

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-00-39-A
Date: 23 January 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Order of: 23 January 2009

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

ORDER LIFTING CONFIDENTIALITY

The Office of the Prosecutor

Mr. Peter Kremer QC

The Appellant

Mr. Momčilo Krajišnik

Counsel for the Appellant on the Matter of JCE

Mr. Alan M. Dershowitz

Mr. Nathan Z. Dershowitz

Amicus Curiae

Mr. Colin Nicholls QC

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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);

BEING SEIZED of a request by the Prosecution to lift the confidential status of the Appendices to its Supplemental Brief of 18 November 2008¹ and the Book of Authorities, filed on 28 November 2008 (“Request”);²

NOTING that the Appellant Momčilo Krajišnik (“Appellant”) has not responded to the Request;

NOTING that the Prosecution has filed a public redacted version of its Supplemental Brief,³ whereas neither the Appellant nor *Amicus Curiae* has filed public redacted versions of their respective Supplemental Briefs of 18 November 2008;⁴

NOTING that the Parties’ and *Amicus Curiae*’s Supplemental Briefs argue the impact of the additional evidence⁵ on the Trial Judgement⁶ and that parts of this evidence presently under seal pertain to the fair trial grounds of appeal (Exhibits AD1, AD2, AD4 – AD9, AP1 – AP7 as well as parts of the testimonies of Mr. George Mano, Mr. Stefan Karganović and Mr. Nicholas Stewart QC);

CONSIDERING that the Appendices to the Prosecution’s Supplemental Brief consist of pieces of evidence from the trial record, and that the Prosecution has not indicated which parts thereof were confidential at trial, nor why the confidentiality of these parts should be lifted on appeal;

CONSIDERING that the Book of Authorities to the Prosecution’s Supplemental Brief is confined to legal sources which do not warrant seal;

CONSIDERING Article 21(2) of the Statute of the Tribunal and the general importance of transparency of the proceedings of the Tribunal;⁷

¹ Consolidated Supplemental Brief on the Additional Evidence of George Mano, Stefan Karganović, Radovan Karadžić and Nicholas Stewart, 18 November 2008 (“Prosecution’s Supplemental Brief”).

² Notice of Filing of Public Redacted Version of Prosecution Consolidated Supplemental Brief and Request to Lift Confidentiality of Appendices to the Consolidated Supplemental Brief and of the Prosecution’s Book of Authorities, 28 November 2008, para. 2.

³ Notice of Filing of Public Redacted Version of Prosecution Consolidated Supplemental Brief and Request to Lift Confidentiality of Appendices to the Consolidated Supplemental Brief and of the Prosecution’s Book of Authorities, 28 November 2008.

⁴ Consolidated Supplemental Brief in Relation of the Additional Evidence, 18 November 2008; *Amicus Curiae*’s Supplemental Appellate Brief on Additional Evidence, 18 November 2008.

⁵ See AT. 611 (11 November 2008); Decision on Appellant Momčilo Krajišnik’s Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008, Disposition; Decision on Prosecution’s Motion to Adduce Rebuttal Material, 8 October 2008, para. 17.

⁶ *Prosecutor v. Momčilo Krajišnik*, Case No.: IT-00-39-T, Judgement, 27 September 2006.

⁷ See Order Issuing a Public Redacted Version of “Decision on Appellant Momčilo Krajišnik’s Motion to Present Additional Evidence” and Lifting of Confidentiality of Certain Documents, 4 November 2008, p. 2.

CONSIDERING *proprio motu* the confidential status of other filings of the Parties and *Amicus Curiae*, additional evidence, private session transcripts, and decisions and orders rendered by the Appeals Chamber;

CONSIDERING the Appellant's informed statement before the Appeals Chamber at the evidentiary hearing on 11 November 2008 that he does not wish the lawyer-client privilege between him and his former counsel Mr. Nicholas Stewart QC "to be an obstacle to [Mr. Stewart's] substantive testimony",⁸

CONSIDERING that Mr. Nicholas Stewart QC's substantive testimony during the evidentiary hearing on 11 November 2008 concerned the same subject-matter as that addressed by confidential Exhibits AD1, AD2 and AD4 – AD9 and the confidential *viva voce* evidence by Messrs. Mano⁹ and Karganović,¹⁰ but was nonetheless given mostly in open session without the Appellant at any point invoking the lawyer-client privilege;

CONSIDERING however, that Exhibit AD4 contains details which were not specifically addressed during Mr. Stewart's testimony and which would therefore remain protected under the lawyer-client privilege;

CONSIDERING therefore that no issue arises that would compel confidentiality of Exhibits AD1, AD2 and AD5 – AD9 based on lawyer-client privilege, but that such confidentiality is warranted for Exhibit AD4;

