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**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-AR73.11

Date: 11 September 2008

Original: English

IN THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision: 11 September 2008

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

PUBLIC

**DECISION ON SLOBODAN PRALJAK'S APPEAL OF THE TRIAL
CHAMBER'S DECISION ON THE DIRECT EXAMINATION OF
WITNESSES DATED 26 JUNE 2008**

The Office of the Prosecutor:

Mr. Kenneth Scott
Mr. Douglas Stringer

Counsel for the Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Jadranko Prlić
Ms. Senka Nožica and Mr. Karim Khan for Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Slobodan Praljak
Ms. Vesna Alaburić and Mr. Nicolas 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

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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 an interlocutory appeal filed by Slobodan Praljak’s (“Appellant”) on 30 July 2008¹ against the decision rendered by Trial Chamber III (“Trial Chamber”) on 26 June 2008.² The Office of the Prosecutor (“Prosecution”) filed its response on 8 August 2008.³ The Appellant did not file a reply.

I. BACKGROUND

2. On 10 May 2007, during the presentation of the Prosecution’s case, the Trial Chamber issued the “Decision on the Mode of Interrogating Witnesses” stating, *inter alia*, that witnesses “shall primarily be questioned by counsel of the [Appellant]” and that the Appellant may only directly address a witness “[i]n exceptional circumstances and after authorisation of the Chamber”.⁴ This decision was confirmed by the Appeals Chamber on 24 August 2007, in relation to Guideline C covering the Appellant’s participation in the questioning of witnesses.⁵ The Appeals Chamber was in particular satisfied that “there was good reason for the Trial Chamber to determine that a stricter application of Guideline C was justified in order to protect the rights of the Appellant’s co-accused to a fair and expeditious trial, as well as the rights of the Appellant” notably in light of the experience of the Appellant’s interventions which lacked legal expertise and entailed a waste of time.⁶

3. On 24 April 2008, the Trial Chamber issued the “Decision Adopting Guidelines for the Presentation of Defence Evidence”.⁷ According to Guideline 1 of this decision, the Appellant may only directly examine a witness with the leave of the Trial Chamber and under exceptional circumstances in particular related to the examination of events in which he personally took part or to the examination of issues about which he has specific expertise.⁸

¹ Slobodan Praljak’s Appeal of the Trial Chamber’s 26 June 2008 Decision on the Direct Examination of Witnesses, 30 July 2008 (“Appeal”).

² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Motion for Reconsideration Presented by the Praljak Defence, 26 June 2008 (“Impugned Decision”).

³ Prosecution’s Response to Slobodan Praljak’s Appeal of the Trial Chamber’s 26 June 2008 Decision on the Direct Examination of witnesses, 8 August 2008 (“Response”).

⁴ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on the Mode of Interrogating Witnesses, 10 May 2007 (“Trial Chamber’s Decision of 10 May 2007”), para. 8 citing Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006.

⁵ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.5, Decision on Praljak’s Appeal of the Trial Chamber’s 10 May 2007 Decision on the Mode of Interrogating Witnesses, 24 August 2007 (“Appeals Chamber’s Decision of 24 August 2007”).

⁶ Appeals Chamber’s Decision of 24 August 2007, para. 9.

⁷ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision Adopting Guidelines for the Presentation of Defence Evidence, 24 April 2008 (“Trial Chamber’s Decision of 24 April 2008”).

⁸ Trial Chamber’s Decision of 24 April 2008, para. 3 (“Guideline 1”).

4. In the Impugned Decision, the Trial Chamber denied, by a majority, the Appellant's motion⁹ seeking reconsideration of Guideline 1 and authorisation to cross-examine witnesses about the events in which he personally took part or questions of which he has specific expertise. The Trial Chamber furthermore provided, by a majority, its explanation of the "specific expertise" criterion as referring to "the expertise held by an Accused at the time of the alleged facts an owing to which he was charged in the Amended Indictment of 11 June 2008".¹⁰ On 23 July 2008, the Trial Chamber granted the Appellant's request¹¹ for certification to appeal the Impugned Decision.¹²

II. STANDARD OF REVIEW

5. It is well-established in the jurisprudence of the Tribunal that the Trial Chambers exercise discretion in relation to trial management and the conduct of proceedings before them.¹³ In the present case, the Impugned Decision's holding to provide further explanation in relation to Guideline 1 is a discretionary decision of the Trial Chamber, to which the Appeals Chamber accords deference. This deference is based on the Appeals Chamber's recognition of the Trial Chamber's familiarity with the day-to-day conduct of the parties and practical demands of the case.¹⁴ The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error.¹⁵ The Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion 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 discretion.¹⁶

⁹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak's Motion for Reconsideration of the Denial of his Right to Conduct a Cross-Examination per the Guidelines for the Presentation of Evidence, 30 May 2008.

