



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-AR73.16
Date: 3 November 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, President
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. John Hocking

Decision: 3 November 2009

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ**

PUBLIC

**DECISION ON JADRANKO PRLIĆ'S INTERLOCUTORY
APPEAL AGAINST THE *DECISION ON PRLIĆ DEFENCE
MOTION FOR RECONSIDERATION OF THE DECISION ON
ADMISSION OF DOCUMENTARY EVIDENCE***

The Office of the Prosecutor:

Mr. Kenneth Scott
Mr. Douglas Stringer

Counsel for the Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Mr. Jadranko Prlić
Ms. Senka Nožica and Mr. Karim A. A. Khan for Mr. Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Mr. Slobodan Praljak
Ms. Vesna Alaburić and Mr. Nicholas Stewart for Mr. Milivoj Petković
Ms. Dijana Tomašegović-Tomić and Mr. Dražen Plavec for Mr. Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Mr. 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 seised of an interlocutory appeal filed by Jadranko Prlić (“Appellant”) on 23 July 2009¹ against the “Decision on Prlić Defence Motion for Reconsideration of the *Decision on Admission of Documentary Evidence*”, issued on 29 June 2009 (“Impugned Decision”)² by Trial Chamber III (“Trial Chamber”).

I. PROCEDURAL HISTORY

2. On 5 December 2008 the Defence of Jadranko Prlić (“Defence”) filed a motion³ requesting that the Trial Chamber admit 1,135 documents into evidence pursuant to Rule 89(C) of the Rules of Procedure and Evidence (“Rules”) as relevant evidence of probative value to his defence case.⁴ The Prosecution filed a response on 20 January 2009.⁵ On 28 January 2009, the Defence filed a request for leave to reply and a reply.⁶

3. In its decision dated 6 March 2009,⁷ the Trial Chamber admitted some of the 1,135 Defence documents into evidence pursuant to Rule 89(C) of the Rules,⁸ and denied admission of the remaining documents on the basis that: (a) certain documents lacked “sufficient indicia of reliability and authenticity”;⁹ (b) the Defence failed to explain the relevance to the Indictment of a number of

¹ Jadranko Prlić’s Interlocutory Appeal Against the *Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence*, 23 July 2009 (“Appeal”).

² The English version of the Impugned Decision was filed on 16 July 2009.

³ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić’s Motion for the Admission of Documentary Evidence, 5 December 2008 (“5 December Motion”).

⁴ The Trial Chamber subsequently issued a decision in which it stated that the Defence’s categorisation of 396 of its 1,135 proposed exhibits was “extremely general”. The Trial Chamber ordered, *inter alia*, that the Defence classify the relevant proposed exhibits “into specific and non-general categories, by referring to the relevant paragraphs of the Amended Indictment”. See *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Prlić Defence Motion for the Admission of Documentary Evidence, 19 December 2008, p. 3. The Defence subsequently submitted a more detailed classification of the 396 proposed exhibits. See *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić’s Motion for Protective Measures of Certain Documents & Additional Classification of Certain Subjects Included in the Motion for Admission of Documentary Evidence, 4 January 2009 (“4 January Motion”).

⁵ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Prosecution Response to Jadranko Prlić’s (1) Motion for Admission of Documentary Evidence and (2) Motion for Protective Measures of Certain Documents & Additional Classification of Certain Subjects Included in the Motion for Admission of Documentary Evidence with confidential annex, 20 January 2009 (“20 January Response”). The 20 January Response addresses the Defence’s 5 December and 4 January Motions.

⁶ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić’s Request for Leave to Reply & Reply to Prosecution Response to Jadranko Prlić’s (1) Motion for Admission of Documentary Evidence and (2) Motion for Protective Measures of Certain Documents & Additional Classification of Certain Subjects Included in the Motion for Admission of Documentary Evidence, 28 January 2009.

⁷ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Prlić Defence Motion for Admission of Documentary Evidence, 6 March 2009 (“6 March Decision”). The English translation of the 6 March Decision was filed on 27 March 2009.

⁸ *Id.*, p. 10 and Annex to the 6 March Decision.

⁹ *Id.*, para. 28 and Annex to the 6 March Decision.

documents relating to municipalities outside the scope of the Indictment;¹⁰ (c) with regard to a number of video transcripts, the Defence was unable to provide copies of the videos with the result that the Trial Chamber was unable to verify the accuracy of the transcripts;¹¹ and (d) the translations provided for some of the Defence documents were incomplete, specifically, “certain BCS originals and translations of the Proposed Exhibits” had been “reversed in the *e-court* system”.¹²

4. On 8 May 2009 the Defence filed a motion requesting that the Trial Chamber reconsider its 6 March Decision with regard to 681 of the 1,135 proposed exhibits.¹³ The Prosecution filed confidentially a response on 22 May 2009.¹⁴ The Trial Chamber considered the Defence submissions regarding all 681 documents, and subsequently delivered the Impugned Decision in which it stated that it would: (a) reconsider 31 of the 681 documents submitted in the Reconsideration Motion, and (b) admit 17 of the 31 reconsidered documents into evidence.¹⁵

5. In a motion filed 6 July 2009, the Defence requested certification to appeal the Impugned Decision.¹⁶ By a decision dated 16 July 2009, the Trial Chamber granted the Defence request for certification.¹⁷ In its Appeal the Appellant requests that the Appeals Chamber: (a) “remand the Impugned Decision to the Trial Chamber for it to reconsider all documents for which reconsideration was rejected”; and (b) instruct the Trial Chamber “to provide detailed reasoning as to the standard of relevance, reliability and authenticity it is applying in relation to the admission of documentary evidence”.¹⁸ The Prosecution filed a response on 3 August 2009.¹⁹ The Appellant has not replied to the Prosecution Response.

