IT-04-74-AR73.15
A48-A36
20 APRIL 2009

48

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-74-AR73.15
		Date:	20 April 2009
		Original:	English

IN THE APPEALS CHAMBER

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

Acting Registrar: **Mr. John Hocking**

Decision of: **20 April 2009**

PROSECUTOR

v.

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

PUBLIC

DECISION ON JADRANKO PRLIĆ'S INTERLOCUTORY APPEAL AGAINST THE DECISION REGARDING SUPPLEMENT TO THE ACCUSED PRLIĆ'S RULE 84 *BIS* STATEMENT

The Office of the Prosecutor:
Mr. Kenneth Scott
Mr. Douglas Stringer

Counsel for the Accused:
Mr. Michael G. 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

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 an appeal by Jadranko Prlić ("Prlić")[1] against a decision issued by Trial Chamber III ("Trial Chamber") on 12 February 2009,[2] in which the Trial Chamber denied Prlić's motion to have admitted into evidence a supplement of 590 pages ("Supplement") annexed to the motion pursuant to Rule 84 *bis* of the Rules of Procedure and Evidence ("Rules").

I. BACKGROUND

2. During the trial hearing of 5 May 2008, Prlić informed the Trial Chamber that he was foregoing an appearance as a witness in his own case and would instead make a statement under Rule 84 *bis* of the Rules.[3] Prlić made this statement during the hearings of 5 and 6 May 2008.[4] During his oral statement on 6 May, Prlić said that since he had opted to give a statement only 10 days prior to giving it, he had not had time to prepare a reply to the arguments made by Prosecution witness Mr. Tomljanovich, and that consequently, he would be submitting to the Trial Chamber "the full and final version" of his reply as "an addendum to my presentation".[5]

3. On 7 December 2008, Prlić filed "Jadranko Prlić's Supplement to his Rule 84 *bis* Statement". On 5 January 2009, both the Office of the Prosecutor ("Prosecution") and the Accused Bruno Stojić filed responses to the filing, objecting to the admission of the Supplement.[6]

4. On 12 January 2009, the Trial Chamber issued the Impugned Decision, denying the admission of the Supplement.[7] On 13 February 2009, Prlić requested certification to appeal the Impugned Decision pursuant to Rule 73(B) of the Rules.[8] The Trial Chamber granted certification on 4 March 2009.[9]

---

[1] Jadranko Prlić's Interlocutory Appeal Against the *Decision Regarding Supplement to the Accused Prlić's Rule 84 bis Statement, 11 March 2009*, 11 March 2009 ("Appeal").
[2] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Supplement to the Accused Prlić's Rule 84 *bis* Statement, 12 February 2009 ("Impugned Decision").
[3] Transcript in English ("T.") 27455.
[4] T. 27457-27577.
[5] T. 27559.
[6] "Prosecution Objection to Admission of Jadranko Prlić's Purported Supplement to his Rule 84 *bis* Statement", 5 January 2009; "Bruno Stojić's Response to Jadranko Prlić's Supplement to his Rule 84 *bis* Statement", 5 January 2009.
[7] Impugned Decision, para. 21 and Disposition.
[8] Jadranko Prlić's Request for Certification to Appeal Under Rule 73(B) Against the *Décision Relative au Supplément à la Déclaration de l'Accusé Prlić en Vertu de l'Article 84 bis du Rčglement 12 February 2009*, 13 February 2009.
[9] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Prlić Defence Request for Certification to Appeal the Decision of 12 February 2009 Regarding Supplement to the Accused Prlić's Rule 84 *bis* Statement, 4 March

5. On 11 March 2009, Prlić filed his Appeal against the Impugned Decision, arguing that the Trial Chamber erred in law and fact and abused its discretion by denying the admission of the Supplement "on purely procedural grounds", thereby violating his fair trial rights.[10] He requests the Appeals Chamber to reverse the Impugned Decision, and to order the admission of the Supplement into evidence.[11] The Prosecution filed its Response on 20 March 2009, in which it requests the Appeals Chamber to dismiss the Appeal.[12]

II. STANDARD OF REVIEW

6. The Appeals Chamber recalls that under Rule 84 *bis* of the Rules, a Trial Chamber may allow an accused to make a statement after the opening statements of the parties, subject to the control of the Trial Chamber. The Appeals Chamber considers that such a decision rendered pursuant to Rule 84 *bis* of the Rules is a discretionary one to which it must accord deference.[13] In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber has committed a "discernible error" resulting in prejudice to that party.[14] The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[15]