CONSIDERING that Exhibit AD5 contains information which the Presiding Judge at trial deemed should be kept confidential, an assessment with which the Appeals Chamber agrees;

CONSIDERING therefore that parts of Mr. Nicholas Stewart's testimony in private session, in which he referred to Exhibits AD4 and AD5, should remain under seal;¹¹

CONSIDERING that confidential Exhibits AP1 – AP7 consist of evidence in rebuttal to Exhibits AD1 and AD2 which do not, of themselves, warrant seal;

CONSIDERING that, insofar as the abovementioned additional evidence warranted being placed under seal to protect Mr. Nicholas Stewart QC's interests, that reason has been rendered obsolete by his unequivocal statement before the Appeals Chamber that he seeks "no such privacy of anything for [his] own part, in [his] own interests",¹²

⁸ AT. 616 (11 November 2008).

⁹ AT. 359-424 (3 November 2008).

¹⁰ AT. 431-511 (3 November 2008).

¹¹ AT. 618, lines 17-20 and AT. 696, lines 19-23 (11 November 2008).

¹² AT. 613 (11 November 2008).

FINDING therefore, that Exhibits AD4 and AD5 and parts of the private session testimony of Mr. Nicholas Stewart must remain under seal, whereas no valid reason exists why Exhibits AD1, AD2, AD6 – AD9, AP1 – AP7 and the testimonies of Mr. George Mano, Mr. Stefan Karganović and the remainder of the testimony of Mr. Nicholas Stewart QC of 3, 5 and 11 November 2008, respectively, should remain confidential;

NOTING FURTHER its previous confidential decisions and orders addressing matters relating to this evidence, namely: “Decision on Appellant Momčilo Krajišnik’s Motion to Present Additional Evidence” of 20 August 2008,¹³ “Order on Rebuttal Material” of 26 August 2008, “Decision on Prosecution’s Motion to Adduce Rebuttal Material” of 8 October 2008, “Decision on Request by *Amicus Curiae* to Notify the Appellant of the Existence of Certain Documents” of 8 October 2008, “Decision on Urgent Prosecution Request to Direct the Registry and Krajišnik to Disclose Certain Correspondence and Decisions” of 30 October 2008, “Decision on *Amicus Curiae*’s Request Regarding Attendance At Evidential Hearings on 3 and 5 November 2008” of 31 October 2008, “Order to Redact the Public Transcript and the Public Broadcast of a Hearing” of 3 November 2008, and “Decision on Momčilo Krajišnik’s Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115, and to Reconsider Decision Not to Call Former Counsel” of 6 November 2008 (“Decisions and Orders”);

NOTING the transcript of the appeal hearing held on 21 August 2008, parts of which were held in private session due to the then confidential nature of Exhibits AD1 and AD2;¹⁴

CONSIDERING that no valid reason exists why the Decisions and Orders and the abovementioned parts of the 21 August 2008 transcript should remain confidential in those parts which address the evidence abovementioned;

PURSUANT TO Article 21(2) of the Statute and Rules 54, 75(A) and 78 of the Rules of Procedure and Evidence of the Tribunal;

GRANTS the Request in part;

ORDERS the Prosecution to file a public version of the Appendices to its Supplemental Brief of 18 November 2008, redacting the material therein which was placed under seal on the trial record, by 16 February 2009;

¹³ A partially public redacted version of which was issued on 4 November 2008: Order Issuing a Public Redacted Version of “Decision on Appellant Momčilo Krajišnik’s Motion to Present Additional Evidence” and Lifting Confidentiality of Certain Documents (“Order of 4 November 2008”), 4 November 2008.

¹⁴ The following parts of the transcript were thus held in private session: AT. 174 (line 22) -175 (line 12), 299 (line 1) – 300 (line 2), 315 (line 8) -316 (line 16).

ORDERS that the confidential status of the Book of Authorities to the Prosecution's Supplemental Brief be lifted;

ORDERS the Parties and *Amicus Curiae* to file public versions of their Supplemental Briefs, redacting the parts therein which refer to confidential Exhibits AD4 and AD5, and references to those parts of Mr. Nicholas Stewart's testimony in private session, where he referred to Exhibits AD4 and AD5, by 16 February 2009;

ORDERS that Exhibits AD1, AD2, AD6 – AD9, AP1 – AP7, the testimonies of Mr. George Mano, Mr. Stefan Karganović and the testimony of Mr. Nicholas Stewart QC (except for AT. 618, lines 17-20, and AT. 696, lines 19-23) be rendered public in their entirety and **INSTRUCTS** the Registry to make the necessary measures to implement this order;

