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58 AT

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-05-88-AR73.3
		Date:	1 February 2008
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr Hans Holthuis**

Decision of: **1 February 2008**

PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

Public

DECISION ON APPEALS AGAINST DECISION ON IMPEACHMENT OF A PARTY'S OWN WITNESS

The Office of the Prosecutor:

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Ms Jelena Nikolić and Mr Stéphane Bourgon for Drago Nikolić
Mr Aleksandar Lazarević and Mr Miodrag Stojanović for Ljubomir Borovčanin
Ms Natacha Fauveau Ivanović and Mr Nenad Petrušić for Radivoje Miletić
Mr Dragan Krgović and Mr David Josse for Milan Gvero
Mr Peter Haynes and Mr Đorđe Sarapa for Vinko Pandurević

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 a joint appeal filed by Vujadin Popović ("Popović"), Ljubiša Beara ("Beara"), Drago Nikolić ("Nikolić"), Milan Gvero ("Gvero"), and Vinko Pandurević ("Pandurević"),[1] against an oral decision issued on 17 September 2007 by Trial Chamber II ("Trial Chamber") on the impeachment of a party's own witness ("Oral Decision").[2] The Appeals Chamber is further seized of an appeal filed by Radivoje Miletić ("Miletić"),[3] against the Oral Decision and the Trial Chamber's "Decision on Certification and Clarification of the Trial Chamber's Oral Decision on Impeachment of a Party's Own Witness" ("Decision on Certification and Clarification") rendered on 21 November 2007.

I. BACKGROUND

2. In its Oral Decision of 17 September 2007 the Trial Chamber decided as follows:

> The majority of the Chamber, with myself dissenting, is of the opinion that it is open to any party to challenge the credibility of his or her witness in part or in full. The reasons for this position are set out clearly in the separate opinion of my colleague, Judge Kwon [in the *Prosecutor v. Milošević*] ... and there is no point in repeating the same case here. Suffice it to say that the majority of Judges in this case is of the view that in a Tribunal of this nature, where professional judges decide on matters of fact and law, the old-fashioned or maybe archaic rules prohibiting or restricting the impeachment of one's own witness, applicable in some common law jurisdictions, have no application here.
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> ...
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> In the opinion of the majority, it is for each party to determine to what extent and in what the credibility of a witness is to be challenged, and they clearly take the (*sic*) at their own peril; but in the end, the Chamber by majority is satisfied of their capability to assess the credibility of the witness in whole or in part based on the examinations conducted.[4]

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[1] Joint Appeal of Five Accused against the Trial Chamber's Decision on the Impeachment of a Party's Own Witness, filed on 28 November 2007 ("Joint Appeal"). These five accused, together with Radivoje Miletić will be also be referred to as "the Appellants".
[2] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, T. 15457-15458 ("Oral Decision").
[3] Appeal against the Decision on Certification and Clarification of the Trial Chamber's Oral Decision on Impeachment of a Party's Own Witness, filed 5 December 2007 ("Miletić Appeal").
[4] T. 15457-15458.

3. As is clear from the above, the Trial Chamber's Oral Decision is to be read together with the Separate Opinion issued by Judge O-Gon Kwon in the *Prosecutor v. Slobodan Milošević* on 29 April 2004[5] as that opinion sets out the reasons for the position taken by the Trial Chamber.

4. The Oral Decision was followed by a request by Popović, Beara, Nikolić, Gvero, and Pandurević for certification to appeal on 21 September 2007 ("Motion for Certification")[6] and by a request for clarification of the Oral Decision by Miletić on 25 September 2007,[7] joined by Ljubomir Borovčanin ("Borovčanin") and Beara, respectively, on 25 and 26 September 2007[8] (together, "Motion for Clarification").