III. DISCUSSION

7. Prlić submits that the Trial Chamber "erred as a matter of law and fact and abused its discretion" in: (1) finding that the admission of the Supplement fell outside the proper scope of Rule 84 *bis*; (2) concluding that Prlić could have adduced this evidence by: (i) testifying as a witness pursuant to Rule 85(C); (ii) engaging the services of an expert witness to prepare a similar report; or (iii) cross-examining Mr. Tomljanovich; and (3) failing to follow the established practice of the Tribunal regarding the admission of evidence, the relevance and probative value of which

---

2009. *See* also Separate Opinion of Presiding Judge Jean-Claude Antonetti on Prlić Defence Request for Certification to Appeal the Decision of 12 February 2009 Regarding Supplement to the Accused Prlić's Rule 84 *bis* Statement.

[10] Appeal, introductory para.

[11] Appeal, para. 39.

[12] Prosecution Response to Jadranko Prlić's Interlocutory Appeal against the *Decision Regarding Supplement to the Accused Prlić's Rule 84 bis Statement*, 20 March 2009 ("Response"), para. 20.

[13] *See Prosecutor v. Slobodan Milošević,* Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 ("*Milošević* Decision of 1 November 2004"), para. 9.

[14] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, 8 December 2006 ("*Šešelj* Decision of 8 December 2006"), para. 18, citing *Prosecutor v. Mićo Stanišić,* Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić Provisional Release, 17 October 2005, para. 6.

[15] *Šešelj* Decision of 8 December 2006, para. 18, citing *Milošević* Decision of 1 November 2004, para. 9.

should be determined at the end of proceedings.[16] The Prosecution disputes all of these arguments, submitting that the Trial Chamber did not abuse its discretion in denying the admission of the Supplement.[17]

8. The Appeals Chamber has examined each of Prlić's grounds of appeal in turn.

A. Ground of Appeal 1 – The Trial Chamber allegedly erred in finding that the admission of the Supplement fell outside the proper scope of Rule 84 *bis*

1. Submissions

9. Prlić submits that the Trial Chamber "incorrectly concluded that the procedure envisaged by Rule 84 *bis* 'is not the appropriate avenue for the presentation of the Supplement'."[18] He argues that "Rule 84 *bis* does not place any limitations on (a) whether the statement is written or oral in nature; or (b) the point in time – other than after the closing statement of the Prosecution – at which the statement is made".[19] In his view, the object and purpose of the Rule is that the accused should be given the opportunity to be heard at trial, and that this right can be exercised orally or in writing.[20] Citing, *inter alia*, the Trial Chamber in the *Blajojević and Jokić* case, he further submits that Trial Chambers have in their practice taken a liberal approach in deciding when a statement under Rule 84 *bis* may be made.[21]

10. Prlić argues that "Rule 84*bis* effectively articulates the right of the Accused to participate in his trial and have his views heard by the Trial Chamber *throughout* the proceedings, while retaining his right under Article 21(4)(g) of the Statute not to be compelled to testify against himself."[22] He also submits that in any cases of doubt as to whether to admit such a statement, the matter should be resolved in favour of the Accused.[23] He further contends that admitting the Supplement after he has finished calling all his witnesses causes no prejudice to the other parties or to the Trial Chamber, as the other parties may rebut or challenge any aspects of the Supplement through *vive voce* testimony, in their final briefs, or by presenting rebuttal evidence under Rule 85(A)(iv).[24] Finally, he makes the

---

[16] Appeal, para. 2.
[17] Response, para. 3.
[18] Appeal, para. 18, quoting Impugned Decision, para. 21.
[19] Appeal, para. 20.
[20] Appeal, para. 21.
[21] Appeal, para. 22, citing *Prosecutor v. Vidoje Blagojević and Dragan Jokić,* Case No. IT-02-60-T, T. 10923, as well as *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, T. 27500; *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-PT, Order for Filing Motions and Related Matters, 28 November 2003, p. 1; *Prosecutor v. Jovica Stanišić & Franko Simatović*, Case No. IT-03-69-PT, Decision on Future Course of Proceedings, 9 April 2008 ("*Stanišić and Simatović* Decision of 9 April 2008"), para. 17, and Article 67(1)(h) of the Rome Statute of the International Criminal Court.
[22] Appeal, para. 23 (emphasis in original).
[23] *Ibid.*
[24] Appeal, para. 24.