¹⁰ Impugned Decision, p. 5.

¹¹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak's Request for Certification to Appeal the Trial Chamber's 26 June 2008 Decision Further Restricting Witness Examination by the Accused, 2 July 2008.

¹² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Praljak Defence Request for Certification to Appeal, 23 July 2008 ("Certification Decision").

¹³ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.4, Decision on Beara's and Nikolić's Interlocutory Appeals Against the Trial Chamber's Decision of 21 April 2008 Admitting 92 *Quarter* Evidence, 18 August 2008, para. 5; Appeals Chamber's Decision of 24 August 2007, para. 5; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecutor Case, 6 February 2007, para. 8; *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. Slobodan Milošević*, Case No. IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002, para. 14.

¹⁴ Appeals Chamber's Decision of 24 August 2007, para. 5.

¹⁵ *Idem.*

¹⁶ *Idem.*

III. DISCUSSION

A. Arguments of the Parties

6. The Appellant requests the Appeals Chamber to reverse the Impugned Decision or, in the alternative, “to hold that ‘specific expertise’ as described [therein] includes at a minimum the areas of expertise specifically listed in the Indictment”.¹⁷ He tends to interpret the Impugned Decision as restricting him from examining a witness on any issues, except the military issue, whereas he claims to have specific competencies in electrical engineering, philosophy, sociology and theatrical, film and television production.¹⁸ He further submits that there is no basis for the arbitrary and artificial restriction on the definition of “specific expertise” provided by the Trial Chamber in the Impugned Decision.¹⁹ He finally adds that the circumstances have changed since the Appeals Chamber has last had the opportunity to rule on this matter and that a “more comprehensive re[-]evaluation of the issue” is therefore warranted.²⁰

7. As his first ground of appeal, the Appellant argues that the Impugned Decision, in conjunction with the layout of the courtroom which prevents the Accused from communicating with his Counsel during the witnesses’ examination and the complexity of the issues analyzed during the proceedings, results in a violation of his right to a fair hearing guaranteed by Article 21(2) of the Statute of the Tribunal (“Statute”).²¹ In support of this argument, the Appellant gives two examples where his expertise would be essential to the examination of witnesses. First, he refers to his intention to call a witness who would testify that it was physically impossible for the Herceg-Bosna/HVO authorities to cut off water and power supplies to East Mostar, as alleged by the Prosecution.²² He claims that his personal expertise in this area is significantly greater than his Counsel’s and that preventing him from immediately following up on such complex and technical issues would result in a miscarriage of justice.²³ Second, the Appellant submits that he might need to intervene on the issue of sociology as he did on 30 August 2007, when he was authorized by the Trial Chamber to cross-examine a witness on a question of demography.²⁴

¹⁷ *Praljak’s Appeal*, paras 1 and 72.

¹⁸ *Ibid.*, paras 3, 5.

¹⁹ *Ibid.*, paras 3, 6.

²⁰ *Ibid.*, para. 6; see also para. 36 where the Appellant argues that “the procedure approved by the Appeals Chamber bears little resemblance to the restrictive procedure now in place” and para. 53.

²¹ *Ibid.*, para. 21.

²² *Ibid.*, paras 23-26 with reference to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak’s Submission Pursuant to Rule 65 *ter*, 31 March 2008 (confidential), Annex A, pp. 19-20, Witness 13.

²³ *Ibid.*, paras 27-28.

²⁴ *Ibid.*, paras 29-32.