¹⁰ *Id.*, para. 29 and Annex to the 6 March Decision.

¹¹ *Id.*, paras 30-31 and Annex to the 6 March Decision.

¹² *Id.*, para. 37 and Annex to the 6 March Decision.

¹³ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić’s Motion for Reconsideration of the Decision on Prlić Defence Motion for Admission of Documentary Evidence, 8 May 2009 (“Reconsideration Motion”).

¹⁴ *Prosecutor v. Jadranko Prlić, et al.*, Case No. IT-04-74-T, Prosecution’s Response to Jadranko Prlić’s Motion for Reconsideration of the Decision on Prlić Defence Motion for Admission of Documentary Evidence, filed confidentially on 22 May 2009 (“22 May Response”). On 8 June 2009, the Trial Chamber orally instructed the Defence to file supplemental submissions explaining why the Defence, in its Reconsideration Motion, disclosed the identities of a number of document sources after having previously refused to make such disclosures in its 5 December Motion. See T. 41290-41291, 8 June 2009 (Private Session). Consequently, the Defence filed “Jadranko Prlić’s Supplemental Submissions to His 8 May 2009 Motion for Reconsideration Pursuant to the Trial Chamber’s Oral Instructions of 8 June 2009” on 10 June 2009 (“Supplemental Submissions”). The Prosecution filed its “Prosecution Response to Prlić’s Supplemental Submissions to his 8 May 2008 Motion for Reconsideration Pursuant to the Trial Chamber’s Oral Instructions of 8 June 2009” on 12 June 2009.

¹⁵ Impugned Decision, p. 14. See also Annex to the Impugned Decision.

¹⁶ Jadranko Prlić’s Request for Certification to Appeal Under Rule 73(B) against the *Décision relative à [sic] la demande de la Défense Prlić en vue du réexamen de la décision portant sur l’admission d’éléments de preuve documentaires*, 6 July 2009. The Prosecution filed the “Prosecution Response to Jadranko Prlić’s Request for Certification to Appeal Under Rule 73(B) against the *Décision relative à la demande de la défense Prlić en vue du réexamen de la décision portant sur l’admission d’éléments de preuve documentaires*” on 13 July 2009.

¹⁷ Decision on Certification to Appeal Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 16 July 2009 (“16 July Decision”). The English version of the 16 July Decision was filed on 23 July 2009.

¹⁸ Appeal, p. 17.

II. STANDARD OF REVIEW

6. A Chamber has the discretion to reconsider a previous interlocutory decision in exceptional cases if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.²⁰ As the decision to reconsider is a discretionary one, the Appeals Chamber will not conduct a *de novo* review of such a decision. “The issue in an appeal from such a decision is not whether the prior decision sought to be reconsidered was correct, or whether the decision not to review it was correct, in the sense that the Appeals Chamber agrees with either decision, but rather whether the Trial Chamber has correctly exercised its discretion in refusing to reconsider the prior decision.”²¹ For an Appellant to succeed on appeal, it must be demonstrated that the Trial Chamber has committed a “discernable error”²² resulting in prejudice to a party.²³ The Appeals Chamber will overturn a Trial Chamber’s exercise of its discretion only where it is found to be: (a) based on an incorrect interpretation of governing law; (b) based on a patently incorrect conclusion of fact; or (c) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.²⁴ The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations in reaching its discretionary decision.²⁵

III. DISCUSSION

A. The First Ground of Appeal

7. In the 6 March Decision, the Trial Chamber denied admission of certain Defence documents related to municipalities outside the scope of the Indictment. It reasoned that the Defence had

¹⁹ Prosecution Response to Jadranko Prlić’s Interlocutory Appeal against the *Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence*, 3 August 2009 (“Response”).

²⁰ *Juvénal Kajelijeli v. The Prosecutor*, Judgement, Case No. ICTR-98-44-A, 23 May 2005, para. 204; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108 bis.3, Decision on Request of Serbia and Montenegro for the Review of the Trial Chamber’s Decision of 6 December 2005, 6 April 2006 (confidential) (“*Milošević Serbia Request Decision*”), para. 25, footnote 40. See also *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on the Prosecution Motion for Reconsideration, 23 August 2006, pp. 3-4 and *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Motions for Reconsideration, 1 December 2006, para. 6.

²¹ *Theoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Interlocutory Appeal From Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of “Lack of Jurisdiction”, 2 May 2002, para. 10. See also *Prosecutor v. 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 (“*Milošević Decision on Joinder*”), para. 4; *Milošević Serbia Request Decision*, para. 16.

²² *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, 17 October 2005 (“*Stanišić Provisional Release Decision*”) para. 6. See also *Milošević Serbia Request Decision*, para. 16.

²³ *Milošević Decision on Joinder*, para. 6. See also *Milošević Serbia Request Decision*, para. 16.

²⁴ *Stanišić Provisional Release Decision*, para. 6. See also *Milošević Serbia Request Decision*, para. 16.

²⁵ *Milošević Decision on Joinder*, para. 5. See also *Stanišić Provisional Release Decision*, para. 6, footnote 10 and *Milošević Serbia Request Decision*, para. 16.