point that it is "perfectly permissible" under Rule 84 *bis* that the Supplement seeks to rebut Prosecution evidence; indeed, "if the Accused is unable to *adequately* rebut and challenge the case against him, the *fair trial rights* of the Accused are frustrated and the very spirit of a *fair* trial is undermined."[25]

11. The Prosecution responds that the scope and purpose of Rule 84 *bis* do not provide for the Supplement.[26] It contends that "Rule 84 *bis* relates exclusively to opening statements", which is indicated by its positioning as "*bis*" to Rule 84 which pertains to opening statements.[27] This has the consequence, the Prosecution submits, that should an accused elect to make a statement at a later time, it is Rule 84 that governs the timing, which provides that a delayed opening statement would be "after the conclusion of the Prosecutor's presentation of evidence and before the presentation of evidence for the defence."[28] The Prosecution asserts that the original purpose of adopting Rule 84 *bis* was to "narrow and focus the actual issues in dispute," although it concedes that subsequent practice at the Tribunal has not seen the Rule used as originally envisaged.[29] It argues that allowing such statements at late stages of the trial defeats the purpose of the Rule, and renders the Rule as "another means of arguing one's case, rather than narrowing issues or presenting evidence".[30] In its view, the Supplement "is more akin to a Rule 94 self-appointed expert report, responding paragraph by paragraph to Mr. Tomljanovich's sworn and cross-examined evidence".[31] The Prosecution further submits that the arguments and citations in the Appeal do not provide a legal basis for admitting the Supplement,[32] whereas the application of Rule 84 *bis* by the Trial Chamber in the *Kvočka et al.* case supports its view that such statements may only be made as part of opening statements.[33]

---

[25] Appeal, para. 25 (emphasis in original).
[26] Response, para. 3.
[27] Response, para. 10. *See* also para. 5.
[28] *Ibid.*, quoting Rule 84 (emphasis and internal quotations omitted).
[29] Reponse, paras 6-7, citing the 1999 Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/643, 22 November 1999 ("[...] Civil law experience appears to indicate that such statements by the accused can have the effect of shortening the proceedings by narrowing issues, eliminating those not disputed and clarifying matters. [...] [T]he rule change reflects a worthwhile effort by ICTY to improve case management and subsequent experience may confirm its value.").
[30] Response, para. 7. In the Prosecution's view, "Trial Chambers that have broadened the application of Rule 84 *bis* [...] have done so without taking cognisance of the Rule's original purpose, and even so, such rulings do not in any way support what the accused Prlić is seeking to do here". *Ibid.*
[31] *Ibid.*
[32] Response, para. 8.
[33] Response, para. 11, quoting *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-T, T. 9448-9449 ("[...] there is sense in having the statement of the accused as a continuation of the opening statement. [...] But not within the sense of Rule 84 *bis* can he make this statement after the presentation of evidence has been produced. Therefore Mr. Zigić can either make the statement now or he forfeits the right to make the statement.").

2. Analysis

12. Rule 84 *bis* of the Rules, entitled "Statement of the Accused", provides:

> (A) After the opening statement of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement.
>
> (B) The Trial Chamber shall decide on the probative value, if any, of the statement.

13. In the Impugned Decision, the Trial Chamber found that the purpose of Rule 84 *bis* of the Rules is "to give an accused the opportunity to be heard by the Chamber without having to appear as a witness in his own case".[34] The Trial Chamber further held that "a statement by the accused under Rule 84 *bis* is a supplementary right granted to him, which he may exercise if he so wishes, notwithstanding his other rights under the Statute of the Tribunal and the Rules".[35]

14. In regard to Prlić's contention that such statements may be given in writing, the Appeals Chamber notes that while the plain wording of Rule 84 *bis* suggests that such statements would ordinarily be made orally in court,[36] the Rule does not prohibit such statements being given by an accused in written form. In principle, therefore, a statement made under Rule 84 *bis* might be given in written form, although its admission would remain subject to the authorisation of the Trial Chamber, and under its control.[37]