5. The Prosecution responded to the Motion for Certification on 5 October 2007[9] and to the Motion for Clarification on 8 October 2007.[10] Gvero filed a reply to the former on 11 October 2007.[11]

6. On 21 November 2007 the Trial Chamber issued its Decision on Certification and Clarification in which it granted the Motion for Certification and clarified that a party seeking to challenge the credibility of its own witness: (i) need not seek permission; (ii) need not have the witness declared "hostile" as a first step; (iii) would not be limited in the manner in which challenge is made *i.e.* he or she should be able to "cross-examine" the witness using all of the relevant techniques, including leading questions; and (iv) may do so during the course of the examination-in-chief or on redirect.[12] The Trial Chamber noted, however, that notice must be given when such a challenge begins and ends[13] and that evidence adduced through this process would not in principle

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[5] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Separate Opinion of Judge O-Gon Kwon on Trial Chamber Confidential Decision Issued 28 January 2004, 29 April 2004 ("Separate Opinion of Judge Kwon").
[6] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Defence Motion Seeking Certification of the Trial Chamber's Oral Decision on Cross-Examination by a Party of its Own Witness, 21 September 2007.
[7] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, General Miletić Defence Motion for Clarification of the Decision Regarding Impeachment of a Witness by the Party Calling the Witness, Rendered During the Hearing of 17 September 2007, 24 September 2007.
[8] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Borovčanin Defence Notification on Joining « *Requête de la Défense du Général Miletić aux fins de clarification de la Décision relative à la récusation du témoin par la partie qui l'a appelé rendue lors de l'audience du 17 septembre 2007* », 25 September 2007 ; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Beara Defence Notification on Joining « *Requête de la Défense du Général Miletić aux fins de clarification de la Décision relative à la récusation du témoin par la partie qui l'a appelé rendue lors de l'audience du 17 septembre 2007* », 26 September 2007.
[9] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Prosecution Response to 21 September 2007 Defence Motion Seeking Certification of the Trial Chamber's Oral Decision on Cross-Examination by a Party of its Own Witness, 5 October 2007.
[10] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Prosecution Response to General Miletić's Defence Motion for Clarification Dated 24 September 2007, 8 October 2007.
[11] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Reply on Behalf of Milan Gvero to Prosecution Response to 21 September 2007 Defence Motion Seeking Certification of the Trial Chamber's Oral Decision on Cross-Examination by a Party of its Own Witness, 11 October 2007.
[12] Decision on Certification and Clarification, para. 14.
[13] *Ibid.*, para. 15.

be limited to challenging the credibility of the witness, but may also be considered in relation to substantive issues.[14]

7. On 22 November 2007, Miletić sought certification to appeal the Oral Decision and the Decision on Certification and Clarification.[15] The Trial Chamber granted his request in an oral decision at the 22 November 2007 hearing.[16]

8. The Appellants, in their Joint Appeal, filed on 28 November 2007, submit "that the Trial Chamber erred in law by holding that a party can cross-examine its own witness at any stage, in whole or in part, with a view to challenging both the credibility of the witness and the substance of the testimony simply by making a declaration to that effect."[17] The Appellants argue specifically that the abuse of discretion in this case by the Trial Chamber results from its incorrect interpretation of Rules 85 and 90 of the Rules of Procedure and Evidence ("Rules").[18]

9. The Miletić Appeal, filed on 5 December 2007, indicates that Miletić adopts all the arguments set forth in the Joint Appeal,[19] in addition to specifically appealing the substance of the clarification made by the Trial Chamber in its Decision on Certification and Clarification.[20]

10. The "Prosecution's Response to Appeals Against the Trial Chamber's Decision on Impeaching a Party's Own Witness" was filed on 10 December 2007 ("Prosecution Response"). In its response it argues that the Impugned Decision "sets out a fair and expeditious procedure for the calling party to impeach its witness" and that the procedure is consistent with the Rules.[21]

11. On 14 December 2007 a "Joint Defence Reply to Prosecution's Response to Appeals against the Trial Chamber's Decision on Impeaching a Party's Own Witness" ("Joint Reply") was filed confidentially by Popović, Beara, Nikolić, Miletić , Gvero, and Pandurević.

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[14] *Ibid.*, para. 16.
[15] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, T. 18094-18095.
[16] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, T. 18129.
[17] Joint Appeal, para. 9.
[18] *Id.*
[19] Miletić Appeal, para. 8.
[20] *Ibid.*, para. 7.
[21] Prosecution Response, para. 2.

II. STANDARD OF APPELLATE REVIEW

12. Trial Chambers exercise broad discretion in relation to trial management, the admissibility of evidence, and in defining the modalities of cross-examination.[22] The Trial Chamber's decision in this case to allow a party to impeach its own witness without seeking the permission of the Trial Chamber, is a procedural matter relating to the management of the trial. Such a decision, including the Trial Chamber's statements on the permissible scope of the challenge and the admissibility of evidence adduced through this process for the truth of its contents, is to be accorded deference by the Appeals Chamber.

