



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-T
Date: 27 November 2008
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French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, presiding
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: Mr Hans Holthuis

Decision of: 27 November 2008

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON PRESENTATION OF DOCUMENTS BY THE PROSECUTION IN
CROSS-EXAMINATION OF DEFENCE WITNESSES**

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Douglas Stringer

Counsel for the Accused:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Karim A. A. Khan for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Nicholas Stewart for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

I. INTRODUCTION

1. Trial Chamber III (“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 (“Tribunal”) is seized of the “Joint Motion of Praljak, Petković, Ćorić and Pušić Defences Requesting Trial Chamber Directions and Guidelines on Presentation and Admission Into Evidence of Documents Presented by the Prosecution During Cross-Examination of Defence Witnesses”, filed by Counsel for the four Accused (“Joint Defence”) on 10 October 2008 (“Motion”) in which the Joint Defence requests the Chamber to adopt a certain number of guidelines.

II. PROCEDURAL BACKGROUND

2. On 27 October 2008, the Prosecution filed the “Prosecution Response to the Joint Defence Motion of 10 October 2008 Requesting Directions and Guidelines on Presentation and Admission Into Evidence of Documents Presented by the Prosecution During Cross-Examination of Defence Witnesses” (“Response”) in which it requests the Chamber to deny the Motion of the Joint Defence.
3. At the hearing of 30 October 2008, the Chamber granted the Joint Defence leave to file a reply.¹ On 3 November 2008, the Joint Defence filed the “Joint Reply of Praljak, Petković, Ćorić and Pušić Defences to Prosecution Response to Joint Defence Motion of 10 October 2008 Requesting Trial Chamber Directions and Guidelines on Presentation and Admission Into Evidence of Documents Presented by the Prosecution During Cross-Examination of Defence Witnesses” (“Reply”).

III. ARGUMENTS OF THE PARTIES

4. In the Motion, the Defence argues that it is necessary to formulate guidelines for the presentation of “new documents” by the Prosecution in the cross-examination of Defence witnesses.² According to the Joint Defence, “new documents” are those documents that were not admitted during the Prosecution case or during the

¹ Transcript in French (“T(F”), 30 October 2008, p. 33984.

² Motion, para. 3.

Defence cases, whether or not they are on the 65 *ter* List³ of the Prosecution.⁴ The requests of the Joint Defence are set out in the form of guidelines it requests the Chamber to adopt.⁵ Through these guidelines, the Joint Defence requests the Chamber to prohibit the Prosecution during its cross-examination from putting any “new documents” to a Defence witness in order to establish the guilt of the Accused.⁶ In other words, the Joint Defence requests the Chamber to forbid the Prosecution to present “new documents” except for the purposes of impeaching a witness’s credibility or refreshing his/her memory.⁷ The Joint Defence further requests a ban on the admission of any documents used to refresh a witness’s memory.⁸ In its view, a witness’s words are considered to constitute the witness’s testimony, and not the documents put to that witness, whose admission is therefore not justified.⁹ Finally, the Joint Defence requests that the Prosecution disclose, in a language understood by the Accused and at least seven days after it receives the schedule of witnesses the Defence intends to call for one month, any document not contained in the 65 *ter* List which it intends to use in the cross-examination of a Defence witness.¹⁰ The Defence requests that the Prosecution explain the reason why it seeks to put “new documents” to the witness.¹¹

5. In support of the Motion, the Joint Defence submits that it is a fundamental principle established by the Tribunal for the Prosecution to present all of its evidence going to proof of the guilt of the Accused during its case. In this regard the Defence cites Article 21 of the Statute of the Tribunal (“Statute”) and Rule 85 (A) of the Rules.¹² It argues that the Joint Defence has prepared its defence cases in the light of the evidence admitted during the Prosecution case, in particular the lists of witnesses and exhibits filed pursuant to Rule 65 *ter* (G) of the Rules.¹³ As a result, it would be particularly prejudicial to the Accused to allow the Prosecution

³ List of Exhibits filed by the Prosecution pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence (“Rules”) on 19 January 2006 (“65 *ter* List”).

⁴ Motion, para. 3 (emphasis added).

⁵ Motion, paras. 1, 31 and 32.

⁶ Motion, para. 31.

⁷ Motion, para. 31.

⁸ Motion, para. 31.

⁹ Motion, para. 31.

¹⁰ Motion, para. 31.

¹¹ Motion, para. 31.

¹² Motion, para. 9.