8. Under the second ground of appeal, the Appellant develops his arguments according to which “a rationale must be provided when making a blanket restriction on the full use of the [Appellant’s] expertise”, especially in the circumstances where the Trial Chamber already has sufficient control over the modes of interrogating the witnesses available to the Appellant.²⁵

9. In his third ground of appeal, the Appellant alleges that the Impugned Decision violates his rights and guarantees under Article 21(4)(d) of the Statute. He submits that the existing restrictions imposed by the Trial Chamber’s Decision of 10 May 2007 already leave him with only a “bare minimum”, a further restriction of which would lead to the violation of his defence rights.²⁶ The Appellant further argues that the “presence of defence counsel cannot be used to penalize the Accused” and that it is inappropriate to use the right to an expeditious trial as “a weapon” against him provided that none of the accused in the present case has invoked this right.²⁷

10. The Appellant’s fourth and fifth grounds of appeal deal with the alleged violations of Articles 21(4)(e) and 21(4)(g) of the Statute, respectively. He particularly underlines that the requirement for the Appellant to demonstrate “how he employed his expertise in relation to the facts alleged in the Indictment in order to enjoy his basic right to participate in the proceedings” might be construed as self-incriminating.²⁸

11. Finally, the sixth ground of appeal contains arguments according to which the Impugned Decision is factually incorrect as it can be interpreted as recognizing that the Appellant only has specific expertise in the military domain.²⁹

12. The Prosecution responds that the Appeal should be rejected inasmuch as it (i) raises a new issue that has not been certified for appeal; (ii) reiterates the arguments previously litigated before the Appeals Chamber; (iii) is based on an attempt to extend the notion of “specific expertise” to biographical information set out in the Indictment; and (iv) refuses to recognize the existing rulings by the Trial and Appeals Chambers.³⁰

13. In support of its arguments, the Prosecution firstly submits that the Impugned Decision as well as all preceding motions and rulings only related to the right of an accused to personally conduct cross-examination of witnesses called by other parties.³¹ The Certification Decision thus only allowed an appeal in connection with the Appellant’s participation in the cross-examination of

²⁵ *Ibid.*, paras 41, 43.

²⁶ *Ibid.*, para. 49.

²⁷ *Ibid.*, paras 51-52.

²⁸ *Ibid.*, para. 66.

²⁹ *Ibid.*, paras 69-71; see *supra*, para. 6.

³⁰ Prosecution’s Response, para. 3.

those witnesses, as opposed to examination-in-chief of witnesses called by him, which is a new matter impermissibly brought before the Appeals Chamber.³²

14. Secondly, the Prosecution submits that the arguments of the Appellant were previously considered and rejected by the Appeals Chamber and that the situation has not changed since then in any meaningful way in the sense that the Appellant is still able, under certain circumstances, to cross-examine the witnesses called by his co-accused.³³

15. Thirdly, the Prosecution argues that the Trial Chamber's elaboration of "specific expertise" is not a departure from the original guidelines, and that any alleged violation of the Appellant's rights in this regard is at best hypothetical given that the Trial Chamber has not yet had an opportunity to apply the definition spelled out in the Impugned Decision.³⁴ The Prosecution adds that the educational and professional background information contained in the Indictment is simply biographical and does not amount to the Prosecution's acknowledgement of the Appellant's "specific expertise" in those spheres.³⁵

16. Finally, the Prosecution asserts that, throughout his authorized interventions, the Appellant has demonstrated that he "still lacks the skill to conduct a proper cross-examination" and that those interventions have not assisted the court but rather wasted time.³⁶ In this regard, the Prosecution claims that the Appellant wilfully disregards the procedural rules imposed by the Trial Chamber.³⁷

B. Analysis

1. Scope of Appeal

17. The Appeals Chamber notes that the Certification Decision reads as follows:

[...] the Impugned Decision made an important clarification with regard to the limitations placed on an Accused to personally *examine a witness*,

[...] the Chamber holds that limiting the right of Accused persons assisted by Counsel to participate directly in *the examination of witnesses* by construing the rights as enshrined in Article 21(4)(d) and (e) of the Statute is an issue that would significantly affect the fairness of the trial,³⁸

18. Although it is true that the issue at stake initially arose at the stage when the Appellant was participating in *cross-examination* of witnesses called by the Prosecution and/or his co-accused, a

³¹ *Ibid.*, paras 4-5.

³² *Ibid.*, paras 6-11.

³³ *Ibid.*, paras 13-19, citing the Appeals Chamber's Decision of 24 August 2007, paras 9, 11 and 13; see also para. 34.

³⁴ *Ibid.*, paras 21-22.

³⁵ *Ibid.*, para. 22.

³⁶ *Ibid.*, paras 27-33.