13. Deference implies that 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 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.[23]

14. 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.[24] 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

15. The Appellants recognise that the Trial Chamber's determination regarding the procedure to be adopted to impeach a party's own witness is discretionary in nature.[25] Their principal submission

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[22] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 8; *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Milan Babić, 14 September 2006, para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination By Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 ("*Prlić* Decision on Cross-Examination"), p. 3; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("Decision on Radivoje Miletić's Interlocutory Appeal") para. 4; *Prosecutor v. Milošević*, Case Nos.: IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Decision on Joinder"), para. 3.

[23] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("*Prlić* Decision on Admission of Transcript"), para. 8; *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 ("*Milutinović* Decision on Review"), para. 6.

[24] *Milošević* Decision on Joinder, para. 4; *Milutinović* Decision on Review, para. 6.

[25] Joint Appeal, para. 7; Miletić Appeal, para. 9.

is therefore that the Trial Chamber incorrectly interpreted Rules 85 and 90 of the Rules in holding that a party can cross-examine its own witness at any time, in order to challenge both the credibility of the witness and the substance of his or her testimony, without first seeking the permission of the Trial Chamber to do so.[26]

16. The Appellants specifically take issue with the suggestion that Rule 90 of the Rules could be read to allow for cross-examination by the calling party.[27] They concede that while it may be true that "there is no Rule of the Tribunal which expressly prohibits a party from cross-examining a witness it calls",[28] Rules 90(H) and 85(B) clearly indicate that cross-examination is the province of the opposing party.[29] For the Appellants, cross-examination holds a distinct forensic purpose from the examination-in-chief in that it affords the opposing the party the opportunity to test the evidence given in chief and allows, in particular, the use of leading questions to elicit specific answers and the tendering of evidence which would in principle be inadmissible if tendered by the calling party.[30]

17. The Appellants argue in the alternative that even if the Trial Chamber's holding in relation to cross-examination is upheld as consistent with these Rules, the prejudice resulting from a change in "the practice of cross-examination in force, half-way through the [t]rial" constitutes an abuse of discretion.[31]

18. The question before the Appeals Chamber is whether the Trial Chamber committed a discernable error in holding that (i) a calling party need not seek permission to impeach its witness but must give notice of its intention to do so; (ii) no limitation would be placed on a party challenging the credibility of its own witness; and (iii) evidence adduced through this process may be admitted for the truth of its contents.

(i) Impeachment of a Party's Own Witness

19. The Appellants submit that the primarily adversarial character of the Tribunal's Rules on the hearing of witnesses, the position at common law, and the practice within the Tribunal support their

[26] Joint Appeal, para. 9; Miletić Appeal, para. 10.
[27] Joint Appeal, para. 31.
[28] Separate Opinion of Judge Kwon, para. 2.
[29] Joint Appeal, para. 31.
[30] *Ibid.*, paras. 21-22, 27-28.
[31] *Ibid.*, para. 10.

argument that a declaration of hostility or adversity by the Trial Chamber is a necessary step in allowing a party to impeach and thus cross-examine its own witness.[32]

20. The Appellants express the concern that putting this determination in the hands of the calling party provides an enormous potential for evidential and other advantages. They argue for example that the calling party might not wish to impeach their witness so much as use the opportunity to ask leading questions and that such a procedure is likely to affect strategic and tactical decisions regarding the calling of particular witnesses.[33] The Appellants further suggest that this process will be used to tender additional material, which would otherwise be inadmissible, for its substantive value and not necessarily to discredit the witness.[34]

21. In response, the Prosecution submits that the procedure set out by the Impugned Decision is fair and expeditious and consistent with the Rules.[35] It notes that while some Trial Chambers have taken the approach of determining whether a witness is in fact hostile[36] others have adopted the approach set out in the Impugned Decision.[37] As a result, the Prosecution argues that "there are alternative ways in which to conduct the process of impeachment" and that "the existence of reasonable alternatives does not mean that the Trial Chamber abused its discretion."[38] The Prosecution further adds that the Appellants have failed to establish any discernible discretionary error resulting in prejudice.[39]