15. With respect to the timing of giving such statements, the Appeals Chamber is persuaded that the placement of this Rule as part of Rule 84 pertaining to opening statements, together with the clear wording of the Rule itself that such statements be made "[a]fter the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor" indicate that statements under this Rule should take place prior to the presentation of evidence by the Prosecution. This conclusion is also supported by the original purpose of the Rule – to "improve case management" by narrowing issues in dispute at the outset at

[34] Impugned Decision, para. 17.
[35] Impugned Decision, para. 18.
[36] *See* also Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: OUP, 2005), p. 142: "[...] it is doubtful whether the [Rule 84 *bis*] statement can be written".
[37] The Appeals Chamber notes that this is the first time that an accused before the Tribunal has submitted a written document pursuant to Rule 84 *bis* of the Rules. The Appeals Chamber is also conscious of Article 67(1)(h) of the Rome Statute of the International Criminal Court, which explicitly provides for a right of an accused to make an unsworn oral *or written* statement in his or her defence.

trial[38] – which suggests that such statements should take place prior to the presentation of the prosecution case.

16. In practice, however, while most statements made pursuant to Rule 84 *bis* of the Rules have taken place at the end of opening statements of the parties,[39] Trial Chambers have on occasion allowed accused persons to make such statements at later stages of the trial proceedings.[40] The Trial Chamber in this case has also indicated that it would allow an accused person to make more than one Rule 84 *bis* statement.[41] In general, Trial Chambers enjoy a wide margin of discretion in determining matters relating to the admissibility of certain types of evidence at trial, as well as in defining the modalities of the exercise of the rights of the Defence.[42] Recognising that there may be situations in which it may be appropriate to allow a Rule 84 *bis* statement after the presentation of

[38] Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634, para. 87.

[39] In *Prosecutor v. Slobodan Milosević*, Case No. IT-01-54, the accused made a three day Rule 84 *bis* statement at the end of the Prosecution's opening statement (T. 225-509). In *Prosecutor v. Baton Haxhiu*, Case No. IT-04-84-R77.5, the accused made a short unsworn statement after the opening statements of the parties (T. 20). In *Prosecutor v. Milan Martić*, Case No. IT-95-11, the accused made a 45 minute Rule 84 *bis* statement after the opening statements of the parties (T. 295-319). In *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, the accused made a four hour statement under Rule 84 *bis* after the opening statement of the Prosecution (T. 1855). In *Prosecutor v. Mile Mrkšić et al.*, the accused Šljivančanin made a Rule 84 *bis* statement of about 20 minutes and the accused Radić made a Rule 84 *bis* statement of two or three minutes after the opening statements of the parties (T. 520-530). In *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81, the accused made a 45 minute Rule 84 *bis* statement at the conclusion of the Prosecution's opening statement (T. 424-432). In *Prosecutor v. Vlastimir Đorđevic*, Case No. IT-05-87/1, the accused made a 25 minute Rule 84 *bis* statement after the opening statement of the Prosecution (T. 227-242).

[40] *See*, e.g, *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1, T. 9449-9473 (the accused Žigić gave a 45 minute Rule 84 *bis* statement at the beginning of his defence case, on 26 March 2001); *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39, T. 27500-27534 (the accused made a 45 minute Rule 84 *bis* statement at the end of the trial proceedings, on 31 August 2006); *Stanišić and Simatović* Decision of 9 April 2008, para. 14 (noting that if the accused Stanišić was too ill to attend court, he could make a statement pursuant to Rule 84 *bis* of the Rules at a later stage of the trial); *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-PT, Order for Filing of Motions and Related Matters, 7 March 2003, p. 3 and *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-PT, Order for Filing of Motions and Related Matters, 28 November 2003, p. 3 (both finding that Rule 84 *bis* applies throughout the proceedings in accordance with the accused's right to be heard in person by the Trial Chamber, and that "this right is granted from the outset whenever a witness has finalized his or her testimony and at the end of a party's presentation of a case, notwithstanding further rights of the accused, as laid down in the Statute and Rules, and notwithstanding other directives of the Trial Chamber if the interests of justice so demand"); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Vidoje Blagojević's Oral Request, 30 July 2004, p. 7, quoting Motion Hearing, 17 June 2004, T. 10922-25 (finding that although "an unsworn statement is generally made after the opening statement of the parties, the Trial Chamber does not find any reason to deny you the opportunity to make an unsworn statement at a later time").