³⁷ *Ibid.*, para. 33.

plain reading of the Certification Decision makes it clear that the Trial Chamber certified an appeal against the Impugned Decision with respect to the more general right of an accused to participate in the examination (including examination-in-chief, cross-examination or re-examination) of witnesses called by any party. Moreover, the Impugned Decision provides clarification to Guideline 1, which in turn stipulates the order of the examination of witnesses called by either party.³⁹ The Appeals Chamber therefore rejects the Prosecution's arguments claiming that the Appeal contains impermissibly new issues that were not certified for appeal.

2. Alleged Errors

19. The Appeals Chamber has already held that when an accused is effectively represented by counsel, it is, in principle, for the counsel to conduct the examination of witnesses.⁴⁰ It has however recognized that Trial Chambers may, under exceptional circumstances, authorize an accused to participate in the examination in person.⁴¹ It has also been established that the Trial Chambers are entitled under Rule 90(F) of the Tribunal's Rules of Procedure and Evidence ("Rules") to exercise control over the manner in which such examination is conducted,⁴² including ensuring that it "is not impeded by useless and irrelevant questions".⁴³

20. As recalled above, in its Decision of 24 April 2008, the Trial Chamber stated that the exceptional circumstances under which the Appellant would be allowed to address a witness directly during the presentation of defence evidence "relate in particular to the examination of events in which an Accused participated personally, or the examination of issues about which he possesses specific expertise".⁴⁴ In the Impugned Decision, the Trial Chamber dismissed the Appellant's request for reconsideration of these criteria and went further to define "specific

³⁸ Certification Decision, pp. 4-5 (emphasis added; footnotes omitted).

³⁹ Impugned Decision, p. 5; Trial Chamber's Decision of 24 April 2008, para. 3.

⁴⁰ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement ("*Nahimana et al.* Appeal Judgement"), para. 267 and fn. 651; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Scheduling Order, 16 November 2006, pp. 3-4; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Hassan Ngeze's Motions Concerning Restrictive Measures of Detention, 20 September 2006 (confidential), p. 7: "Article 20(d) of the Statute provides for an alternative between the right to self-representation and the right to legal assistance, but does not entitle an accused or an appellant who has a counsel assigned to him/her to choose at whim when to accept or not his/her counsel's advice" (footnotes omitted).

⁴¹ Appeals Chamber's Decision of 24 August 2007, paras 9, 11, 13; *Nahimana et al.* Appeal Judgement, paras 267, 269-270, 274, 276.

⁴² Rule 90(F) of the Rules provides:

"The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to

(i) make the interrogation and presentation effective for the ascertainment of the truth; and
(ii) avoid needless consumption of time."

⁴³ *Nahimana et al.* Appeal Judgement, paras 182, 270; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, paras 45, 99, 102; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeal Judgement, 1 June 2001, para. 318.

⁴⁴ Trial Chamber's Decision of 24 April 2008, para. 3 citing to Trial Chamber's Decision of 10 May 2007, para. 12 and the Appeals Chamber's Decision of 24 August 2007.

expertise” as referring to “the expertise held by an Accused at the time of the alleged facts and owing to which he was charged in the Amended Indictment of 11 June 2008”.⁴⁵ The Appeals Chamber is not satisfied that it needs to reconsider its decision of 24 August 2007 approving a stricter application of Guideline C which the Trial Chamber has now decided to continue to apply to examination of witnesses called by the Appellant or his co-accused.⁴⁶ In these circumstances, the real issue currently before the Appeals Chamber is whether the Trial Chamber committed a discernable error in defining those “exceptional circumstances” by providing its clarification of the term “specific expertise”.

21. The ordinary meaning of the term “expertise” involves “skill or expertness in a particular branch of study or sport”.⁴⁷ The clarification provided in the Impugned Decision limits the possibility of the Appellant’s personal participation in the examination of witnesses with respect to issues on which he has specific expertise to instances where he can prove that it existed at the time of the facts alleged in the Indictment and underlies the charges listed therein. The Appeals Chamber reiterates that it is within the Trial Chamber’s discretionary power to define the circumstances under which it can allow the Appellant to intervene in the examination of witnesses. However, it did not need, at this stage of the proceedings, to further restrict the criteria that would apply to all his future requests for personal intervention. Although the Trial Chamber based its decision on its experience concerning previous interventions of the Appellant, the Appeals Chamber considers that the Trial Chamber should have allowed more flexibility for its assessment of the notion of specific expertise and perform such assessment on a case-by-case basis when faced with a specific request. The approach taken by the Trial Chamber could potentially lead to violation of the Appellant’s rights under Article 21 of the Statute and thus constitutes an abuse of discretion.