22. With regard to the scope and effect of the Impugned Decision, the Prosecution notes that since it opened its case on 21 August 2006, it has sought to impeach aspects of the testimony of its own witness on only one occasion.[40] The Prosecution also observes that the Impugned Decision "neither abandons nor undermines the Trial Chamber's authority to control the nature and extent of a witness' examination under Rule 90(F)" adding, that the opposing party "will still be able to object to a calling party impeaching its own witness."[41]

23. In reply the Appellants note that while the Prosecution may have impeached its witness on one occasion it has in fact attempted to impeach several of its own witnesses on many occasions.[42]

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[32] Joint Appeal, paras. 13-16; Miletić Appeal, paras. 13-21.
[33] Joint Appeal, paras. 17-20.
[34] *Ibid.*, paras. 27-28.
[35] Prosecution Response, paras. 2-3, 7-10.
[36] Referring to *Prosecutor v. Radoslav Brđanin,* Case No. IT-99-36-T, T. 807, 24 January 2002; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, T. 2735-2742 and T. 4002-4010.
[37] Referring to *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on Admission into Evidence of Prior Statement of a Witness, 5 July 2005 (*Halilović* Decision).
[38] Prosecution Response, para. 10.
[39] *Ibid.*, para. 6.
[40] Referring to T.14653-14656, 3 September 2007.
[41] Prosecution Response, para. 12.
[42] Joint Reply, para. 2.

The Appellants take further issue with the Prosecution's contention that the Impugned Decision leaves room for the opposing party to object to the impeachment of the calling party's own witness.[43]

24. While the Tribunal is in no way bound by the rules of the common law[44] and the Rules do not provide clear guidance on the question of impeaching a party's own witness, Rules 85 and 90 are nonetheless largely reflective of the common law system. It is the parties who call and question "their" witnesses in turn and who are then cross-examined by the opposing side.[45] Accordingly, recognizing that the procedure for the hearing of witnesses at the Tribunal is rooted in the adversarial process, it is important to be cautious in removing safeguards that belong to that process for reasons of fairness to the parties and for the purpose of ascertaining the truth; in this case, leaving the determination of adversity, and the green light to cross-examine, to the calling party rather than to the Trial Chamber.[46]

25. To be sure, reasonable alternative procedures for impeaching one's own witness do exist. The Trial Chamber may for example decide to grant the calling party leave to cross-examine its own witness on an inconsistent statement without a prior showing of adversity. The determination could then be made on the basis of the cross-examination. A Trial Chamber might also adopt a flexible approach as was done in the *Krajišnik* case where the calling party raises the issue of its witness' hostility and the Trial Chamber then decides how to proceed.[47] In that case, the Trial Chamber informed the parties that it might show more initiative than would be expected under the

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[43] *Ibid.*, paras. 11-12.

[44] Rule 89(A) of the Rules.

[45] *See e.g. Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005 ("*Limaj* Decision"), para. 8.

[46] The determination of adversity lies with the court at common law. Canada, Australia and the United Kingdom all have nearly identical statutory provisions to this effect. Canada: *Canada Evidence Act*, R.S.C. 1985, C-5, s. 9: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement"; Australia: *Evidence Act 1929* (S.A.), s. 27, *see also*, *R v. Hutchison* (1990) 53 SASR 587 at 592: "The crucial consideration is that the party calling the witness is unable, by reason of the witness's unwillingness to tell the truth or the whole truth, to elicit the true facts by non-leading questions"; United Kingdom: *Criminal Procedure Act* 1865 c18, s 3, *see also*, *R v. Jobe*, [2004] EWCA Crim 3155. *See also* United States of America: *Federal Rules of Evidence*, 28 U.S.C. app., Rules 607: "The credibility of a witness may be attacked by any party, including the party calling the witness" and Rule 611(c): "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." *See also, Ellis v. Chicago*, 667 F2d 606 at 613 (7th Cir, 1981) (internal citations omitted): "In essence, Rule 611(c) codifies the traditional more of dealing with leading questions. It acknowledges that they are generally undesirable on direct examination, that they are usually permissible on cross-examination, and that there are exceptions to both of these propositions. Although not explicitly stated, the rule is consistent with what has long been the law – that in the use of leading question much must be left to the sound discretion of the trial judge who sees the witness and can, therefore, determine in the interests of truth and justice whether the circumstances justify leading questions to be propounded to a witness by the party producing them."