“fail[ed] to provide any explanations as to the reasons why it considers that these Proposed Exhibits are important for the determination of the case” and that it had “merely described the content of the Proposed Exhibits without explaining their link to the Indictment”.²⁶ It concluded that the Defence “provided no explanation allowing the Chamber to determine whether they bear sufficient indicia of relevance” necessary for admission.²⁷ Subsequently, in the Impugned Decision, the Trial Chamber denied the Defence request for reconsideration of these documents on the basis that the Defence “fail[ed] to provide proof of a clear error committed by the Chamber” and instead “add[ed] to the arguments that it had previously submitted without demonstrating the existence of particular circumstances that would justify a reconsideration.”²⁸

8. Under his first ground of appeal, the Appellant claims that by this decision “[t]he Trial Chamber erred as a matter of law and fact and abused its discretion by refusing to reconsider any documents for which there was allegedly insufficient explanation as to how they were relevant to the Indictment.”²⁹

1. Submissions

9. In support of his Appeal, the Appellant cites certain guidelines issued by the Trial Chamber regarding the presentation of Defence evidence.³⁰ Guidelines 9(a)(iii) and 9(a)(vi) provide, respectively, that a Defence motion for the admission of documents into evidence must contain “[r]eferences to the relevant paragraphs of the Indictment” and “[r]easons why the party considers the document important for the determination of the case”.³¹ The Appellant submits that the 5 December Motion was fully compliant with these Guidelines. He asserts that by denying the Defence request for admission on the basis that it failed to explain how its documents were relevant to the Indictment, the Trial Chamber imposed an additional requirement on the Defence not stipulated in the Guidelines. The Appellant argues that there is a distinction between the provision of reasons as to why a party considers a document important for the determination of its case, and providing an explanation as to how a document is linked to the Indictment.³² The Appellant thus submits that “[t]he Trial Chamber should not have required an additional explanation as to how these documents were linked to the Indictment.”³³

²⁶ 6 March Decision, para. 29.

²⁷ *Id.*

²⁸ Impugned Decision, para. 27.

²⁹ Appeal, p. 8.

³⁰ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision Adopting Guidelines for the Presentation of Defence Evidence, 24 April 2008 (“Guidelines”).

³¹ *Id.*, para. 35.

³² Appeal, paras 23, 27-28.

³³ *Id.*, para. 27.

10. The Appellant also submits that, whereas the Defence application for admission was subjected to this additional requirement, Prosecution applications were not.³⁴ The Appellant compares the descriptions provided by the Prosecution regarding four proposed Prosecution exhibits, with descriptions given by the Defence to four documents submitted in the 5 December Motion.³⁵ He argues that, despite the fact that the Defence followed the descriptive format used by the Prosecution, its documents were rejected while the Prosecution's documents were admitted. The Appellant asserts that the comparison reflects that the Prosecution "was never required to explicitly show how a particular document was relevant to the Indictment",³⁶ and that the Trial Chamber applied "an entirely different – and higher – standard" to the Defence, with the result that "the Trial Chamber's approach results in vastly disparate treatment between the Defence and the Prosecution".³⁷

11. The Appellant further submits that the Trial Chamber ought to have granted reconsideration in view of the over 300 pages of additional information submitted with the Reconsideration Motion, which provided "new and extremely detailed explanations" as to the relevance of each document to the Indictment.³⁸

12. In its Response, the Prosecution emphasises that the Impugned Decision was based on the Defence's failure to satisfy the legal requirements for reconsideration. It argues that the Appellant fails to challenge this finding and instead addresses the substantive merits of the Trial Chamber's 6 March evidentiary findings.³⁹ The Prosecution submits that the Defence submission of a vast volume of additional information with its Reconsideration Motion amounts to an attempt to present new arguments that could have been made at the time it filed its 5 December Motion.⁴⁰ The Prosecution also argues that requesting that a party explain how its documents are relevant to the Indictment does not constitute a new or additional requirement, as this is embodied in Guidelines 9(a)(iii) and 9(a)(vi). It submits that the information sought by the requirement enables the Trial Chamber to apply Rule 89(C) of the Rules.⁴¹ The Prosecution further submits that the Trial Chamber equitably applied the standards and Guidelines regarding the admissibility of evidence between the Prosecution and the Defence.⁴²

³⁴ *Id.*, paras 23-24, 27.

³⁵ *Id.*, paras 24-25. The Prosecution documents cited for comparison by the Appellant were: P06307, P05354, P0007, P00100 and P00100. The Defence documents cited were: 1D00222, 1D00518, 1D00299 and 1D00224.

³⁶ Appeal, para. 24. (Emphasis original).

³⁷ *Id.*, para. 27.

³⁸ *Id.*, para. 29.

³⁹ Response, para. 5.

⁴⁰ *Id.*, para. 6.

⁴¹ *Id.*, para. 10.

⁴² *Id.*, paras 11-15.

