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: IT-01-48-AR73.2

Date: 19 August 2005

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision of: 19 August 2005

THE PROSECUTOR

v.

SEFER HALILOVIĆ

DECISION ON INTERLOCUTORY APPEAL CONCERNING ADMISSION OF RECORD OF INTERVIEW OF THE ACCUSED FROM THE BAR TABLE

Counsel for the Prosecution:
Mr. Phillip Weiner
Ms. Sureta Chana
Mr. David Re
Mr. Manoj Sachdeva

Counsel for the Defence:
Mr. Peter Morrisey
Mr. Guénaël Mettraux

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 in the case of *Prosecutor v. Sefer Halilović,* which is currently pending in Trial Chamber I of the Tribunal. On 20 June 2005, the Trial Chamber issued the "Decision on Admission into Evidence of Interview of the Accused" admitting into evidence from the bar table the record of the Prosecution's interview of Mr. Halilović ("Appellant").[1] On 30 June, the Trial Chamber granted the Appellant's request for certification to appeal the Impugned Decision.[2] On 6 July 2005, the Appellant filed his appeal brief,[3] and on 18 July 2005, the Prosecution filed its response.[4]

2. Prior to the filing of its Response,[5] the Prosecution filed a motion requesting the Appeals Chamber to order the Appellant to re-file his Appeal brief on grounds that the Appellant's Brief exceeded the limits described in the Practice Direction on the Lengths of Briefs and Motions ("Practice Direction").[6]

3. The Appellant responded to that Motion to Re-File on 11 July 2005.[7] He argues that the Appeal Brief falls within the Practice Direction limits, and that the annex includes an up-to-date procedural background and "re-prints" of relevant paragraphs of the Defence Response filed at trial, which are consistent with the Practice Direction.[8]

4. The Appeals Chamber did not find it necessary to dispose of the Prosecution's Motion to Re-File prior to the due date of the Prosecution's filing of its Response to the Appellant's Brief. The brief filed by the Appellant is in fact 30 pages and therefore conforms to the Practice Direction in terms of length of briefs. However, parts of the annexes include factual and legal arguments, contrary to Clause (C) 6 of the Practice Direction. Consequently, the Appeals Court will disregard any factual or legal arguments in the annexes and will not deem them relevant in deciding the outcome of this Appeal.

Standard of Review

[1] Decision on Admission into Evidence of Interview of the Accused, 20 June 2005 ("Impugned Decision").
[2] Decision on Motion for Certification, 30 June 2005.
[3] Defence Appeal Concerning Admission of Record of Interview of the Accused From the Bar Table, 6 July 2005 ("Appeal").
[4] Response to "Defence Appeal Concerning Admission of Record of Interview of the Accused From the Bar Table", 18 July 2005 ("Response").
[5] Motion for the Appellant to Re-File an Oversized Appeal Brief, 8 July 2005 ("Motion to Re-File").
[6] IT/184 Rev.1
[7] Response to Prosecution Motion for Re-Filing of Defence Appeal, 11 July 2005 ("Defence Response").

5. It is well established in the jurisprudence of the Tribunal that an interlocutory appeal challenging the exercise of discretion by a Trial Chamber is not a hearing *de novo*. In reviewing the exercise of a Trial Chamber's discretion, the issue is not whether the Appeals Chamber agrees with the decision of the Trial Chamber but whether the Trial Chamber has abused its discretion in reaching that decision. For the Appeals Chamber to intervene in a Trial Chamber's exercise of discretion, the Appellant must demonstrate that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion or that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[9]

Grounds for Appeal

6. In this Appeal, the Appellant claims that the Trial Chamber erred in the means by which it permitted the record of interview to be received into evidence in an unqualified manner; by failing to find that the Appellant's participation in the interview was rendered involuntary on the basis of inducements offered by the Prosecution; by failing to consider that the circumstances in which the interview was conducted rendered the interview unreliable; and by failing to take into account the fact that at the time of the interview the Appellant was not represented by competent counsel. The Appellant argues that the Trial Chamber should have held that the record of interview was inadmissible or exercised its discretion pursuant to Rule 89(D) and excluded the record of interview to ensure the fair trial of the Appellant.

