of the foregoing, the Appeals Chamber

DISMISSES the Prlić Appeal;

DISMISSES the Joint Defence Appeal;

ORDERS Prlić to file redacted public versions of his filings in these appellate proceedings within 15 days of the filing of this decision.

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

Dated this 23rd day of November 2007,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

[103] See, *inter alia*, *Halilović* Appeal Judgement, para. 125; *Blagojević and Jokić* Appeal Judgement, para. 226.
[104] Tape recordings may result to have been incomplete or might have deteriorated; a Chamber may have objective grounds to suspect the existence of inducements not resulting from the portion of the conversation recorded; obvious lack of sincerity may impact on the transcript's probative value to a level that would make it unreasonable to admit it into evidence...Chambers faced with such situations, as well as other exceptional circumstances, may adopt various types of solutions in order to safeguard the fairness of the proceedings.