HEREBY ISSUES a public redacted version of the "Decision on Momčilo Krajišnik's Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115, and to Reconsider Decision Not to Call Former Counsel" of 6 November 2008;

ORDERS that the confidential status of the following decisions and orders be lifted:

1. "Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence" of 20 August 2008,
2. "Order on Rebuttal Material" of 26 August 2008,
3. "Decision on Prosecution's Motion to Adduce Rebuttal Material" of 8 October 2008,
4. "Decision on Request by *Amicus Curiae* to Notify the Appellant of the Existence of Certain Documents" of 8 October 2008,
5. "Decision on Urgent Prosecution Request to Direct the Registry and Krajišnik to Disclose Certain Correspondence and Decisions" of 30 October 2008,
6. "Decision on *Amicus Curiae*'s Request Regarding Attendance At Evidential Hearings on 3 and 5 November 2008" of 31 October 2008, and
7. "Order to Redact the Public Transcript and the Public Broadcast of a Hearing" of 3 November 2008;

ORDERS that the confidential status of the aforementioned parts of the transcript of the appeal hearing held on 21 August 2008¹⁵ be lifted;

¹⁵ Namely: AT. 174 (line 22) -175 (line 12), 299 (line 1) – 300 (line 2), 315 (line 8) -316 (line 16).

ORDERS the Parties and *Amicus Curiae* to file public redacted versions of their submissions adjudicated in the Decisions and Orders, in accordance with the present order, by 16 February 2009;

AFFIRMS that the present order pertains only to the confidentiality of the Decisions and Orders as such, and does not affect, where applicable, the confidential or *ex parte* status of the documents addressed in the Decisions and Orders; and

REJECTS the remainder of the Request.

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

Dated this twenty-third day of January 2009,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding

[Seal of the Tribunal]

UNITED
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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-00-39-A
Date: 6 November 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 6 November 2008

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC REDACTED

**DECISION ON MOMČILO KRAJIŠNIK'S MOTION TO PRESENT
ADDITIONAL EVIDENCE AND TO CALL ADDITIONAL WITNESSES
PURSUANT TO RULE 115, AND TO RECONSIDER DECISION NOT TO
CALL FORMER COUNSEL**

The Office of the Prosecutor
Mr. Peter Kremer QC

The Appellant
Mr. Momčilo Krajišnik

Counsel for the Appellant on the Matter of JCE
Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz

Amicus Curiae
Mr. Colin Nicholls QC

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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 the “Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115, and to Reconsider Decision Not to Call Former Counsel”, filed confidentially by Momčilo Krajišnik on 15 October 2008 (“Motion” and “Appellant”, respectively). On 21 October 2008, the Prosecution filed its confidential “Prosecution Response to ‘Motion to Present Additional Evidence and to Call Additional Witnesses Pursuant to Rule 115 and to Reconsider Decision not to Call Former Counsel’” (“Response”). While the Appellant has not filed a formal reply, on 23 October 2008, he publicly filed a “Submission Relating to Further Appeals Proceedings” in which he replies to parts of the Response.

A. Background

2. On 20 August 2008, the Appeals Chamber admitted into evidence under Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) additional evidence relating to the conduct of Mr. Nicholas Stewart QC as former lead counsel for the Appellant’s defence at trial (confidential Exhibits AD1 and AD2).¹ On 8 October 2008, the Appeals Chamber granted the Prosecution’s motion to adduce material in rebuttal to this evidence (confidential Exhibits AP1 – AP7).² On the same date, the Appeals Chamber considered that, at that juncture and pending examination of evidence adduced by the Parties pursuant to Rule 115 of the Rules, it did not find it in the interests of justice to call the Appellant’s former counsel to appear under Rules 98 and 107 of the Rules.³ Also, on 8 October 2008, the Appeals Chamber allowed *Amicus Curiae* to inform the Appellant by 10 October 2008 of the existence of particular documents in the Appellant’s possession which are of direct relevance to the issues raised in Exhibit AD2.⁴ The Appellant now requests six of these documents to be admitted into evidence under Rule 115 of the Rules, and also seeks permission to call his former lead counsel Mr. Nicholas Stewart QC, his former co-counsel Ms. Chrissa Loukas, and former Legal Officer of the Tribunal Mr. Alexander Zahar as witnesses under the same Rule.⁵

¹ Decision on Appellant Momčilo Krajišnik’s Motion to Present Additional Evidence (“Rule 115 Decision of 20 August 2008”), 20 August 2008, public redacted version filed on 4 November 2008, para. 20.

² Decision on Prosecution’s Motion to Adduce Rebuttal Material (confidential), 8 October 2008, paras 10, 11 and 15.