(i) Manner of Tendering the Record of Interview

7. The Appellant claims that the Trial Chamber erred by, over the Defence's objection, permitting the record of interview to be tendered from the bar table-that is, by allowing it to be submitted directly by counsel into evidence, rather than introducing it during a witness's testimony so that the witness could identify it and testify as to its foundation, and so that the opposing party could contest its foundation and admissibility.[10] The Appellant contends that it was improper to

[8] Defence Response, para. 4.
[9] *Prosecutor v Milosević*, Case No: IT-00-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, at paras. 9-10.
[10] Appeal, para. 6; Impugned Decision, para. 10.

permit his prior statements to be introduced in this manner when he had chosen not to testify in his own defence. [12]

8. The Appellant concedes, however, that tender from the bar table may be permitted if in compliance with Rule 89(B). That Rule provides that:

> in cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law.

9. However, the Appellant says that application of this Rule would make the record of interview inadmissible due to the alleged conduct of the Prosecution in persuading the Appellant to agree to give the interview. He says that the failure of the Prosecution to adduce evidence to rebut his allegations was a breach by the Prosecution of the best evidence rule as laid out in the Trial Chamber's guidelines on the conduct of the Trial.[13] The Appellant argues that the Trial Chamber erred when it failed to take this factor into account.[14]

10. The Appellant claims further that the admission of the record of interview conflicts with the principle supporting the orality of debates which underpins the procedure of the Tribunal. He argues that while the principle is not absolute, it is the guiding principle in determining the admissibility of evidence and that exceptions to that principle in the Rules have been interpreted narrowly.[15] He says that the admission of the record of interview from the bar table deprived him of an opportunity to challenge its reliability and to elicit evidence relevant to the conditions of its admissibility and thus violated his right to confront the evidence presented against him.[16]

11. The Appellant also claims that the Trial Chamber's reliance upon the *Kvočka* Appeals Chamber Judgement as precedent for the proposition that a party can tender a record of interview or statement of an accused person from the bar table regardless of whether that accused has given evidence and or agreed to that record being tendered, is erroneous.[17] He argues that it has been the general practice of the Tribunal not to admit prior statements of an accused where he or she has chosen not to testify, unless the accused agrees to that admission. Furthermore, the Appellant claims that the understanding of the Senior Trial Attorney in *Kvočka* to tender the record was the

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[12] Appeal, para. 9.
[13] Guidelines on the Standards Governing The Admission of Evidence, 16 February 2005 ("Guidelines").
[14] Appeal, para. 9.
[15] *Ibid*, para.11.
[16] *Ibid*, para. 13.
[17] *Ibid*, para. 14.

same point made by the Pre-Trial Judge in this case, Judge Kwon, who stated that he did not think the Appellant's statement could be used as evidence unless the Appellant testified.[18]

12. The Appellant claims further that the Trial Chamber's reliance upon the *Simić* and *Krstić* cases as supporting authority is also erroneous. In both cases, the accused agreed to the record of interview being tendered by the Prosecution, and in the *Krstić* case, the record of interview was used by the Prosecution to elicit evidence from witnesses, including the accused Krstić. This has not been the situation in the present case. [19] The Appellant claims that his position is consistent with the practice of the Tribunal in other cases. [20]

13. In Response, the Prosecution argues that the Appellant fails to specify how the Trial Chamber erred. It says that the Trial Chamber applied the relevant principles enunciated by the Appeals Chamber *Kvočka* in determining that the "relevant safeguards and procedural protections had been applied and that the evidence was reliable". It argues that this is consistent with Rule 89(B) of the Rules and as such no legal error has been shown.[21] The Prosecution refutes the Appellant's arguments concerning the principle of orality, stating that oral debate is not necessarily required in admitting documents into evidence and that the Trial Chamber did not err in finding that orality was not required upon it being satisfied that the interview was voluntary and the evidence reliable.[22] It further argues that the Trial Chamber's reliance on the *Kvočka*, *Simić* and *Krstić* precedents was solely for the purpose of establishing that there was no prohibition on admitting into evidence records of interview from the bar table as asserted by the Appellant. Accordingly, the Prosecution claims that no legal error has been established by the Appellant. [23]

Analysis

14. With respect to the Appellant's first argument, that the Rules do not permit a record of an interview with the accused to be tendered into evidence unless the accused has chosen to testify or has consented to the tender, the Appeals Chamber does not agree that the Rules impose such a categorical restriction. The Rules instead grant Trial Chambers considerable discretion on evidentiary matters; in particular Rule 89(C) states that a "Chamber may admit any relevant evidence which it deems to have probative value". Here the Trial Chamber was satisfied that the record of interview was relevant and probative, and the Appellant does not dispute these points.