22. Moreover, the Appeals Chamber emphasizes that both Guideline C (as amended by the Trial Chamber’s Decision of 10 May 2007) and Guideline 1 refer to “exceptional circumstances” which relate *in particular* to the events in which the Appellant participated personally or issues falling within his specific expertise, and should therefore not be read as restricting those circumstances to

⁴⁵ Impugned Decision, p. 5.

⁴⁶ Guideline 1.

⁴⁷ *Oxford English Dictionary Online*, Oxford University Press, <http://dictionary.oed.com> (last updated on 12 June 2008) (“*Oxford English Dictionary Online*”). The term “expertness” is, in turn, defined as “experience, thorough knowledge” or “skill derived from practice” (*ibid.*). The Appeals Chamber notes that the French original of the Impugned Decision uses the term “*compétence*” which is defined as “*capacité, fondée sur un savoir ou une expérience, que l’on reconnaît à une personne*” (*Dictionnaire de l’Académie française, 9^e édition, version informatisée, http://atilf.atilf.fr/academie9.htm* (last updated on 26 October 2007) with its English equivalent being “sufficiency of qualification; capacity to deal adequately with a subject” (*Oxford English Dictionary Online*).

Cf. the definition of “expertise” elaborated in the Appeals Chamber’s jurisprudence in the context of expert testimony: “a skill or knowledge acquired through training” (*Nahimana et al.* Appeal Judgement, para. 198) and “specialized knowledge regarding a technical, scientific, or otherwise discrete set of ideas or concepts that is expected to lie outside



these two scenarios.⁴⁸ Indeed, various other circumstances may still arise during the proceedings which may justify the Appellant's participation in the examination.⁴⁹

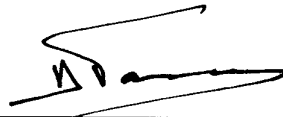
23. In light of the Appeals Chamber's findings above, it need not consider the remainder of the Appellant's arguments.

IV. DISPOSITION

24. For the foregoing reasons, the Appeals Chamber **GRANTS** the Appeal **IN PART**, **QUASHES** the Trial Chamber's finding on the definition of "specific expertise", **UPHOLDS** the remainder of the Impugned Decision and **DISMISSES** the rest of the Appeal.

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

Done this 11th day of September 2008
At The Hague, The Netherlands.



Judge Andréia Vaz, Presiding

[Seal of the Tribunal]

the layperson's ken" (*Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Appeal Judgement, 20 May 2005, para. 303).

⁴⁸ Recalling the Trial Chamber's Decisions of 10 May 2007 and 24 April 2008, the French original of the Impugned Decision reads "[...] *dans des circonstances exceptionnelles notamment liées, soit à l'examen d'événements auxquels un Accusé a personnellement participé, soit à l'examen de questions au sujet desquelles il possède des compétences spécifiques*" (p. 2, emphasis added). The English translation however erroneously reads "[...] under exceptional circumstances linked either to the examination of events in which an Accused personally took part or to the examination of issues about which he has specific expertise".

⁴⁹ Cf. *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T where the Trial Chamber allowed Momčilo Krajišnik to put questions to witnesses as "an experiment" to consider whether or not to allow him to represent himself (T. 13439; T.17205). See also *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T where the Trial Chamber accorded Hassan Ngeze the permission to cross-examine witnesses (under the control of the Chamber) as a temporary measure pending the consideration of his request for the withdrawal of his counsel (T. 15 May 2001, pp. 95-96); or – on a different occasion – allowed him to put additional questions to the witness through the Chamber on the basis of – otherwise unidentified – exceptional circumstances, provided that the questions were relevant and admissible (T. 27 November 2001, pp. 1-8); or allowed Hassan Ngeze to sit next to his Co-Counsel so as to participate actively in the cross-examination (T. 4 July 2002, pp. 3-12). The Appeals Chamber has found no error in the approach taken by the latter Trial Chamber (*Nahimana et al.* Appeal Judgement, paras 266-276).