³ Decision on Motion of *Amicus Curiae* to Make a Submission on Procedural Fairness to Former Counsel, 8 October 2008 (“Decision on Submission to Former Counsel”), pp. 1-2.

⁴ Decision on Request by *Amicus Curiae* to Notify the Appellant of the Existence of Certain Documents (confidential), 8 October 2008 (“Decision on Request to Notify”)

⁵ Motion, paras 6, 47 and 48.

B. Applicable law

3. A motion to present additional evidence before the Appeals Chamber must be filed not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay.⁶

4. For additional evidence to be admissible under Rule 115 of the Rules it must satisfy the following requirements: The applicant must first demonstrate that the additional evidence tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence.⁷

5. The applicant must then show that the evidence is both relevant to a material issue and credible.⁸ Evidence is relevant if it relates to findings material to the Trial Chamber's decision.⁹ Evidence is credible if it appears to be reasonably capable of belief or reliance.¹⁰ A finding that evidence is credible demonstrates nothing about the weight to be accorded to such evidence.¹¹

6. Next, the applicant must demonstrate that the evidence *could* have had an impact on the verdict, in other words, the evidence must be such that, considered in the context of the evidence given at trial, it could demonstrate that the conviction was unsafe.¹² If the evidence was available at trial, it may still be admissible on appeal if the applicant can establish that exclusion of the evidence would lead to a miscarriage of justice, in that if it had been available at trial it *would* have affected the verdict.¹³ Whether the evidence was available at trial or not, the Appeals Chamber has recognised that the evidence shall not be assessed in isolation, but in the context of the evidence given at trial and any other evidence already admitted.¹⁴

⁶ Rule 115(A) of the Rules.

⁷ Rule 115(B) of the Rules; Decision on Appellant Momčilo Krajišnik's Motion to Call Radovan Karadžić Pursuant to Rule 115, 16 October 2008 ("Rule 115 Decision of 16 October 2008"), para. 4.

⁸ Rule 115 Decision of 16 October 2008, para. 5.

⁹ Rule 115 Decision of 16 October 2008, para. 5.

¹⁰ Rule 115 Decision of 16 October 2008, para. 5.

¹¹ Rule 115 Decision of 16 October 2008, para. 5.

¹² Rule 115 Decision of 16 October 2008, para. 6.

¹³ Rule 115 Decision of 20 August 2008, para. 8.

¹⁴ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008, para. 7; Rule 115 Decision of 16 October 2008, para. 6; Rule 115 Decision of 20 August 2008, para. 9.

7. Finally, a party seeking to admit additional evidence bears the burden of specifying with clarity the impact the additional evidence could have on the Trial Chamber's decision.¹⁵ A party that fails to do so runs the risk that the evidence will be rejected without detailed consideration.¹⁶

C. Submissions

8. The documents the Appellant seeks to have admitted are:

- (1) a letter and memorandum by Mr. Nicholas Stewart QC, dated 28 October 2005 ("Document 1");
- (2) notes by Mr. Nicholas Stewart QC from a meeting between him and Judge Orié of the Trial Chamber on 31 October 2005, dated 4 November 2005 ("Document 2");
- (3) notes by Mr. Nicholas Stewart QC from a meeting between him and Mr. Alexander Zahar, Legal Officer with the Trial Chamber, on 1 November 2005, dated 4 November 2005 ("Document 3");
- (4) a letter from Mr. Nicholas Stewart QC to Judge Orié, dated 5 February 2007 ("Document 4");
- (5) a letter from Judge Orié to Mr. Nicholas Stewart QC, dated 6 March 2007 ("Document 5"); and
- (6) a letter from Mr. Nicholas Stewart QC to Judge Orié, dated 22 March 2007 ("Document 6").¹⁷

9. In support of his request to have these documents admitted under Rule 115 of the Rules, the Appellant argues that he was not aware of them until *Amicus Curiae* notified him of their existence pursuant to the 8 October 2008 Decision on Request to Notify.¹⁸ He also contends that they were unavailable to him at trial and that the only opportunity he had to discover them was on 5 July 2007,¹⁹ when *Amicus Curiae*, following the termination of his previous counsel mandate, handed over approximately 150 boxes of documents and 200 gigabytes of electronic data to the Appellant.²⁰ However, the Appellant posits, it was impossible for him to identify the six documents now at issue within this volume of material, given the resources at his disposal, his limited knowledge of the English language, and the fact that the documents are not on the trial record.²¹ In

¹⁵ Rule 115 Decision of 16 October 2008, para. 7.

¹⁶ Rule 115 Decision of 16 October 2008, para. 7.