[18] *Ibid*, para. 17.
[19] *Ibid*, paras. 18,19.
[20] *Ibid*, para. 20.
[21] Response, para.7.
[22] *Ibid*, para. 13.
[23] *Ibid*, paras. 15-16.

The Trial Chamber therefore had the discretion to admit the record, at least so long as doing so did not violate any of the specific restrictions outlined in the remainder of the Rules, nor the general principle of Rule 89(B) requiring application of "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".

15. The Appeals Chamber does not find that fairness or the "spirit of the Statute and general principles of law" require that the admissibility of an accused's prior statements turn on whether he has agreed to testify or consented to the admission. The Appellant's argument to the contrary rests implicitly on the right of an accused against self-incrimination. An accused has the right to refuse to give statements incriminating himself prior to trial, and he had the right to refuse to testify at trial. But where the accused has freely and voluntarily made statements prior to trial, he cannot later on choose to invoke his right against self-incrimination retroactively to shield those statements[24] from being introduced, provided he was informed about his right to remain silent before giving this statement; there is, however, a presumption that he knows about this right if he is assisted by counsel. Nor does the Appellant point to any provision of the Rules or rules of customary international law that specifically imposes such a restriction on the admission of an accused's prior statements. The Appeals Chamber therefore concludes that no such rules exists.

16. The Appellant's second complaint, that the method of introducing the evidence (via tender from the bar table) breached the principle of orality, is misplaced. There is to be sure, a general principle that witnesses before the Tribunal should give their evidence orally rather than have their statement entered into the record. The principle has its origin in the Roman law requirement that parties before a tribunal make submissions orally rather than in writing, and exists in various forms in common and civil law traditions today. The principle of orality and its complement, the principle of immediacy, act as analogues to common law hearsay rules and are meant to ensure the adversarial nature of criminal trials, and the right of the accused to confront witnesses against him.

17. However, the principle of orality, as reflected in the Rules, is not an absolute restriction, but instead simply constitutes a preference for the oral introduction of evidence. Rule 89(F) states that a "Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in

[24] Cf. *Niyitegeka v Prosecutor*, ICTR-96-14-A, Judgement, 9 July 2004, paras. 30-36.
[26] In addition Rules 92 *bis* specifically authorises and provides procedures for the admission of written witness statements under certain circumstances not applicable here (involving witness statements that go "to proof of a matter other than the acts and conducts of the accused as charged in the indictment").

written form.[26] The Tribunal's jurisprudence recognises that the interests of justice may often allow for the admission of prior statements of the accused. The principle of orality is weaker in application to the accused's own statements than to the testimony of other witnesses. As the Appeals Chamber explained in the *Kvočka* case, the rules of evidence applicable to witness testimony do not always apply to the statements of an accused: "[t]here is a fundamental difference between an accused, who might testify as a witness if he so chooses, and a witness". [28] The principle of orality is intended principally to ensure the accused's right to confront the witnesses against him, and in this respect its logic is not applicable to the accused's own statements. Moreover, to the extent that the principle of orality ensures that in-court witness testimony (generally understood to be more reliable) is used instead of those witnesses' out-of-court statements where possible, that logic is also less applicable to the accused's statements, for the accused may, as the Appellant did, refuse to testify.