2. Analysis

13. As the Appellant has noted, pursuant to Guidelines 9(a)(iii) and 9(a)(vi) issued by the Trial Chamber, in seeking the admission of the documents, the party is required to provide references to the relevant paragraphs of the Indictment and reasons why it considered the documents important for the determination of the case. The Appellant did provide, *prima facie*, the requested information in its 5 December Motion. Indeed, many of the documents and their explanations as to their importance in relation to the case were accepted by the Trial Chamber. The Defence pleaded that the determination of the case referred to the Defence case.⁴³ The Defence appears to argue that the words ‘case’ and ‘indictment’ may not be completely interchangeable. For instance, the expression ‘Defence case’ may refer to the ‘Defence Theory’ of the case and therefore involves events or locations that are not specifically mentioned in the Indictment. However, the Appeals Chamber underscores that the Guidelines must be interpreted in the light of the Rules and the jurisprudence. When introducing documentary evidence pursuant to Rule 89(C) of the Rules, the parties must explain how the content of the document relates to a material issue.⁴⁴ This issue is a question of fact and depends upon the circumstances of each case. The Appeals Chamber must accord considerable deference to the Trial Chamber’s discretion in its evaluation of the relevance of the documentary evidence.

14. In the Impugned Decision, the Trial Chamber denied the Defence motion to reconsider as the Defence failed to provide sufficient explanations as to the reasons why the Trial Chamber should reconsider its findings in its 6 March Decision in relation to these Exhibits. It concluded that the explanations provided by the Defence in relation to some of the documents were clearly insufficient. The Appeals Chamber does not agree that the Trial Chamber added a new condition to the admission of documentary evidence or set up a higher standard than the ones required by Rule 89(C) of the Rules and its jurisprudence or the Guidelines. The Appellant failed to demonstrate that the Trial Chamber improperly exercised this evidentiary discretion.

15. The Appellant acknowledges that the Prosecution was required to demonstrate the importance of the documents submitted as evidence to its case.⁴⁵ As noted above, the provision of such information is consistent with the Rule 89(C) requirement that the moving party demonstrate

⁴³ Appeal, para. 27.

⁴⁴ See *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal Against the Trial Chamber’s Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009 (“Prlić 12 January Decision”), para. 17, citing *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellants Jean-Bosco Barayagwiza’s and Ferdinand Nahimana’s Motions for Leave to Present Additional Evidence Pursuant to Rule 115, 12 January 2007, paras 7, 13, 18-20 and *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko’s Request for Reconsideration, 27 September 2004, para. 12.

⁴⁵ Appeal, para. 24.

the relevance of any proposed evidence to the Indictment. Consequently, the Appeals Chamber finds no merit in the Appellant's submission that the Trial Chamber exempted the Prosecution from having to explain the relevance of proposed Prosecution exhibits to the Indictment.

16. The Appeals Chamber also notes the Appellant's comparison of the descriptions given by the Prosecution to four Prosecution documents subsequently admitted into evidence, with descriptions provided by the Defence of four Defence documents which were denied admission.⁴⁶ The substantive assessment as to whether the parties' applications adequately demonstrate the relevance of a document to the Indictment falls squarely within the Trial Chamber's "considerable discretion in deciding on issues of admissibility of evidence".⁴⁷ The Appellant has failed to demonstrate that the Trial Chamber improperly exercised this evidentiary discretion.

17. The Appellant's final submission under this ground is that the Trial Chamber erred in failing to grant reconsideration in view of the over 300 pages of additional information the Appellant submitted with the Reconsideration Motion.⁴⁸ He claims that this additional information provided the Trial Chamber with details as to how each document denied admission in the 6 March Decision was relevant to the Indictment and thus the Trial Chamber erred by failing to find this additional information sufficient to warrant admission of the documents.⁴⁹

18. The Appeals Chamber recalls that for an applicant to succeed in a request for reconsideration, "he must satisfy the [Trial] Chamber of the existence of a clear error of reasoning in the [Impugned Decision], or of particular circumstances justifying its reconsideration in order to avoid injustice".⁵⁰ Particular circumstances include new facts or new arguments.⁵¹ However, to succeed on this basis, an applicant must demonstrate how any new facts or arguments submitted in a request for reconsideration justify reconsideration.⁵²

19. In the instant case, the Appellant attached a significant amount of new information to his Reconsideration Motion, and this additional information was considered by the Trial Chamber in determining whether or not reconsideration should be granted to the Appellant. Having considered the information, the Trial Chamber found that the Appellant failed to demonstrate that this new

⁴⁶ *Id.*, paras 24-25.

⁴⁷ *Prosecutor v. Zejnir Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić and Esad Landžo (aka "Zenga")*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 533.

⁴⁸ Appeal, paras 29-30.

⁴⁹ *Id.*

⁵⁰ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004 ("*Galić Decision*"), p. 2. See also *Prosecutor v. Enver Hadžihasanović, Amir Kubura*, Case No. IT-01-47-A, Decision on Appellant's Motion for Reconsideration and Extension of Time Limits, 30 January 2007 ("*Hadžihasanović Decision*"), para. 9.

⁵¹ *Galić Decision*, p. 2.

⁵² *Galić Decision*, p. 2, *Hadžihasanović Decision*, para. 9. See also *Milošević Decision on Joinder*, paras 4-5.

information constituted a new circumstance justifying reconsideration, such as establishing the existence of new facts that it was unable to present in its initial 5 December Motion.⁵³ Indeed, the Trial Chamber found that the new information provided by the Defence merely “add[ed] to the arguments that it had previously submitted”.⁵⁴ The Appellant has failed to demonstrate on appeal that the Trial Chamber erred in this finding. It was well within the exercise of the Trial Chamber’s discretion to refuse reconsideration in circumstances where in submitting new information the appellant patently failed to demonstrate that it was of such a nature that it constituted a new circumstance warranting the Trial Chamber’s reconsideration.