¹⁷ Motion, para. 6; Motion Annexes 1-6.

¹⁸ Motion, paras 5-7.

¹⁹ See Decision on Request to Notify, p. 2; Response, para. 13.

²⁰ Motion, para. 42.

²¹ Motion, para. 42.

addition, he argues that the failure of Mr. Nicholas Stewart QC to hand over the documents to him should not be to his detriment.²²

10. The Appellant further submits that Documents 1 – 6 are credible,²³ relevant “for the issues of ineffective assistance of counsel and fair trial”,²⁴ and that they would have had an impact on the verdict in that their exclusion would lead to a miscarriage of justice.²⁵ For instance, he claims that in Document 1, [redacted].²⁶ Document 2, the Appellant argues, shows that [redacted].²⁷ As for Document 3, the Appellant submits that the statements by Mr. Alexander Zahar relayed therein convey the view of the Trial Chamber’s Judges that Mr. Nicholas Stewart QC badly managed his relationship with co-counsel Ms. Chrissa Loukas,²⁸ and that the Trial Chamber had not granted more time for the Defence because, given Mr. Nicholas Stewart QC’s mismanagement of the defence, any extra time given to him would not be properly used.²⁹

11. In support of his request to call the additional witnesses, the Appellant submits, first, that in light of the new information in Documents 1 – 6, the Appeals Chamber should reconsider its previous decision not to call Mr. Nicholas Stewart QC to testify.³⁰ Second, he argues that Mr. Nicholas Stewart QC should be heard to attest to the accuracy of the statements in Documents 1 – 3, and to testify on the issues of ineffective assistance of counsel and fair trial.³¹ Third, the Appellant posits that Ms. Chrissa Loukas should be heard to explain whether she left the case because of pressures from the Trial Chamber or because Mr. Nicholas Stewart QC deliberately loaded work on her so that he could work on other cases. The Appellant argues that her testimony would “shed additional light on Mr. Stewart’s professionalism”.³² Fourth, the Appellant claims that Mr. Alexander Zahar should be heard because, according to Documents 2 and 3, he was directly involved in the issue of ineffective assistance of counsel and, as an employee with the Trial Chamber, his view will be “highly relevant” for that issue.³³ Finally, the Appellant invites the

²² Motion, para. 43, referencing Rule 115 Decision of 20 August 2008, para. 12.

²³ Motion, paras 7 (“the Appellant has no reason to doubt the veracity and accuracy of the notes made by Mr. Stewart”) and 30.

²⁴ Motion, para. 41.

²⁵ Motion, para. 44.

²⁶ Motion, para. 12.

²⁷ Motion, para. 14.

²⁸ Motion, para. 19.

²⁹ Motion, para. 21.

³⁰ Motion, para. 46.

³¹ Motion, para. 46.

³² Motion, para. 38.

³³ Motion, para. 37.

Appeals Chamber, should it find it appropriate, to call *proprio motu* “other persons involved in the matters set out in [his] Motion”.³⁴

12. The Prosecution responds that the Appellant shows neither good cause nor cogent reasons for the late filing of the Motion,³⁵ in particular in light of *Amicus Curiae*'s Motion of 28 June 2007 which, it argues, must have made the Appellant aware that he was in possession of material “highly relevant to the ineffective assistance of counsel ground of appeal”.³⁶

13. The Prosecution does not specifically address whether the Motion meets the other requirements of Rule 115 of the Rules. Instead, it requests the Appeals Chamber to rule that the Appellant has waived his right to lawyer-client privilege under Rule 97 of the Rules in relation to all communication related to the conduct of his counsel at trial.³⁷ It contends that, without such a waiver, Mr. Nicholas Stewart QC would not be able to testify,³⁸ and that the waiver would allow an independent investigation into the alleged ineffective assistance of Mr. Nicholas Stewart QC.³⁹ The Prosecution requests the Appeals Chamber to order such an investigation, or alternatively, to order the Appellant to provide the Prosecution and *Amicus Curiae* with access to all relevant material in his possession pertaining to the issue of ineffective assistance of counsel to enable them to identify and present relevant evidence.⁴⁰ Such an investigation, the Prosecution contends, may yield statements from former counsel which might obviate the need for Mr. Nicholas Stewart QC and Ms. Chrissa Loukas to testify. As such, it claims an order to call them is premature.⁴¹

14. In reply, the Appellant argues that it would be unfair to disregard Documents 1 – 6 “on some spurious technical ground”.⁴²

D. Discussion

1. Cogent reasons for late filing of the Motion

15. Because the Appellant filed his Motion on 15 October 2008, that is, after the Appeal Hearing on 21 August 2008, he must show cogent reasons for the delayed filing of the Motion.⁴³

³⁴ Motion, para. 47.