18. Finally, the Appellant argues that the Trial Chamber breached its own guidelines for the application of the best evidence Rule by admitting the statement without first requiring the Prosecution to call witnesses to rebut the allegations of the Appellant regarding the circumstances surrounding the taking of the record of interview. In the guidelines issued on the conduct of the trial the Trial Chamber stated that:

> The "best evidence rule" will be applied in the determination of matters before this Trial Chamber. This means that the Trial Chamber will rely on the best evidence available in the circumstances of the case and parties are directed to regulate the production of their evidence along these lines. What is the best evidence will depend on the particular circumstances attached to each document and to the complexity of this case and the investigations that proceeded it.[31]

19. The Appeals Chamber is not satisfied that the Trial Chamber breached its own guidelines for application of the best evidence Rule that witnesses must always be called. The Guidelines reflect the large measure of discretion that the Trial Chamber has to determine under the Rule whether or not it is necessary, in the particular circumstances of a case, to call witnesses to establish the authenticity of a document as the best evidence. Where that document is a record of interview with an accused, and the Trial Chamber is satisfied that the interview has been conducted in compliance with Rule 63, which includes application of the recording procedure of Rule 43, and adherence to

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[28] *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, paras. 122-126 ("*Kvočka* Appeals Judgement").
[31] Guidelines, Annex, para. 8.

the caution requirements of Rule 42(A) (iii), it is well within the discretion of the Trial Chamber not to require further evidence of the circumstances of that interview to establish its authenticity.

(ii) Voluntariness of the Interview

20. Next, the Appellant argues that prior to admitting the record of interview of an accused, the Trial Chamber had an obligation to ensure that it was obtained voluntarily. The Appellant contends that the Defence had argued at trial that the record of interview was obtained by impermissible inducement and cannot be said to have been obtained voluntarily as required by the Rules. He claims that the Trial Chamber erred in several respects in finding that there had been no inducement on the part of the Prosecution, which vitiated the voluntariness of the interview, rendering it inadmissible.

21. The Appellant argues that the Appeals Chamber has made clear that "a pre-requisite for admission of evidence must be compliance by the moving party with any relevant safeguards and procedural protections and that it must be shown that the evidence is reliable".[32] He says that the argument of the Prosecution that viewing the interview and reading the transcript "provide proof beyond reasonable doubt that it was voluntary" is incorrect. His claim is that the inducement took place prior to the interview. The Appellant argues further that contrary to the claim of the Prosecution, the burden of proof that the statements were made voluntarily rests squarely on the Prosecution at all times.[33]

22. The Appellant claims that the actual content of the interview is irrelevant to this issue and that the Trial Chamber erred by stating that to vitiate consent the inducement must be shown to have led the accused "to make an admission, or in other words, to incriminate himself".[34] He says that this proposition is wrong in law and that, in any event, "the Trial Chamber had to be satisfied that at least some of the evidence contained in the record of interview was incriminatory – and thus relevant to the charges – lest the record of interview would become irrelevant and therefore un-admissible pursuant to Rule 89(C)." [35]

23. The Appellant argues that the promise of provisional release in exchange for an accused's full cooperation or giving of an interview has been considered in national jurisdictions to be a

[32] Appeal, para. 25.
[33] *Ibid*, para. 27.
[34] *Ibid*, para. 28.
[35] *Ibid*.

typical inducement that would lead to the exclusion of the statement.[36] The same applies to the inducement that prosecution might be avoided if an accused gives the Prosecution the information it seeks. He claims that both of these inducements were offered to him in this case.[37] The Appellant argues that it is not a requirement that the inducement is agreed to by the parties. All that needs to be shown is the communication of an inducement and the understanding of it by the accused. He claims that the Trial Chamber "erred when suggesting that only where an "agreement" has been reached between the prosecution and the Defence could there be said to be an impermissible inducement".[38]

24. The Appellant says that he is on record as claiming that an inducement was offered and that the Prosecutor herself recognised this. In a letter to the Defence, the Prosecutor stated that:

> I met Mr Balijagić and told him that a full cooperation of Mr Halilović could have a positive influence on the Prosecution's position in respect to a potential application for provisional release.