¹³ Motion, paras. 17 *et seq.*

to continue putting its case after its case has been concluded.¹⁴ The Joint Defence objects to the Prosecution's presenting of a document going to proof of the guilt of the Accused when that document has not been previously admitted, regardless of whether or not it is on the 65 *ter* List.¹⁵ With regard to the documents that are not on the 65 *ter* List, it submits more specifically that by not including the documents on the 65 *ter* List the Prosecution made a choice not to present them at any stage of the trial.¹⁶ The Joint Defence also argues that the presentation of "new documents" by the Prosecution in cross-examination would require that the Accused be granted additional time in order to examine these new documents and adjust their defence.¹⁷ The Joint Defence further submits that permitting the Prosecution to present a "new" inculpatory document in the cross-examination of a witness for an accused would violate the right of the other accused to examine or have examined the witnesses against them.¹⁸ It recalls that in accordance with the Decision of 24 April 2008,¹⁹ further cross-examination is not permitted.²⁰

6. In the Response, the Prosecution objects to the Motion. It responds that according to the Appeals Chamber jurisprudence, there is no ban on the Prosecution presenting during the defence phase documents going to proof of the guilt of the accused.²¹ The Prosecution submits that instead of imposing a ban on the use of an entire category of documents, such as the category of "new documents", a Trial Chamber is required to establish whether the document in question and the manner in which it is presented infringe upon the rights of the accused.²² The Prosecution argues that the Joint Defence has failed to specifically identify which "new document" has allegedly caused it prejudice.²³ The Prosecution also refers to Rules 89, 90 (F) (i) and 90 (H) of the Rules in order to support its position. In particular, it submits that placing a ban on the presentation of "new documents" in cross-examination would run counter to Rule 90 (H) of the Rules.²⁴ The Prosecution also

¹⁴ Motion, paras. 17 *et seq.*

¹⁵ Motion, para. 31.

¹⁶ Motion, para. 22.

¹⁷ Motion, paras. 24 and 25.

¹⁸ Motion, para. 28.

¹⁹ Decision Adopting Guidelines for the Presentation of Defence Evidence, rendered by the Chamber on 24 April 2008 ("Decision of 24 April 2008").

²⁰ Motion, para. 28 citing paragraph 2 of the Decision of 24 April 2008.

²¹ Response, paras. 3 (i), 4-7.

²² Response, para. 6.

²³ Response, paras. 3(ii), 9-11.

²⁴ Response, paras. 12-19.

argues that a single document may impeach the credibility of a witness and at the same time support the Prosecution case.²⁵ As regards the Joint Defence request to be informed in advance of documents used by the Prosecution in cross-examination, the Prosecution submits that Defence Counsel in the present case objected to a similar Prosecution request concerning the documents that the Defence Counsel wished to use in their respective cross-examinations. The Prosecution recalls that the Chamber denied the Prosecution's request in this regard.²⁶ The Prosecution then submits that the Motion should be dismissed because it is out of time.²⁷

7. In the Reply, the Joint Defence responds in particular to the Prosecution's proposed interpretation of the Tribunal jurisprudence and provisions of the Rules. Furthermore, it argues that there is no need to specify concrete prejudice suffered by the Accused as the result of the presentation of a document. According to the Joint Defence, the very principle of a fair trial is at stake and the Chamber should establish guidelines and ban the presentation of "new documents" in order to ensure the rights of the Accused as defined in Article 21 of the Statute.²⁸

IV. DISCUSSION

8. As a preliminary remark, the Chamber notes that in the Motion, the Defence conducts a theoretical debate. It has not identified a specific incident that may have prejudiced the rights of the Accused in this case. In this regard, the Chamber recalls that during the hearing of 24 September 2008, Counsel for the Accused Petković raised an objection to the Prosecution's presentation of two documents not contained in its 65 *ter* List.²⁹ Nonetheless, that objection, just like the Motion, was founded on the very principle defended by the Joint Defence in the Motion and not on any prejudice caused by the presentation of the documents in question.³⁰ The Chamber considers that the issue at bar it must address is one of

²⁵ Response, paras. 22-26

²⁶ Response, paras. 3 (iv), 29 and 30.

²⁷ Response, paras. 3 (v) and 35.

²⁸ Reply, paras. 10-13.

²⁹ T(F) pp. 32744 and 32747.

³⁰ This is also made clear by the fact that the Petković Defence did not raise any objections in respect of the request for admission made by the Prosecution, IC00858.

principle. The answer to this question of principle is not therefore dependent upon the showing of prejudice. Moreover, contrary to the Prosecution's allegation, the Motion was not filed out of time. The decisions rendered by the Chamber dealing with the presentation of evidence in the present case, which are cited by the Prosecution in the Response, do not address the matter at issue. To date, the Chamber has not made a ruling on the modalities of the presentation of documents that have not been admitted by the Prosecution during the cross-examination of defence witnesses.