³⁵ Response, paras 2, 8-16.

³⁶ Response, paras 13 (citing “Motion Regarding Appellate Ground of Ineffective Assistance of Counsel”, filed confidentially by *Amicus Curiae* on 28 June 2007 (“*Amicus Curiae*'s Motion of 28 June 2007”), para. 8) and 15.

³⁷ Response, paras 17 and 24.

³⁸ Response, para. 25.

³⁹ Response, para. 26.

⁴⁰ Response, paras 26, 27 and 35.

⁴¹ Response, para. 32.

⁴² Submission Relating to Further Appeals Proceedings, para. 4.

⁴³ Rule 115(A) of the Rules.

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16. *Amicus Curiae* handed over Documents 1 – 6, which are not on the trial record, to the Appellant on 5 July 2007, along with all the other case-related material following the termination of *Amicus Curiae*'s previous counsel mandate.⁴⁴ However, in its Decision on Request to Notify of 8 October 2008, the Appeals Chamber considered that “the Appellant may not be aware of the existence of these documents, because the case-related material handed over to the Appellant amounted to approximately 150 unsorted boxes of documents and 200 gigabytes of electronic data which is predominantly in English”.⁴⁵ The Prosecution's submission that *Amicus Curiae*'s Motion of 28 June 2007 put the Appellant on notice of Documents 1 – 6⁴⁶ does not cause the Appeals Chamber to revisit this consideration. In *Amicus Curiae*'s Motion of 28 June 2007 the argument was made that the material handed over to the Appellant contained “information highly relevant to the ineffective assistance of counsel ground of appeal”.⁴⁷ However, *Amicus Curiae* did not specify in any further detail the nature of this information or where it could be found in the large amount of material provided to the Appellant. In fact, *Amicus Curiae* stated that “the Appellant may have difficulty accessing and utilising this information in his Appeal Brief because the documents are in English”.⁴⁸

17. The Appeals Chamber therefore concludes that Documents 1 – 6, and the issues therein on which Mr. Nicholas Stewart QC, Ms. Chrissa Loukas and Mr. Alexander Zahar would testify, came to the Appellant's attention only after *Amicus Curiae* had informed him thereof pursuant to the Decision on Request to Notify of 8 October 2008. In the circumstances, this constitutes cogent reasons for the filing of the Motion on 15 October 2008.

2. Request for admission of Documents 1 – 6 pursuant to Rule 115 of the Rules

18. Documents 1 – 6 relate to an issue material to the Trial Judgement, namely, whether the alleged ineffective assistance of former lead counsel Mr. Nicholas Stewart QC rendered the Appellant's trial unfair. They are therefore relevant. The Appeals Chamber also finds that Documents 1 – 6 bear enough indicia of credibility to pass muster under Rule 115 of the Rules.⁴⁹

19. Turning to the alleged unavailability of Documents 1 – 6, the Appeals Chamber notes that Documents 1 – 3 were in the possession of former counsel Mr. Nicholas Stewart QC during trial. Moreover, they were either directly addressed to the Trial Chamber or put to its attention during trial. The Trial Chamber thus rendered its verdict in full awareness of their contents. The Appeals

⁴⁴ Decision on Request to Notify; Motion, para. 42; Response, para. 13.

⁴⁵ Decision on Request to Notify, p. 2.

⁴⁶ Response, paras 13, (citing *Amicus Curiae*'s Motion of 28 June 2007, para. 8) and 15.

⁴⁷ *Amicus Curiae*'s Motion of 28 June 2007, para. 8.

⁴⁸ *Amicus Curiae*'s Motion of 28 June 2007, para. 8.

Chamber recalls that where the failure to have material admitted into evidence at trial resulted solely from counsel's negligence or inadvertence, such material may be admissible on appeal if the Appellant can demonstrate that they are of such substantial importance to the success of the appeal that their exclusion would lead to a miscarriage of justice.⁵⁰

20. The remaining Documents 4 – 6 were produced in 2007, that is, after the trial, but do not contain new information on Mr. Nicholas Stewart QC's conduct beyond that already relayed in Documents 1 – 3. Rather, they confirm that the meetings referred to in Documents 1 – 3 actually took place, and specify to an extent the role played by Mr. Alexander Zahar in one of the meetings. In this regard, the Appeals Chamber notes that Documents 1 – 6 must be read together, for they concern a series of connected events related to the issue of alleged ineffective assistance of former lead counsel Mr. Nicholas Stewart QC.⁵¹ As such, they are, at least in part, mutually corroborative. The documents contain several indications that Mr. Nicholas Stewart QC was unable to cope with the work of the defence team, and that this affected the quality of the Appellant's defence at trial. This information must be read together with the totality of the evidence on the record. In light of the above, the Appeals Chamber finds that the admission of Documents 1 – 6 is in the interests of justice as they are of substantial importance to the success of the first ground of appeal submitted by the Appellant and the *Amicus curiae* to the extent that their exclusion would lead to a miscarriage of justice.