20. The first ground of appeal is therefore dismissed.

B. The Second Ground of Appeal

21. In the 6 March Decision, the Trial Chamber denied admission to a number of Defence documents allegedly originating from various archives on the basis that it “found no indication, such as an archives stamp or headings from Official Gazettes, on the Proposed Exhibits themselves, to determine that they in fact originate from these archives.”⁵⁵ The Trial Chamber stated that the Defence failed to explain how it obtained the documents, and that consequently, the Trial Chamber lacked “the sufficient indicia of reliability and authenticity to be able to admit these Proposed Exhibits.”⁵⁶ In the Impugned Decision, the Trial Chamber subsequently denied the Defence request for reconsideration on the basis that the Defence merely challenged the Trial Chamber’s 6 March Decision and added to the arguments submitted in its 5 December Motion, without providing proof of a clear error of reasoning on the part of the Trial Chamber.⁵⁷

22. Under his second ground of appeal, the Appellant argues that “[t]he Trial Chamber erred as a matter of law and fact and abused its discretion by refusing to reconsider any documents for which there were allegedly insufficient indicia of reliability or authenticity”.⁵⁸

1. Submissions

23. In support of this ground of appeal, the Appellant submits that the Trial Chamber was overly stringent in assessing the indicia of reliability of certain Defence documents. He argues that certain rejected documents, although lacking references to dates or sources, possessed other indicia of

⁵³ Impugned Decision, para. 27.

⁵⁴ *Id.*

⁵⁵ 6 March Decision, para. 28.

⁵⁶ *Id.*

⁵⁷ Impugned Decision, para. 28.

⁵⁸ Appeal, p. 12.

reliability sufficient for establishing *prima facie* reliability.⁵⁹ The Appellant also asserts that the Trial Chamber's approach to assessing Defence applications for admission, as opposed to Prosecution applications, reflects "disparate treatment between the Defence and the Prosecution".⁶⁰ He states that on previous occasions, the Trial Chamber admitted Prosecution newspaper articles, which lacked dates and indications as to the sources on the premise that there were other indicia of reliability. He cites Prosecution exhibit P00740 as an example.⁶¹ The Appellant also submits that reconsideration ought to have been granted in view of fresh information submitted by the Defence with its Reconsideration Motion demonstrating the reliability of these documents.⁶²

24. The Appellant further submits that the Trial Chamber refused reconsideration due to the fact that it erroneously subsumed authenticity under the heading of reliability. He asserts that "[r]eliability and authenticity are clearly two separate matters" and argues that, "[u]nlike reliability, authenticity is not a separate requirement that must be proven before a document can be considered admissible".⁶³ The Appellant argues that questions relating to the authenticity of a document are to be reserved until the close of proceedings at which time they are considered within the context of the weight to be assigned to the relevant exhibit.⁶⁴ The Appellant states that the documents denied admission for lack of authenticity were sourced from official Gazettes and were rejected because they did not bear the official header of the Gazette, a signature, or a stamp. He submits that the Trial Chamber's finding "is even more puzzling if one considers that the Trial Chamber previously admitted documents of the same type", and cites 39 documents as examples.⁶⁵

25. The Prosecution submits that the Appeal does not attempt to show that there are particular circumstances that justify reconsideration.⁶⁶

⁵⁹ *Id.*, paras 31-32.

⁶⁰ *Id.*, para. 32.

⁶¹ *Id.*

⁶² *Id.*, para. 33.

⁶³ *Id.*, para. 35.

⁶⁴ *Id.*, para. 35. The Appellant cited *Prosecutor v. Blaškić*, Case No. IT-85-14-T, Judgement, 3 March 2000, paras 34-36.

⁶⁵ Appeal, paras 36-37. The Defence documents listed in footnote 62 of the Appeal are as follows: 1D01218, 1D01617, 1D01143, 1D01619, 1D01223, 1D01224, 1D01339, 1D01225, 1D01144, 1D00507, 1D00509, 1D01621, 1D91623 [sic], 1D01747, 1D01758, 1D00265, 1D00778, 1D00779, 1D00782, 1D00780, 1D0781, 1D01448, 1D01447, 1D00957, 1D00955, 1D00958, 1D0960 [sic], 1D00967, 1D00969, 1D00970, 1D00973, 1D0972, 1D0785, 1D00974, 1D00976, 1D00977, 1D00980, 1D00984, 1D00986.

⁶⁶ Response, para. 18.

2. Analysis

(a) The Trial Chamber's assessment of the indicia of reliability

26. The Appellant contends that the absence of a date or source should not have proved fatal to the Defence application for the admission of certain newspaper articles, as they had other indicia of reliability, specifically, the names of the authors of the articles.⁶⁷ In support of this submission, the Appellant cites Defence proposed exhibit 1D02359.⁶⁸

27. Contrary to the arguments of the Appellant, the Trial Chamber did not require strict proof of reliability, but some indicia of *prima facie* reliability. The Trial Chamber considered that crucial to an informed assessment of the *prima facie* relevance of proposed documentary evidence is the provision of such basic information as the sources and dates of the documents in question, information which, in essence, allows the entities responsible for the contents of the documents and the periods in time to which those contents relate, to be identified. It found that the documents excluded on this basis did “not contain the indicia necessary for the Chamber to rule on the admission of a piece of evidence.”⁶⁹ This finding was well within the exercise of the Trial Chamber's discretion and the Appellant has failed to demonstrate any error in that regard.