9. The Chamber first notes that neither the Statute nor the Rules specifically address the question as to whether and to which extent the Prosecution may present inculpatory documents during the cross-examination of defence witnesses. There is neither express authorization nor express prohibition. In order to address the issue at hand, and in accordance with Rule 89 (B) of the Rules, the Chamber must apply rules of evidence which 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. The Chamber notes that the provisions relevant to the case at bar are Articles 20 (1) and 21 of the Statute and Rules 85 (A), 89 and 90 of the Rules.

10. The Chamber agrees with the Joint Defence that it is an accepted principle that the Prosecution shall present evidence going to proof of the guilt of the accused in the framework of its case-in-chief. This principle is expressed in Rule 85 (A) of the Rules and in the Tribunal jurisprudence.³¹ Accordingly, the Prosecution may present documents during the cross-examination of defence witnesses primarily for the purpose of testing the credibility of the witness or refreshing his/her memory.³²

³¹ *The Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Re-Open the Prosecution's Case, 19 August 1998 ("*Delalić Decision*"), para. 18; *The Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Oral Decision of 29 November 2004, T(F) p. 12521-12528 ("*Hadžihasanović Oral Decision*"); *The Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Reconsideration regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukašin Andrić, and Dobre Aleksovski and Decision *Proprio Motu* Reconsidering Admission of Exhibits 837 and 838 regarding Evidence of Defence Witness Barry Lituchy, 17 May 2005, footnote 17; *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Reasons for Oral Decision on Admission of Exhibits 1316 and 1317, 24 April 2008, para. 9.

³² *Hadžihasanović Oral Decision*, T(F) p. 12523.

11. In support of its contrary view, the Prosecution cites a decision rendered by the Appeals Chamber in *Delić*.³³ According to the Prosecution, the Appeals Chamber expressly discussed the issue at hand and was not convinced by the arguments presented by the Accused *Delić*, which are similar to those raised by the Joint Defence in the present case.³⁴ The Prosecution argues that the Appeals Chamber did not prohibit the use of documents going to proof of the guilt of the accused during the defence phase of the case.³⁵ In the Reply, the Joint Defence disputes the Prosecution's interpretation of the *Delić* Decision.³⁶ Having analyzed that decision, the Chamber considers that it does not address the matter at issue here. In the *Delić* Decision, the Appeals Chamber emphasized the fact that the Trial Chamber had failed to specify for which purpose it was admitting two exhibits, even though the Accused *Delić* requested clarification of this.³⁷ Accordingly, it ordered the Trial Chamber to provide this clarification. While the Appeals Chamber seems to allow the possibility for the Prosecution to present documents going to proof of the guilt of the accused in the cross-examination of defence witnesses, it does not indicate this expressly.
12. In a recent decision, the Appeals Chamber referred to Rule 85 (A) of the Rules and concluded that evidence shall be presented in the order prescribed by this Rule unless the Chamber decides otherwise in the interests of justice.³⁸ In that decision, rendered during the prosecution case, the question concerned at which point the Prosecution should present its witnesses to rebut a defence of alibi. Contrary to the wording of Rules 85 (A) and 67 (B) (ii) of the Rules, the Trial Chamber had asked the Prosecution to present this evidence during its case-in-chief and not in the rebuttal phase.³⁹ Following an appeal by the Prosecution, the Appeals Chamber criticized the Trial Chamber for failing to explain why it was in the interests of justice to change the order of the presentation of evidence from that provided for in

³³ *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008 ("*Delić* Decision").

³⁴ Response, para. 5.

³⁵ Response, para. 5.

³⁶ Reply, paras. 3-9.

³⁷ *Delić* Decision, paras. 20-23.

³⁸ *The Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR73.1, Decision on the Prosecution's Appeal Against the Trial Chamber's Order to Call Alibi Rebuttal Evidence During the Prosecution's Case-in-chief, 16 October 2008 ("*Lukić* Decision"), paras. 22 and 23.

³⁹ *Lukić* Decision, paras. 11 and 12.

Rule 85 (A) of the Rules.⁴⁰ The Appeals Chamber thus concluded that in principle evidence shall be presented in the order set out in Rule 85 (A) of the Rules, unless the Trial Chamber authorizes a change in the interests of justice.