21. For the foregoing reasons, the Appeals Chamber admits Documents 1 – 6 as additional evidence under Rule 115 of the Rules. Having thus found, the Appeals Chamber need not consider the Parties' arguments regarding a potential additional basis for admitting Documents 2 and 3, namely, that they show "a serious miscarriage of justice caused by the practices and the processes adopted by the Trial Chamber".⁵²

3. Request to call additional witnesses pursuant to Rule 115 of the Rules

22. As a preliminary matter, the Appellant requests the Appeals Chamber to reconsider its previous decision not to call Mr. Nicholas Stewart QC as a witness.⁵³ The Appeals Chamber notes

⁴⁹ The Appeals Chamber notes that the Prosecution does not dispute the relevance and credibility of Documents 1 – 6.

⁵⁰ See *Ferdinand Nahimana et al v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 31, with further references.

⁵¹ Namely, Mr. Nicholas Stewart QC's letter and memorandum of 28 October 2005 (Document 1); his meeting with Judge Orié following this letter on 31 October 2005 (Document 2); the meeting between Mr. Nicholas Stewart QC and Mr. Alexander Zahar on 1 November 2005 concerning the same issues as discussed in the 28 October 2005 memorandum and the meeting with Judge Orié (Document 3); and subsequent correspondence between Mr. Nicholas Stewart QC and Judge Orié regarding these events (Documents 4 – 6).

⁵² Motion, paras 8, 22-30; Response, paras 17-20.

⁵³ Motion, para. 46.

that this decision pertained to its discretion to call Mr. Nicholas Stewart QC *proprio motu* under Rules 98 and 107 of the Rules,⁵⁴ and therefore does not bar a request to hear him under Rule 115 of the Rules. The Appellant's request for reconsideration is therefore moot.

23. Turning to the Appellant's request to call Mr. Nicholas Stewart QC, Ms. Chrissa Loukas and Mr. Alexander Zahar under Rule 115 of the Rules, the Appeals Chamber accepts the Appellant's argument that these persons will testify on issues raised in Documents 1 – 6 which, in turn, relate to an issue material to the Trial Judgement, namely, the alleged ineffective assistance of Mr. Nicholas Stewart QC.⁵⁵ The Appeals Chamber further finds that, as the anticipated testimony of these persons is based on Documents 1 – 6, in the particular circumstances of this case, the requirements of relevancy and credibility under Rule 115 of the Rules are met.

24. The Appeals Chamber recalls that Documents 1 – 6, in particular Documents 1 – 3, contain statements by Mr. Nicholas Stewart QC as lead counsel, the exclusion of which would lead to a miscarriage of justice.⁵⁶ Consequently, the admission of his proposed *viva voce* testimony on the same statements is also in the interests of justice as it is of substantial importance to the success of the appeal to the extent that its exclusion would lead to a miscarriage of justice. The Appeals Chamber therefore allows the Appellant's request to call Mr. Nicholas Stewart QC as a witness pursuant to Rule 115 of the Rules to give evidence related to Documents 1 – 6 and evidence concerning ineffective assistance of counsel and unfair trial.

25. As for the proposed testimony of former co-counsel Ms. Chrissa Loukas, the Appellant does not provide any material stemming from her personally relating to the issue of alleged ineffective assistance of former counsel Mr. Nicholas Stewart QC. Nor does the Appellant submit any other documentation from her on the basis of which the Appeals Chamber can determine the potential impact of her possible testimony on the verdict. Rather, the Appellant's position appears to be that, since Ms. Chrissa Loukas is mentioned in Documents 1 – 3, she should be given an opportunity to testify on the issues therein.⁵⁷ In the Appeals Chamber's view, this amounts to a fishing expedition and as such falls outside the ambit of Rule 115 of the Rules.⁵⁸ The Appellant's request to call Ms. Chrissa Loukas under Rule 115 of the Rules is therefore dismissed.

26. The Appellant further submits that the proposed testimony of Mr. Alexander Zahar would relate to those parts of Document 3 which allegedly relay Mr. Alexander Zahar's allegations,

⁵⁴ Decision on Submission to Former Counsel, pp. 1-2.

⁵⁵ Motion, paras 37, 38, 42 and 46.

⁵⁶ *Supra*, para. 20.