[41] During the Rule 98 *bis* ruling on 28 January 2008 in this case, the Trial Chamber stated that although the accused Praljak had already made a Rule 84 *bis* statement before the beginning of the Prosecution case on 27 April 2006, it would be ready to authorize him to take the floor once more to make a statement at the time when the Defence is presenting its case (T. 26873).

[42] *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, 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, 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, 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, para. 3.

the Prosecution case, the Appeals Chamber considers that Trial Chambers retain the discretion to allow an accused to make Rule 84 *bis* statements in later stages of the trial in the interests of justice.

17. Therefore, the Appeals Chamber considers that a statement pursuant to Rule 84 *bis* may be in writing and that Trial Chambers retain the discretion to allow such a statement to be given at later stages of the trial. It also finds that such a statement may be used to rebut Prosecution evidence.[43] The admission and scope of such statements remain under the discretion of the Trial Chamber. However, contrary to the suggestions made by Prlić in his first ground of appeal, the Trial Chamber did not reject the admission of the Supplement on the basis that a statement made pursuant to Rule 84 *bis* must necessarily be made orally, or that it must in every case be made at the outset of the trial. The conclusion of the Trial Chamber that "the procedure laid down in Rule 84 *bis* is not the appropriate avenue for the presentation of the Supplement" was based mainly on the Trial Chamber's consideration that there were alternative procedures under the Rules that Prlić could have used as a way to challenge the evidence against him.[44] The Trial Chamber also took into account that it had allocated Prlić 95 hours to present his case, which included the time to examine his witnesses as well as 24 hours requested by Prlić to testify himself.[45] Prlić has not shown any error on the part of the Trial Chamber in the way that it assessed the scope and purpose of Rule 84 *bis* of the Rules.

18. Therefore, the first ground of appeal is dismissed.

B. Ground of Appeal 2 – The Trial Chamber allegedly erred in finding that Prlić could have adduced this evidence using alternative procedures under the Rules

1. Submissions

19. Prlić submits that the Trial Chamber erred in finding that he could have adduced the evidence contained in the Supplement by either: (a) testifying as a witness pursuant to Rule 85(C) of the Rules; (b) engaging the services of an expert witness to prepare a similar report; or (c) by cross-examining Mr. Tomljanovich.[46] He argues that none of these alternatives were possible or practicable.[47]

20. In terms of testifying as a witness in his own case, Prlić argues that although he had wanted to do so, time constraints on the presentation of his case imposed by the Trial Chamber meant that

[43] *See infra* para. 23.
[44] Impugned Decision, para. 21; *see* also paras 19-20.
[45] Impugned Decision, para. 18.
[46] Appeal, paras 27-32.
[47] *Ibid.*

he was "forced to opt for an unsworn statement pursuant to Rule 84 *bis* instead".[48] In this respect, he contends that his "fair trial rights should not be compromised because of lack of time" and that "[d]enying the admission of the Supplement does just that."[49] With regard to the possibility of engaging an expert to prepare a similar report, Prlić notes that although the Supplement might have the appearance of an expert report, this "does not make it so" and that his expertise in these matters should not be taken against him.[50] He further posits that he did not have the time nor the resources to call an additional expert witness to testify, which demonstrates, in his view, that the Trial Chamber's conclusion "is ill-founded and a violation of the principle of equality of arms".[51] In respect of the alternative of cross-examination, Prlić submits that the right to cross-examine witnesses under Article 21(4)(e) of the Statute is entirely separate from his right to be heard under Rule 84 *bis* of the Rules and that he did avail himself of his right of cross-examination.[52] However, given that it would take, in his estimation, at least "10 working days just for the Prlić Defence to conduct its cross-examination" of Mr. Tomljanovich, it meant that "the time allocated for his cross-examination was woefully insufficient to adduce all the necessary information from such an important witness".[53]