28. Furthermore, the Appellant's reliance on Prosecution exhibit P00740 as proof of the Trial Chamber's allegedly inconsistent evaluation of Defence documents versus documents submitted by the Prosecution⁷⁰ is incongruous. The Prosecution correctly observes that contrary to the Appellant's assertion, exhibit P00740 is not only dated, but bears an official header of the Croatian Defence Council HVO Security and Information Service Center in Mostar.⁷¹ Also, this document is not a newspaper article, but an official record of interrogation.

29. The Appellant also isolates Defence proposed exhibit 1D01423, a newspaper article denied admission in the 6 March Decision, and argues that the absence of a date should not have been fatal to its admissibility as it bore other indicia of reliability, namely, the newspaper's stamp.⁷² The Appellant argues that “other [Defence] documents from the same newspaper, bearing exactly the same stamp but no date were admitted into evidence”, citing Defence exhibits 1D01415, 1D01422,

⁶⁷ Appeal, para. 32.

⁶⁸ *Id.*, fn. 50.

⁶⁹ 6 March Decision, para. 28. Thus, for example, proposed exhibit 1D02359 comprises a newspaper article, which lists only the names of its three authors. It does not provide the name of the publication with which the authors were affiliated, nor does it refer to the publication date, or a date or period in time to which the events and issues discussed in the article relate.

⁷⁰ Appeal, para. 32.

⁷¹ Response, para. 20.

⁷² Appeal, para. 34.

1D01424, 1D01572 and 1D02238.⁷³ He thereby argues that the Trial Chamber's rejection of proposed exhibit 1D01423 and subsequent refusal to reconsider it amounted to "an inexplicably disparate approach to the admission of documentary evidence".⁷⁴

30. The Appeals Chamber notes that each of these exhibits is clearly distinguishable from proposed exhibit 1D01423. Indeed, exhibit 1D01415 bears the caption name of the newspaper publication, as well as a dated stamp indicating the issue number and region of origin.⁷⁵ Exhibit 1D01572 also bears the caption of the publication, as well as a list specifying the name of the publisher, the names of the publication's editorial staff and other contributing staff members. Furthermore, it expressly states that the content of the article relates to issues and events concerning 12 July 1992.⁷⁶ Exhibits 1D01422, 1D01424 and 1D02238, like proposed exhibit 1D01423, all bear a small stamp which reads "Mostarsko Jutro". However, each of the former three exhibits is distinguishable from proposed exhibit 1D01423 on the basis that in addition to the aforementioned stamp, they each indicate the dates to which the events and issues covered in the articles relate.⁷⁷ Contrary to the Appellant's assertion, therefore, an examination of these articles fails to reveal that the Trial Chamber applied an inexplicably disparate approach to the admission of documentary evidence.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ The stamp in question reads "Republic of Bosnia and Herzegovina Mostar **Issue 1, June 11, 1992.** (Emphasis inserted).

⁷⁶ The caption of the article reads "A public assembly of soldiers from the Independent defence battalion of Mostar, held **July 12 1992. THE FIRST 100 DAYS OF THE WAR.**" (Emphasis inserted). Also, the opening lines of the article begin with "**Today (July 12, 1992)** 100 days of the war comes to an end [...]". (Emphasis inserted).

⁷⁷ The headlining paragraph of exhibit 1D01422 states as follows:

While working on the implementation of the Agreement on Friendship and Cooperation between the Republic of Croatia and the Republic of Bosnia and Herzegovina, signed by the Presidents Izetbegović and Tudman, the Joint Commission of HDZ BiH and SDA BiH, upon the recommendation of the Presidency of the Republic of Bosnia and Herzegovina, and after a thorough analysis of the Agreement, at the meeting in Medugorje on **27 August 1992**, has proposed to the Presidency of the Republic of Bosnia and Herzegovina the following [...] (Emphasis inserted).

Likewise, the headline for exhibit 1D02238 reads: "Excerpts from a news conference given by Alija IZETBEGOVIĆ in Mostar on **8 October 1992**; his views on how to improve cooperation between Muslims and Croats, particularly between the HVO/Croatian Defence Council/ and the BH army." (Emphasis inserted).

Exhibit 1D01424 in its caption and in the body of the text, states that

In this issue of the Mostarsko Jutro we bring you excerpts from the press conference held in Busovača on **November 9th** by the Commander of the Joint Command of the Army of BiH and HVO Jasmin Jaganjac [...] We have used material from the Zenica Journal "Naše Nove Riječi" "as well as the video tape recording of the TV broadcast shown on TV BiH Wartime Studio in Mostar. (Emphasis inserted).

31. With respect to the Appellant's submission that the Trial Chamber ought to have granted reconsideration given the additional information submitted with the Reconsideration Motion, the Appeals Chamber notes the Trial Chamber's finding that the Defence failed to demonstrate a clear error of reasoning on the part of the Trial Chamber in the 6 March Decision, and merely added to the arguments previously submitted without demonstrating the existence of a particular circumstance justifying reconsideration.⁷⁸ This finding was a correct application of the standard for reconsideration. In these circumstances, the Appellant has failed to demonstrate on appeal that the Trial Chamber's refusal to reconsider the admission of these exhibits was an unreasonable exercise of its discretion.