⁵⁷ See Motion, paras 8 and 38.

⁵⁸ See Order on "Motion to Interview Radovan Karadžić with a View to then Calling him as a Witness pursuant to Rule 115", 20 August 2008, fn. 9.

“either on behalf of the Trial Chamber or on his own behalf”, against Mr. Nicholas Stewart QC during the meeting between the two men on 1 November 2005.⁵⁹ The Appeals Chamber notes that Document 5 unambiguously limits Mr. Alexander Zahar’s authorisation to represent the Trial Chamber during this meeting to “scheduling proposals for the defence case at a practical level”. The Appellant does not argue that the exclusion of Mr. Alexander Zahar’s testimony on these practical issues, within the limit of his authorisation, would lead to a miscarriage of justice. Rather, the Appellant appears to claim that, although Mr. Alexander Zahar surpassed those limits during the meeting, his view would be “highly relevant for the whole issue of ineffective assistance of counsel” because he was an employee with the Trial Chamber “directly involved in” that issue.⁶⁰ However, these assertions do not clarify whether, and how, the admission of Mr. Alexander Zahar’s proposed testimony is in the interests of justice as being of substantial importance to the success of the appeal to the extent that its exclusion would lead to a miscarriage of justice. Indeed, the Appellant fails to provide any documentation stemming from Mr. Alexander Zahar himself on the basis of which the Appeals Chamber can determine his anticipated testimony’s potential impact on the verdict. The Appellant’s request to call Mr. Alexander Zahar as a witness under Rule 115 of the Rules is accordingly dismissed.

4. Prosecution’s requests for ruling on waiver of lawyer-client privilege and for appointment of independent investigator or alternatively for access

27. At this juncture, the Appeals Chamber does not consider the investigation or access requested by the Prosecution necessary for it to reach a fully informed decision on the claim of ineffective assistance of counsel. In addition to the trial record, the Appeals Chamber has before it numerous documents on this issue from both Parties which have been admitted on appeal. This documentary evidence will be evaluated in light of the *viva voce* evidence given by Mr. George Mano and Mr. Stefan Karganović on 3 November 2008 in relation to the claim of ineffective assistance of counsel. The Prosecution’s request for an independent investigation or access is therefore dismissed.

28. Accordingly, the Prosecution’s request for a ruling on waiver is not supported by the need to appoint an investigation or to order access. Moreover, the Appeals Chamber does not consider the requested ruling on waiver necessary, at this juncture, in order to enable Mr. Nicholas Stewart QC to testify. Insofar as Mr. Nicholas Stewart QC’s testimony may conflict with his obligations under Rule 97 of the Rules, the Appellant will be present in court to personally state whether he waives his lawyer-client privilege where necessary. The Prosecution’s request for a ruling on waiver of

⁵⁹ Motion, para. 37.

⁶⁰ Motion, para. 37.

lawyer-client privilege at this point in time is thus dismissed. As a result, the Appeals Chamber need not address the Prosecution's arguments on the consequences of such a waiver for the admissibility of evidence outside the trial record.⁶¹

5. Invitation to call additional witnesses *proprio motu*

29. The Appellant invites the Appeals Chamber, should it find it appropriate, to call *proprio motu* "other persons involved in the matters set out in [his] Motion".⁶² However, he does not specify the identity of these persons, nor does he explain how their testimony would be relevant. As the Appeals Chamber does not find it in the interests of justice to call additional witnesses under Rules 98 and 107 at this juncture, it declines the Appellant's invitation.

E. Disposition

For these reasons, the Appeals Chamber

GRANTS the Motion in part;

DECIDES that Documents 1 – 6⁶³ are admitted into evidence pursuant to Rule 115 of the Rules;

INSTRUCTS the Registrar to assign exhibit numbers to Documents 1 – 6 and to keep these documents under seal;

ORDERS the Appellant to contact Mr. Nicholas Stewart QC to appear before the Appeals Chamber during an evidentiary hearing on 11 November 2008, and to give evidence on issues raised in Documents 1 – 6 and evidence concerning ineffective assistance of counsel and unfair trial;

REJECTS the remainder of the Motion; and

DENIES the Prosecution's requests.

A scheduling order for the evidentiary hearing on 11 November 2008 will be issued in due course.

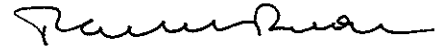
Done in English and French, the English text being authoritative.

Dated this sixth day of November 2008,
At The Hague,
The Netherlands.

⁶¹ Response, para. 30.

⁶² Motion, para. 47.

⁶³ Motion, Annexes 1-6.



Judge Fausto Pocar
Presiding

[Seal of the Tribunal]