The Appellant says that while the Prosecutor denies that the issue of withdrawal of the indictment had been discussed, she does not address the issue of whether that matter was raised at another time or by others in her office in her letter. He says that the Prosecution failed to provide his Defence team with records of conversations between the Office of the Prosecutor and Mr Balijagić despite repeated requests by the Defence. The Prosecution's response was that no such records had been kept.[39] However, the Appellant claims that the fact that such an offer was made by the Prosecution is supported and confirmed by the statements made by him in his letter of 11 August 2004 to the Disciplinary Panel of the ICTY.[40]

25. The Appellant further claims that there is clear evidence of an inducement having been offered in the form of a conditional promise to withdraw charges, set out in the record of interview itself. The Appellant refers to the following exchange:

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[36] *Ibid*, para. 29.
[37] *Ibid.*
[38] *Ibid*, para. 30.
[39] *Ibid*, para. 33.
[40] *Ibid*, para. 34 ("Mr Balijagić explained to me that the main condition for the defence from freedom (i.e. provisional release) is giving an interview to the Hague investigators. Since I was in temporary arrest, I agreed to fulfil that condition so that I could defend myself from freedom. Of course, only later, I realised that there are few conditions for the defence from freedom, from which the crucial one is the Prosecution's estimation that the person will not present a threat for the witnesses and (or) victims. In any case, after the previous guarantees of the Government of Federation (of Bosnia and Herzegovina) (were given), the Prosecution agreed right away and the Court Council (i.e. the Trial Chamber) gave a possibility for the defence from freedom, which, now it is clear, could have been done even without the mentioned interview.")

(Mr Halilović): I would like to ask Mr Nikolai, I was actually told by my attorney that an agreement was reached with Ms Prosecutor, Carla Del Ponte concerning our, that is my, cooperation with the Prosecutor, that is with the prosecution and that in relation to that certain agreements had been made.

However, obviously those agreements are not being respected and before the continuation that a break be taken so that my lawyer can have conversation in the Office of the Prosecutor so that we confirm or deny what we have agreed upon so that after that we could take a decision on how to proceed.

I want to continue the cooperation with the ICTY and that this in no way means the cessation of the cooperation, but I would like to ask that a break be given so that my lawyer can resolve this matter. We have, and I have absolutely fulfilled all the requests that were made to me by the prosecution and of course I am ready to fulfil all the requests that the Prosecutor sets to me with the aim of establishing the truth, whatever it may be. But I wish to get an answer to the question on the reached agreement so that we know how to proceed.

(Mr Balijagić): Mr Investigator, I have had four official meetings with Ms Carla Del Ponte. We have made certain agreements. Let me stress that I did not arrange the meetings with Ms Del Ponte through the Registry but I came upon her call. I had felt that one group of the Prosecutor's associates is influenced by Ms Vasvija Vidovic. That's why I asked Ms Del Ponte whether her subordinates obey her, in realisation of certain agreements with Ms Del Ponte who is the Chief Prosecutor of this Court, so a person whose word ought to be respected. I would ask you for a shorter break, so that you can inform your superiors so that we can clarify these matters. Will the word of Ms Del Ponte be respected or not?! That's why I would like to ask you for a short break, until we resolve this matter, and I would like to ask you to inform Ms Del Ponte or the person who replaces here, or Mr Patrick who is familiar with this situation, or Mr Bob who also knows about this situation and with whom I have had very correct contacts, thanks you kindly.

The Appellant claims that none of the staff present during the interview reacted to these comments, and that in place of a denial, "which would have been required of the prosecution had no such promise been made, Mr Mikhailov, prosecution investigator, called for a break in the interview. He did not discuss this matter when the interview started again awhile later. There is no record of what was discussed, if anything, during the break between Mr Balijagić and OTP members".[41]

26. The Appellant argues that while the Trial Chamber acknowledged the incident in the Impugned Decision it dealt with it inadequately. It noted that "after the break the interview continued with no mention from the Defence Counsel or the Accused of whether any meeting took place or whether any clarification in relation to the alleged agreements has been offered", and in so doing, the Appellant contends that it committed two errors. It allegedly reversed the burden of proof in that it reasoned that unless the Defence was able to establish that its understanding of the promise thought to have been made by the Prosecution had not been clarified during the break, it should not be presumed to have occurred. And "insofar as it would have been for the prosecution to

establish that the matter was indeed clarified during the break and that, despite that clarification, the accused agreed to continue with the interview" no such inference could be drawn on the evidence.[42] The second error alleged by the Appellant is that, regardless of what happened during the break in the interview, the only inference available to the Trial Chamber was that, at least up until that point in the interview, the Appellant was participating in that interview on the understanding that the charges against him might be withdrawn. The Appellant argues that at the very least the Trial Chamber should have excluded the interview up until that point.[43]