(b) The Trial Chamber's requirement for indicia of authenticity

32. The Appeals Chamber notes that the Appellant's assertion that authenticity is an issue wholly divorced from the admissibility of evidence is based on a misapprehension of the Tribunal's case law. In support of his submission that the Trial Chamber erroneously "refused reconsideration for documents initially rejected for lack of authenticity under the heading of reliability",⁷⁹ the Appellant cites an Appeals Chamber decision in the *Delalić* case.⁸⁰

33. Relevance and probative value are the two prerequisites of admissibility under Rule 89(C) of the Rules. In order to assess whether proposed evidence satisfies both prerequisites, consideration is given to an item of evidence's *prima facie* reliability.⁸¹ *Prima facie* reliability does not however constitute a separate and additional prerequisite under Rule 89(C) of the Rules, but is an underlying factor relevant in determining whether the prerequisites of relevance and probative value have been met. Thus, *prima facie* reliability "is a factor in the assessment of its relevance and probative value".⁸² Also, definitive proof of reliability is not required at the admissibility stage.⁸³ Rather, it is an issue to be assessed at a later stage in the course of determining the weight to be attached to the evidence after its admission.⁸⁴

⁷⁸ Impugned Decision, para. 28.

⁷⁹ See Appeal, para. 35.

⁸⁰ Appeal, fn. 57. The Appellant cites *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić and Esad Landžo (aka "Zenga")*, 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 ("*Delalić Decision*").

⁸¹ *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda Appeal Judgement*"), paras 33 and 266; *Delalić Decision*, para. 20; *Prlić 12 January Decision*, para. 15; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, ("*Popović Decision*"), para. 22.

⁸² *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", Vinka Matinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić Appeal Judgement*"), para. 402. (Emphasis inserted). See also *Delalić Decision*, para. 20.

⁸³ *Popović Decision*, para. 22.

⁸⁴ *Id.*

34. Authenticity may be similarly viewed in terms of the distinction between *prima facie* proof and definite proof. *Prima facie* proof of authenticity is appropriate at the admissibility stage, whereas definitive proof of authenticity is relevant to evidentiary weight later on in the proceedings. Authenticity relates to whether a document is what it professes to be in origin or authorship. It may therefore be relevant in assessing whether a document is *prima facie* reliable. Thus, whether a document bears basic features indicative of *prima facie* authenticity may, in the individual circumstances facing a Trial Chamber, be relevant to the underlying factor of *prima facie* reliability. Conversely, definitive proof of authenticity is an issue relevant to the evidentiary weight to be assigned to a document after admission.⁸⁵

35. The *Delalić* Decision upon which the Appellant relies does not support his position. Rather, the *Delalić* Decision clarifies that it is erroneous to claim that strict proof of authenticity constitutes a separate and distinct requirement to the prerequisites of relevance and probative value of Rule 89(C) of the Rules. The *Delalić* Decision states that:

The Applicant submits that where the tendering party has not proven the authenticity of a document then that document is necessarily irrelevant and of no probative value; hence it should be excluded. Sub-rule 89(E), whereby “[a] Chamber may request verification of the authenticity of evidence obtained out of court”, cited by the Applicant, does not operate as a pre-condition to bar the admissibility of evidence under Sub-rule 89(C). There is no legal basis for the Applicant’s argument that proof of authenticity is a separate threshold requirement for the admissibility of documentary evidence.⁸⁶

With regard to the notion that definitive proof of authenticity is an element of admissibility:

The implicit requirement that a piece of evidence be *prima facie* credible – that it have sufficient indicia of reliability – is a factor in the assessment of its relevance and probative value. To require *absolute* proof of a document’s authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by Sub-rule 89(C).⁸⁷

36. The Appeals Chamber notes that the Trial Chamber correctly applied the foregoing standards. The Appellant’s submission that the Trial Chamber refused reconsideration due to the fact that it erroneously subsumed authenticity under the heading of reliability is therefore unmeritorious.

37. With regard to the Appellant’s submission that the Trial Chamber’s rejection of certain documents for lack of sufficient indicia of authenticity was “puzzling” given its prior admission of 39 documents allegedly of the same type,⁸⁸ the Appeals Chamber notes that these 39 documents were tendered through witnesses. As the Prosecution correctly observes, the testimony of witnesses

⁸⁵ *Id.*

⁸⁶ *Delalić* Decision, para. 25. (Emphasis inserted).

⁸⁷ *Id.*, para. 20. (Emphasis inserted). See also the *Naletilić* Appeal Judgement which states at para. 402 that “[t]here is no separate threshold requirement for the admissibility of documentary evidence.” (Emphasis inserted).

⁸⁸ Appeal, para. 37.

concerning these documents,⁸⁹ and the Trial Chamber's ability to observe their demeanour as they testified about the documents, would, in the absence of such authenticating features on the documents as stamps or signatures, have placed the Trial Chamber in a position to assess their authenticity.

38. Finally, regarding the Appellant's submission that the Trial Chamber should have granted reconsideration in view of the additional information submitted with the Reconsideration Motion attesting to the authenticity of the documents denied admission in the 6 March Decision, the Appeals Chamber notes that the Reconsideration Motion failed to show how this additional information constituted a particular circumstance justifying reconsideration. The Appellant has therefore failed to show that the Trial Chamber improperly exercised its discretion by denying reconsideration.⁹⁰

39. The second ground of appeal is therefore dismissed.

C. The Third Ground of Appeal

40. In the 6 March Decision, the Trial Chamber denied admission to 32 Defence videos on the basis that they lacked dates and sources.⁹¹ In the Impugned Decision, the Trial Chamber stated that it had, in previous decisions, erroneously admitted videos which did not have sources or dates, but noted that it did not err when it decided to reject the Defence videos in the instant case.⁹²

41. The Appellant's third ground of appeal states that the Trial Chamber erred "by refusing to reconsider any video material that initially lacked a date or a source."⁹³

1. Submissions

42. The Appellant points to the Trial Chamber's admission in the Impugned Decision, that it had on separate occasions erroneously admitted certain Prosecution videos which lacked dates or sources.⁹⁴ He argues that this reflects a disparity in the Trial Chamber's treatment of the Defence and the Prosecution and that, in view of the fact that the Trial Chamber admitted Prosecution videos lacking source and date references, the Trial Chamber erred in refusing to reconsider its decision

⁸⁹ Response, para. 21.