13. The Prosecution further relies on Rule 90 (H) of the Rules in order to justify the presentation in cross-examination of “new documents” (in other words documents that have not yet been admitted) which go to proof of the guilt of the Accused. In the Reply, the Joint Defence argues that even if Rule 90 (H) of the Rules authorized the Prosecution to step outside the framework of direct examination, it would in no way authorize the Prosecution to present “new documents” going to proof of the guilt of the Accused.⁴¹ According to the Joint Defence, Rule 90 (H) concerns the scope of cross-examination and makes no mention of documentary evidence.⁴²

14. The Chamber first notes that it has broadly interpreted Rule 90 (H) of the Rules.⁴³ It is settled in its jurisprudence that the Prosecution may, in the cross-examination of defence witnesses, raise questions that go beyond the framework of direct examination and the credibility of the witness. The Chamber refers the Parties to the Decision of 27 November 2008 and to the decisions rendered previously in this regard. The question is whether this rule, which *prima facie* concerns oral evidence,⁴⁴ may also apply to written evidence and justify the presentation of “new documents” in cross-examination. In order to answer this question, it is appropriate to recall the purpose of Rule 90 (H) of the Rules.

15. Rule 85 (A) of the Rules provides that the Prosecution shall present its evidence in chief during the prosecution phase. It follows that, in principle, the Prosecution is not entitled to present inculpatory evidence during the defence phase. Rule 90 (H) provides for an exception. This is explained *inter alia* by the fact that during the presentation of its case-in-chief, the Prosecution is not in a position to have knowledge of the list of witnesses and the list of exhibits that Counsel for the Defence will file in accordance with Rule 65 *ter* (G) of the Rules. These lists are

⁴⁰ *Lukić* Decision, para. 23.

⁴¹ Reply, para. 18.

⁴² Reply, para. 18.

⁴³ Decision on Scope of Cross-Examination under Rule 90 (H) of the Rules, 27 November 2008.

filed only after the Prosecution case has been completed.⁴⁵ During its case-in-chief therefore, the Prosecution does not know which witnesses the Defence will call to court, is perhaps unaware that these witnesses exist and does not know whether they will be in a position to testify on matters related to its case. If during the testimony of a defence witness it becomes apparent that the witness has the requisite knowledge to answer the Prosecution's questions, it would therefore be justified to permit the Prosecution to address matters related to its case with that witness.

16. The question now is whether by analogy this rule applies to the presentation of "new documents". The Chamber recalls that the Prosecution had several avenues available to introduce its documents during its case-in-chief. Accordingly, it could tender them through Prosecution witnesses but also from the bar table.⁴⁶ The Chamber recalls that it admitted 4,469 exhibits offered by the Prosecution during its case-in-chief.⁴⁷ As the Prosecution had control over its case-in-chief, it was obliged to choose the witnesses through whom it was going to introduce documents going to proof of the guilt of the Accused or, otherwise, to formulate written motions requesting the admission of these documents in accordance with the guidelines laid down by the Chamber. In principle, it should not therefore need defence witnesses in order to introduce "new documents" with the sole purpose of establishing the guilt of the Accused.
17. While documents going to proof of the guilt of the Accused must in principle be presented during the prosecution phase, the Chamber recognizes that there may be some exceptions.
18. In addition to rebuttal evidence provided for in Rule 85 (A) of the Rules, which comes only after evidence for the Defence has been presented, the jurisprudence of the Tribunal also recognizes that in exceptional circumstances the Prosecution may

⁴⁴ Rule 90 of the Rules is entitled "Testimony of Witnesses" and establishes mostly rules governing the appearance and examination of witnesses before the Tribunal. The only exception is found in Rule 90 (F) of the Rules.

⁴⁵ Rule 65 *ter* (G) provides: "After the close of the Prosecutor's case and before the commencement of the defence case, the pre-trial Judge shall order the defence to file the following: (i) a list of witnesses the defence intends to call [...] (ii) a list of exhibits the defence intends to offer in its case [...]"

⁴⁶ Decision on Admission of Evidence, 13 July 2006; Decision Amending the Decision on Admission of Evidence Dated 13 July 2006, 29 November 2006.

⁴⁷ Communication from the Registry dated 17 March 2008.

request leave to reopen its case in order to present new evidence.⁴⁸ The term new evidence refers here to evidence that was not in the possession of the Prosecution at the time of the conclusion of its case, but also to evidence which by the exercise of reasonable diligence could not have been obtained by the Prosecution at that time.⁴⁹ When ruling on a request to reopen a case, a Trial Chamber, in the exercise of its discretionary power, must also weigh the probative value of the proposed evidence against the prejudice that may be caused to the rights of the Accused as a result of a case being reopened.⁵⁰ Moreover, it follows from the *Lukić* Decision discussed above that the interests of justice may lead a Trial Chamber to make an exception to the rule set out in Rule 85 (A) of the Rules.