27. The Appellant argues further that the only evidence available to the Trial Chamber indicated that the whole of the interview was affected by the indictment. At an earlier stage of the interview Mr Balijagić had indicated his understanding that the interview was proceeding on the basis that the Prosecution offered to withdraw the indictment should certain circumstances be established by the interview. The Appellant claims that at no time did the OTP staff present react to that suggestion or deny that such a promise had been made.[44]

28. The Appellant says that on 10 February 2003, the matter was discussed again in open court. New counsel for the Appellant, Mr Caglar, stated in open court that the Appellant's previous counsel Mr Balijagić had informed him about the existence of an agreement between the Prosecution and the Defence that under certain circumstances, the indictment against the Appellant would be withdrawn.[45]

29. The Appellant says that at the same Status Conference he also made it clear that the actions of Mr Balijagić had been dictated by what he understood to be an agreement with the Prosecution regarding the withdrawal of the charges against him:

> Before coming to this Status Conference I spoke with Mr Balijagić I asked him why he didn't object – why he hadn't objected to the indictment because I wanted to state something about it here and ask the Trial Chamber to ensure that I didn't suffer because of what the lawyers failed to do.
>
> His explanation was that he didn't object to the indictment, as he said, because of operations which were in course with the Prosecution, and also because he had reached an agreement with the Prosecution according to which the indictment would be withdrawn at a given moment in time. And this agreement, Balijagić said, is an agreement he reached with the chief Prosecutor, Carla Del Ponte. This is something he stated in front of witnesses on several occasions.

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[41] *Ibid*, para. 35.
[42] *Ibid*, para. 36.
[43] *Ibid*, para 37.
[44] *Ibid*, para.38.
[45] *Ibid*, para. 39.

The Appellant claims further that the existence of such a promise was also acknowledged by Mr Balijagić in a letter to the Disciplinary Panel:

> The representatives of the prosecution said that, that is also a possibility and if Mr Halilović proves that he was not the commanding officer of operation "Neretva 93" the prosecution shall withdraw the indictment.

The Appellant argues that it was only after these promises of conditional support for provisional release and withdrawal of charges had been made that he agreed to be interviewed. The Appellant submits that it was up to the Prosecution to establish that these promises had no effect on his decision to be interviewed and that it failed to do so.[46]

30. The Appellant also argues that the Trial Chamber erred in denying his request for a *voir dire* hearing on the basis that it was not necessary. He says that that finding could be considered a breach of the fair trial guarantee in that it denied the Defence a fair opportunity to access evidence which might have been relevant to its case in this matter. He argues that not only did the Trial Chamber erroneously place the burden of proof on him, but also disregarded clear evidence of an absence of voluntariness and prevented the Defence from obtaining further evidence of that absence. The Appellant says that the voluntariness of the interview was presumed by the Trial Chamber and not proved by the Prosecution and that evidence to the contrary was dismissed by the Trial Chamber as irrelevant or insufficient, further evidencing error on the part of the Trial Chamber.[47]

31. In Response, the Prosecution argues that the finding of the Trial Chamber at paragraph 11 of the Impugned Decision, that there is no evidence in support of the Defence's allegations of promises offered by the Prosecution in relation to the Accused's release and/or as to a withdrawal of the indictment to induce the Accused to give the interview, is plainly correct.[48] It says that the evidence before the Trial Chamber was uncontradicted, showing that the interview had been taken in accordance with Rule 63 and that there was no evidence from which it could find that the interview was other than voluntary and taken in accordance with the Rules. As such, it says that no error has been established by the Appellant.[49]

32. With respect to the Appellant's claim of error on the part of the Trial Chamber in shifting the burden of proof to the Appellant regarding the voluntariness of the interview, the Prosecution says

[46] *Ibid*, para. 40.
[47] *Ibid*, paras. 48-49.
[48] Response, para.18.