traditional common law approach, by determining on a case-by-case basis whether to allow the Prosecution to put questions in a more leading way to the witness, and in relation to which issues.[48]

26. The Appeals Chamber considers that notwithstanding the exact form the impeachment procedure takes, the Trial Chamber must be the one to determine whether to allow the calling party to cross-examine its witness. It must also be the one to limit the scope of the questioning, if and to the extent it considers appropriate, within its discretion. Despite the Prosecution's assertion that the Trial Chamber has not abandoned or undermined its authority to control the nature and extent of a witness' examination under Rule 90(F), it is difficult to interpret the Impugned Decision otherwise. By stating that "a party need not seek permission to challenge the credibility of its own witness nor is the process of having a witness declared "hostile" necessary before taking such a step", the Trial Chamber leaves no room for objections to impeachment.[49] Furthermore, objections to the scope of the challenge also appear to be precluded by the Trial Chamber's assertion that it "would not place any limitations on the way in which such a challenge may be conducted."[50] This is the prejudice occasioned by the discernible error.

27 In practice, it may not always be clear whether the calling party actually seeks to impeach its own witness. The Trial Chamber in this case has on occasion allowed the Prosecution to introduce documents through its witness on re-examination in order to correct information elicited from the witness during cross-examination.[51] It has also allowed the Prosecution on re-examination to ask its witness about a prior interview, conceding that such questioning might go to the witness' credibility.[52] In another instance during this trial the Prosecution laid the groundwork for an application to cross-examine its own witness.[53] In doing so it relied on the *Limaj* Decision, noting that in laying the foundation for a declaration of hostility by the Trial Chamber, and in particular to demonstrate whether the witness is willfully not answering the question, the witness should first be given the chance to refresh his recollection.[54] General agreement was expressed by the parties that the impeachment procedure laid down in the *Limaj* Decision represents the governing law.[55] In the result, the Trial Chamber came to the conclusion that both the witness' testimony and prior statement were open to varying interpretation on the essential question and decided "that it would be in the interest of justice for the Chamber itself to clarify the issue with the witness."[56] Lastly, in

[47] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, T. 8558-8559, 23 November 2004.
[48] *Ibid.*, T. 8559.
[49] Decision on Certification and Clarification, para. 14.
[50] *Id.*
[51] T. 15614-15615, 19 September 2007.
[52] T. 15362, 13 September 2007.
[53] T. 9930-9931, 3 April 2007 (private session).
[54] T. 9931-9932, 3 April 2007 (private session).
[55] T. 9931, T.9944-9945, 3 April 2007.
[56] T. 9958-9959, 4 April 2007.

the one case where the Prosecution explicitly asked to impeach its own witness, the Trial Chamber allowed it on a showing by the Prosecution that its witness was not being truthful.[57]

28. The Trial Chamber's practice to date, as well as that of other Trial Chambers,[58] demonstrates a general if not altogether consistent approach that puts the decision to allow a party to put a prior statement to its own witness and cross-examine that witness in the hands of the Trial Chamber. This may or may not be done on the basis of a prior determination of hostility. In this light the Appeals Chamber considers that the Trial Chamber's decision to put the determination to impeach in the hands of the calling party constitutes a discernible error. It further considers that the Trial Chamber committed a discernible error in deciding to leave the scope of the challenge to the discretion of the impeaching party. It may be that the Trial Chamber will decide to allow a calling party to put a prior inconsistent statement to its witness in order to clarify a particular contradiction without declaring the witness hostile. The interests of justice dictate a certain measure of flexibility. However, this again will be a matter for the Trial Chamber to determine in the circumstances before it.

(ii) Admission of Evidence for the Truth of its Contents

29. The Appellants challenge the Impugned Decision on the ground that it allows evidence adduced through the cross-examination of a party's own witness to be considered in relation to the substantive issues.[59] The Appeals Chamber finds no error by the Trial Chamber in this respect.

30. The Appeals Chamber notes that the concern raised by the Appellants appears to be largely rooted in the incentive they argue this creates for the calling party to unilaterally impeach its own witnesses in some way, no matter how small.[60] This concern is however chiefly addressed by the fact that, as the Appeals Chamber has stated above, the calling party may not, of its own determination, launch into a cross-examination of its own witness.