21. The Prosecution responds that "[t]he issue of adequate time [...] for the Defence to present its case has already been considered by the Appeals Chamber on a number of occasions and the Trial Chamber's rulings have repeatedly been affirmed", including with regard to the right to cross-examination.[54] It recalls that Prlić was allocated and took a full trial day to cross-examine Mr. Tomljanovich, and that when asked by Judge Antonetti at the end of the day whether he required more time for cross-examination, his counsel Mr. Karnavas stated that this was not necessary.[55] The Prosecution also underlines that Prlić was given 95 hours to conduct its direct-examinations, which is "twice as much as any other accused", which "'included the time to examine the Prlić Defence witnesses as well as the time that would be used by the Accused Prlić to appear as a witness'".[56] It further avers that Prlić's lack of resources to present its case in terms of calling an additional expert witness "is not convincing, particularly when considered that it is only made a substantial time after the Prlić Defence finalised the presentation of its case".[57] It argues that if Prlić was unable to

[48] Appeal, para. 27.
[49] Appeal, para. 29.
[50] Appeal, para. 30 (emphasis in original).
[51] Appeal, para. 31.
[52] Appeal, para. 32.
[53] *Ibid.*
[54] Response, para. 14.
[55] Response, para. 15, citing T. 6854.
[56] Response, para. 16, quoting Impugned Decision, para. 18.
[57] Response, para. 17.

present his case due to lack of resources, it would have been expected that he would raise this matter with the Trial Chamber either prior to, or during the presentation of his case-in-chief.[58]

2. Analysis

22. In relation to Prlić's argument that he chose to make use of Rule 84 *bis* rather than testify as a witness as a measure to present his case within the time allocated, the Trial Chamber ruled that Rule 84 *bis* was not "a substitute procedure intended to compensate for the fact that, in this specific instance, the Accused has not chosen to make use of the various procedures laid down in the Rules to challenge the evidence against him".[59] The Trial Chamber considered that "Rule 84 *bis* is not the appropriate procedure for requesting the admission of documents to rebut prosecution evidence".[60] It noted that the Rules avail the Defence of several procedures, such as the possibility to call a witness to challenge the evidence of Mr. Tomljanovich, to tender an expert report through an expert witness under Rule 94 *bis*, or for Prlić to have appeared as a witness under Rule 85(C).[61]

23. The Appeals Chamber recalls that it has dealt with the issue of adequate time for the presentation of Prlić's case and that it has upheld the Trial Chamber's allocation of time in this respect.[62] Accordingly, Prlić had adequate time and resources to rebut the Prosecution's evidence without resort to supplementing his Rule 84 *bis* statement with a 590 page document. While the Appeals Chamber considers that a statement made pursuant to Rule 84 *bis* may touch upon any aspect of the case against the accused, including expert reports, the scope and length of such statements remain under the control of the Trial Chamber. The Appeals Chamber also notes that Prlić had the opportunity to cross-examine Mr. Tomljanovich, and had in fact declined the Trial Chamber's offer of further time for such cross-examination.[63] In these circumstances, it was not unreasonable for the Trial Chamber to consider that Prlić could have used other procedures under the Rules to rebut the Prosecution evidence in this regard and that a supplement to his Rule 84 *bis* statement was not admissible.

24. The second ground of appeal is thus dismissed.

---

[58] *Ibid.*
[59] Impugned Decision, para. 18.
[60] Impugned Decision, para. 20.
[61] *Ibid.*
[62] *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, p. 4.
[63] T. 6854.

C. Ground of Appeal 3 – The Trial Chamber allegedly erred by failing to follow the established practice of the Tribunal in the admission of evidence

1. Submissions

25. Prlić submits that by not admitting the Supplement to his Rule 84 *bis* statement, the Trial Chamber "deviated from the practice of this Tribunal concerning the admission of evidence", which had the effect of depriving him of his right to test the Prosecution's evidence and the right to present evidence under Article 21 of the Statute.[64] In his contention, the *ad hoc* International Criminal Tribunals apply a civil law approach to the admission of evidence, which means that judges "evaluate the evidence pursuant to their free conviction obtained from the entire trial, with the understanding that in case of doubt the evidence should be evaluated in a light most favourable to the accused."[65]

26. Citing the *Kordić and Čerkez* case, he submits that the principles that govern the admissibility of evidence at the Tribunal are: "(a) the establishment of the truth; (b) fairness to the parties; (c) whether the evidence assists an expeditious conclusion of the trial; and (d) whether it would be in the interests of justice to admit the evidence."[66] He argues that the "consistent practice" of the Tribunal is "'first admitting all evidence, unless it appears manifestly inappropriate to do so, and second, at a later stage, assessing its relative weight in the context of the entire trial record'."[67] In the Impugned Decision, however, Prlić contends that the Trial Chamber "rejected the motion outright, on procedural grounds, with no consideration of its potential relevance to Dr. Prlić's case."[68] As a consequence, he submits, the Trial Chamber "has not followed the established procedure and has thus erroneously deprived itself of the opportunity to consider potentially relevant evidence which could lead to Dr. Prlić's acquittal."[69]