19. In this respect, the Chamber recalls that the division between the different phases described in Rule 85 (A) of the Rules is not absolute. In fact, during the prosecution case, the Defence had the opportunity to introduce documents during the cross-examination of prosecution witnesses, and furthermore fully used this opportunity by tendering 1,608 exhibits.⁵¹ It would be difficult to justify having a different arrangement for the Prosecution which, after all, bears the burden of proof. The Chamber also observes that international human rights law does not lay down sharp divisions for the presentation of evidence. The guarantee of a fair trial is satisfied whenever the Defence has the opportunity of effectively presenting its own evidence in response to any evidence offered by the Prosecution. The Chamber further recalls that in particular it has a duty to ascertain the truth (Rule 90 (F) (i) of the Rules) and for this purpose may admit any relevant evidence which it deems to have probative value in accordance with Rule 89 (C) of the Rules.

20. Nonetheless, the Chamber wishes to point out that only exceptional circumstances permit derogation, in the interests of justice, from the rule of principle under Rule 85 (A) of the Rules, such as the importance of the “new document” at an advanced stage of the proceedings. When ruling on a request for admission of “new

⁴⁸ *The Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-T, Decision on the Prosecution’s Application to Reopen Its Case, 1 June 2005 (“*Hadžihasanović* Decision”), para. 31 and *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, Decision on Motion to Reopen the Prosecution Case, 9 May 2008, (“*Popović* Decision”), para. 23.

⁴⁹ *Delalić* Decision, para. 26.

⁵⁰ *Hadžihasanović* Decision, paras. 43-47.

⁵¹ Communication from the Registry dated 17 March 2008.

documents”, the Chamber will assess in particular the potential infringement on the rights of the Accused caused by such an admission. Accordingly, if after the conclusion of its case the Prosecution seeks to admit “new documents” in order to establish the guilt of one or several Accused, it must in particular explain to the Chamber when and by which means it obtained these documents, when it disclosed them to the Defence and why they are being offered only after the conclusion of its case.

21. In the event that the Chamber, in the interests of justice, admits “new documents” aimed at establishing the guilt of the Accused, it must permit the Defence to challenge this evidence. Accordingly, the Chamber may grant additional time to allow the Defence to review the evidence and to offer evidence in rebuttal. The Chamber may also allow for a further cross-examination in order to permit the Accused concerned to cross-examine the witness on this evidence.⁵²
22. The Chamber agrees with the Prosecution that a single document may impeach the credibility of a witness while at the same time be inculcating for the Accused. That distinction cannot be made *in abstracto*. The Chamber therefore must decide on a case-by-case basis and in the light of all the relevant evidence in the case whether or not it is appropriate to admit such a document offered by the Prosecution in cross-examination.

V. CONCLUSION

23. In conclusion, the Chamber does not deem it necessary to adopt new guidelines as the jurisprudence is sufficiently clear. In principle, all of the documents essential to a Party’s case must be tendered into evidence during the phase of the presentation of its case-in-chief. Consequently, if after the conclusion of its case the Prosecution seeks to tender “new documents” into evidence in order to establish the guilt of one or several Accused, it must justify its request by providing exceptional reasons in the interests of justice to admit these documents.
24. Conversely, in cross-examination the Prosecution may present “new documents” for the purpose of impeaching a witness’s credibility or refreshing his/her memory. The Chamber will then decide on a case-by-case basis whether or not it is

appropriate to admit the document in question pursuant to Rule 89 (C) of the Rules.

25. As regards the request for prior notice, the Chamber recalls that it has already denied a similar request.⁵³ Furthermore, the Prosecution cannot know whether and on which basis it will seek to rebut evidence until the time when the witness testifies. There is no justification therefore to impose a notice period on the Prosecution.

26. Should the Chamber grant the Prosecution leave to present “new documents” as evidence in support of its case, it will decide according to the circumstances on the modalities for safeguarding the rights of Defence.

FOR THESE REASONS

IN ACCORDANCE WITH Articles 20 and 21 of the Statute and Rules 65 *ter*, 85 (A) and 90 (H) of the Rules,

DENIES the Motion by a majority as explained in the present decision, Judge Jean-Claude Antonetti appending a partially dissenting opinion.

⁵² Decision of 24 April 2008, para. 2.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-seventh day of November 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

⁵³ Decision on Prosecution Motion Concerning Use of Leading Questions, the Attribution of Time to the Defence Cases, the Time Allowed for Cross-Examination by the Prosecution, and Associated Notice Requirements, 4 July 2008.