31. The Appellants' also misconstrue the *Limaj* Decision in arguing that it stands for the proposition that the contents of any previous inconsistent statement may only be received into evidence for assessing the credibility of the witness. To the contrary, the *Limaj* Decision affirms

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[57] T. 14655-14656, 3 September 2007.
[58] *See e.g. Prosecutor v. Radoslav Brđanin,* Case No. IT-99-36-T, T. 807, 24 January 2002; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, T. 2735-2742 and T. 4002-4010; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, T. 8558-8559, 23 November 2004. *See also, Halilović* Decision, p. 3 ("the party calling the witness may challenge the witness' credibility on portions of his or her testimony, without necessarily [seeking leave from the Trial Chamber], by confronting the witness with specific passages of his or her prior statement, so that explanations can be given for the alleged discrepancies and these explanations can be tested by cross-examination"); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T. 16732-16733.
[59] Joint Appeal, paras. 15, 47 (iv); Miletić Appeal, para. 17.
[60] Joint Appeal, para. 27.

that such evidence may be admitted as hearsay evidence for the truth of its contents when it fulfills the criteria under the Tribunal's Rules of being relevant and sufficiently reliable to be accepted as probative.[61] It also bears noting that this approach is consistent with the position at common law which has evolved alongside developments in the law on hearsay in recent years to allow for the admission of a prior inconsistent statement adduced in this manner for the truth of its contents.[62] While the position at common law is in no way determinative of the issue, it would seem unsound to adopt a stricter approach on this point.

32. The Tribunal's professional Judges, as noted by the Trial Chamber, are competent to assess the truthfulness and to accord the proper weight to a witness' evidence.[63] The decision as to whether a particular piece of evidence will be admitted for the purposes of assessing a witness' credibility and/or for the substance therein must be left to the Trial Chamber's discretion.

IV. DISPOSITION

In light of the foregoing, the Appeals Chamber

GRANTS the Joint Appeal and the Miletić Appeal in so far as it finds that

(i) a calling party must seek the permission of the Trial Chamber to impeach its own witness in relation to the credibility of that witness or the substance of his or her testimony; and

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[61] *Limaj* Decision, paras. 18, 21.

[62] In Canada, the traditional common law rule limiting the use of prior inconsistent statements to impeaching the credibility of the witness was overturned by the Supreme Court of Canada in the case of *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740. The Court found that the existing rule had been attenuated by developments in the law of hearsay. It held that prior inconsistent statements should be substantively admissible on a principled basis, the governing principles being the reliability of the evidence and its necessity. In the United States of America the traditional common law rule was abandoned by the Federal Rules of Evidence, 28 U.S.C. app., Rule 801(d): "A Statement is not hearsay if ... (1) Prior statement by witness - The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition". In Australia the *Evidence Act 1995* C.C.A. provides at section 60: "The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation. With reference to section 60 *see Adam v. The Queen* 207 CLR 96 at 37: "by s. 60 of the Act, the prior statements would be admitted as evidence of the truth of their contents. But that difference brought about by s. 60 was one of the significant alterations in the rules of evidence that the Act was intended to effect. No longer were tribunals of fact to be asked to treat evidence of prior inconsistent statements as evidence that showed no more than that the witness may not be reliable. The prior inconsistent statements were to be taken as evidence of their truth." In the United Kingdom, *see* the *Criminal Justice Act* 2003 c. 44 Pt 11 c 2, s 119: "(1) If in criminal proceedings a person gives oral evidence and (a) he admits making a previous inconsistent statement, or (b) a previous inconsistent statement by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865 (c.18), the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible." *See e.g. R v. Joyce*, [2005] EWCA Crim 1785; *R v. K N*, [2006] EWCA Crim 3309.

(ii) the scope of that challenge must be subject to the control of the Trial Chamber;

DISMISSES the remainder of the Joint Appeal and the Miletić Appeal.

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

Done this 1st day of February 2008,
At The Hague,
The Netherlands.

Judge Fausto Pocar
President

[Seal of the Tribunal]

[63] *Prosecutor v. Vujadin Popović*, 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, para. 31; *Prlić* Decision on Admission of Transcript, para. 57.