27. The Prosecution responds that Prlić's argument "presupposes" that the Supplement can be defined as "evidence".[70] In its view, the Supplement is "neither testimonial nor documentary evidence, and certainly cannot be a vehicle for tendering documents into evidence, by attaching them to an alleged '84 *bis* statement'."[71]

---

[64] Appeal, para. 33.
[65] Appeal, para. 34.
[66] *Ibid.*, citing *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, T. 27358-59.
[67] Appeal, para. 35, quoting *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006, para. 14. *See* also Appeal, paras 37-38.
[68] Appeal, para. 36.
[69] Appeal, para. 39.
[70] Response, para. 18.
[71] *Ibid.*

2. Analysis

28. The Appeals Chamber reiterates that under Rule 84 *bis* of the Rules, the Trial Chamber has decision-making authority as to whether an accused may make a statement, and that any statement that is made remains under the control of the Trial Chamber. The Appeals Chamber also recalls that the decision to admit or exclude evidence generally is one that falls within the discretion of the Trial Chamber and therefore, warrants appellate intervention only in limited circumstances.[72] While statements made under Rule 84 *bis* are a type of evidence – the probative value of which is decided by the Trial Chamber[73]– the admission of such statements, or their scope, are subject to the authority and control of the Trial Chamber.

29. The Rules do not provide explicitly for a written supplement to an accused's Rule 84 *bis* statement to be admitted into evidence in the trial of that person and other accused. A Chamber is therefore called in such a case to apply rules of evidence that "will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".[74] As the Appeals Chamber has previously noted, "[t]his is a delicate exercise for, while the system under which the Tribunal's rules of evidence operates is predominantly adversarial, the jurisprudence – and the Rules themselves – have recognized from the beginning the necessity, and desirability, of certain features which do not accord with a strictly adversarial criminal procedure."[75] Rule 84 *bis* is one such feature.[76] The Appeals Chamber notes that prior to Prlić giving his statement, counsel for Prlić admitted that "through his statement documents cannot come in".[77] It was fully within the discretion of the Trial Chamber not to admit the Supplement, which it determined to be an inappropriate avenue for the presentation of such evidence,[78] taking into

---

[72] *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 19; *Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para. 11. *See* also *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović a.k.a. "Štela"*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 257; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 236.

[73] *See*, e.g., *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007, para. 23, in which the Trial Chamber considered whether the accused's Rule 84 *bis* statement had any probative value, and concluded that it did not.

[74] Rule 89(B).

[75] *Prosecution 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, para. 40.

[76] *See* Giuliano Turone, *The Denial of the Accused's Right to Make Unsworn Statements in* Delalić, 2 J. Int'l Crim. J. (2004) 455-458. The Appeals Chamber, notes, however, that the possibility of an accused to make an unsworn statement is not purely a creature of the civil law, and in fact was part of the common law system in many countries, although the tendency has been to abolish the rule. The US Army Manual for Courts Martial (2008), R.C.M. 1001(c)(2)(C) provides for the possibility of an accused to make an unsworn statement, either orally or in writing, though the statement is not considered as evidence and an accused making an unsworn statement is not a "witness". *See Trial of Albert Bury and Wilhelm Hafner*, United States Military Commission, Freising, Germany, 15 July 1945, Law Reports of Trials of War Criminals, The United Nations War Crimes Commission, Vol. III, London, HMSO, 1948, p. 63.

[77] T. 27456.

[78] *See* Impugned Decision, para. 21.

account the purpose and scope of Rule 84 *bis* within the broader context of the rules on the presentation of evidence before the Tribunal.[79] Prlić has failed to show that the Trial Chamber abused its discretion in this respect.

30. Hence, the third ground of appeal is dismissed.

IV. DISPOSITION

31. On the basis of the foregoing, the Appeals Chamber **DISMISSES** the Appeal.

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

Judge Andrésia Vaz
Presiding Judge

Dated this twentieth day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

[79] *See* Impugned Decision, paras 17-18.