⁹⁰ Impugned Decision, para. 28.

⁹¹ 6 March Decision, Annex.

⁹² Impugned Decision, para. 40.

⁹³ Appeal, p. 15.

⁹⁴ *Id.*, para. 38. See Impugned Decision, paras 18 and 40 and *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of Documentary Evidence (Two Motions: HVO and Herceg-Bosna), 24 January 2008.

denying the admission of Defence videos which likewise lacked the same information.⁹⁵ The Appellant further submits that he provided the Trial Chamber with additional information in his Reconsideration Motion, indicating the dates and sources of the videos, and states that this new information should have further justified reconsideration.⁹⁶

43. The Prosecution submits that, while the Trial Chamber admitted to having erred by admitting certain Prosecution videos, it clearly stated that it had not made an error regarding the exclusion of the Defence videos. The Prosecution “takes this to mean that the Trial Chamber will revisit the admissibility of all video exhibits (Prosecution or Defence) and decide anew on the admissibility” of video material lacking information as to dates and sources.⁹⁷

2. Analysis

44. The Trial Chamber denied admission to the Defence’s proposed video exhibits citing the Defence’s failure to provide date and source information regarding these videos. In view of the Trial Chamber’s prior admission of a number of Prosecution videos having the same deficits, the practical though unintended result is that a lower standard of admission was applied to the Prosecution’s videos. When coupled with the provision of additional information regarding the dates and sources of the videos by the Defence, such a result constituted a circumstance necessitating reconsideration to prevent injustice. In this case, although the Trial Chamber may not have been in error in excluding the videos due to insufficient information, by maintaining a different standard of admission for Prosecution and Defence evidence even after the Defence had effectively cured its error, the Trial Chamber abused its discretion warranting intervention.

45. For the foregoing reasons, the Appeals Chamber by majority, Judge Robinson dissenting, grants the Appellant’s third ground of appeal and remits to the Trial Chamber for reconsideration the question whether to admit the relevant Defence videos in light of the date and source information which the Defence ultimately provided with its Reconsideration Motion.

46. The third ground of appeal is, by majority, Judge Robinson dissenting, granted.

IV. DISPOSITION

47. On the basis of the foregoing, the Appeals Chamber:

- (1) **GRANTS** the Appeal in part;

⁹⁵ Appeal, para. 38.

⁹⁶ *Id.*, para. 39.

⁹⁷ Response, para. 22.

- (2) **REMANDS** the matter to the Trial Chamber in relation to the third ground of appeal as set forth above;⁹⁸ and
- (3) **DISMISSES** the Appeal in all other respects.

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



Judge Patrick Robinson
Presiding Judge

Dated this 3rd day of November 2009,
At The Hague,
The Netherlands

[Seal of the Tribunal]

⁹⁸ *Supra*, para. 45.

DISSENTING OPINION OF JUDGE PATRICK ROBINSON

The Appellant's argument for reconsideration under the third ground of appeal, suggests that because the Trial Chamber applied a lower and incorrect standard in admitting certain Prosecution videos, it was obliged to apply the same standard to the Defence's videos. This line of reasoning is clearly flawed as it suggests that a means of curing what the Trial Chamber regards as an error would be for the Trial Chamber to deliberately repeat that error. Regarding the Appellant's submission that the Trial Chamber should have reconsidered whether to admit the Defence's videos in view of the new date and source information, it is to be noted that the Defence failed to show in its Reconsideration Motion how this new information constituted a particular circumstance justifying reconsideration.

While I must express my concern at the apparent inequity resulting from the Trial Chamber's inadvertent application of a lower evidentiary standard to the Prosecution's videos, the fact remains that the issue on appeal is whether the Trial Chamber properly exercised its discretion to deny reconsideration. The Tribunal's governing law clearly provides that a request for reconsideration "*cannot succeed unless the applicant has demonstrated 'the existence of a clear error of reasoning in the [impugned decision], or of particular circumstances justifying its reconsideration to avoid injustice'.*"⁹⁹ For the reasons outlined in the preceding paragraph, the Appellant failed to demonstrate either of these requirements. The Trial Chamber therefore properly exercised its discretion to deny reconsideration and accordingly, I am of the view that the third ground of appeal must fail. The Appeal would therefore dismiss the Appeal in its entirety.

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



Judge Patrick Robinson
Presiding Judge

Dated this 3rd day of November 2009,
At The Hague,
The Netherlands

[Seal of the Tribunal]

⁹⁹ *Hadžihasanović* Decision, para. 9. (Emphasis inserted). See also *Milošević* Decision on Joinder, paras 4-5, in which the Appeals Chamber stated that where an appeal is brought from a discretionary decision of a Trial Chamber, "[i]t is for the party challenging the exercise of a discretion to identify for the Appeals Chamber a 'discernible' error made by the Trial Chamber."