that the burden always rested on it. However, it says that Rule 92 provides for a shifting evidentiary burden to the Appellant once it is established that the requirements of Rule 63 were complied with. It argues that there was no evidence before the Trial Chamber to establish that the interview was other than voluntary.[50] It argues further that allegations of inducement made by the Appellant were refuted by the Prosecution evidence, and "from the mouth of Mr Halilović himself, on tape, at the very end of the interview".[51] It further claims that at the status conference Mr Halilović stated that when he asked his lawyer why he had not challenged the indictment he was told that this was because discussions were being held with the Prosecution by which the indictment could be withdrawn at anytime. The Prosecution claims that this shows that he was not aware of that alleged inducement until some fourteen months after the interview had been concluded.[52]

33. The Prosecution further refutes the arguments of the Appellant that the Trial Chamber erred by suggesting that only where an agreement had been reached between the Prosecution and Defence could there be said to be an impermissible inducement. It claims that the Appellant misreads paragraph 16 of the Impugned Decision which only finds "that the alleged statements made by the Prosecution could not amount to inducements that could induce the Accused to give information that might contain self incriminating evidence". Accordingly, it claims that no error has been established by the Appellant.[53]

Analysis

34. In the Impugned Decision, the Trial Chamber accepted that the Prosecution had represented to the Appellant that "a full cooperation of Mr Halilović could have a positive influence on the Prosecution's position in respect of an application for provisional release".[54] However, the Trial Chamber reasoned that that statement could not be considered an inducement because the Prosecution did not offer a "promise of provisional release, but only indicated to the Accused that in case of full cooperation the Prosecution would favourably support a potential application for provisional release", which may only actually be granted by a Trial Chamber.[55] The Trial Chamber bolstered this view by noting that the Appellant was represented by Defence Counsel who must

[49] *Ibid*, para. 20.
[50] *Ibid*, paras. 21-22.
[51] *Ibid*, paras. 27-28.
[52] *Ibid*, paras. 29-30.
[53] *Ibid*, para. 32.
[54] Impugned Decision, para. 13.
[55] *Ibid.*

have known that cooperation by an accused with the Prosecution was not a necessary requirement to a grant of provisional release.[56]

35. The Appeals Chamber does not agree that the Prosecution's inability to grant the Appellant provisional release means that the Prosecution's statement that full cooperation by the Appellant "could have a positive influence on the Prosecution's position in respect of a potential application for provisional release" did not amount to an inducement to the Appellant. Such a statement is clearly an inducement because it provides the incentive of a possible reward for cooperation. While cooperation with the Prosecution is not a condition of provisional release, non-cooperation is often cited by the Prosecution as a ground of opposition to an application for provisional release before the Chambers at this Tribunal. Decisions of the Appeals Chamber have made it abundantly clear that a first principle of this Tribunal is that "an accused is not required to assist the Prosecution in proving its case against them"[57] by agreeing to be interviewed by it. Nevertheless as this case shows, the Prosecution has continued to use its influence over an application for provisional release, e.g. by not opposing or even supporting it- provided that the accused is informed in advance that such support is never binding on the competent Chamber -, to persuade accused that it is in their interest to cooperate.

36. Accused at this Tribunal are charged with particularly serious crimes. If convicted they can expect lengthy sentences. Their trials are long and complex, and it is generally to be expected that an accused person will spend a number of years waiting for their trial to commence. Detained at The Hague, accused are often denied frequent contact with their families and friends who are financially prevented from making frequent visits from the former Yugoslavia. Taking into account the context of this Tribunal, a statement by the Prosecutor that it may not oppose an accused's application for provisional release can be a powerful incentive for an accused to speak when he may otherwise have chosen to remain silent. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that the statement of the Prosecution was not an inducement to the Appellant to be interviewed.

37. However, whether the Prosecution's inducement was of an impermissible nature, i.e., whether it rendered the participation of the Appellant in the record of interview involuntary, is another issue. In the Impugned Decision, the Trial Chamber found that the statement of the Prosecution "was not such as to induce the Accused to make an admission, or in other words, to incriminate himself in return for the Prosecution support for his application for provisional

[56] *Ibid.*

release".[58] The Trial Chamber based this finding on the fact that from the time of his initial appearance on 27 September 2001, the Appellant made clear his intention to cooperate fully with the Tribunal regardless of the impact of that cooperation on findings against him.[59] The Trial Chamber also referred to the fact that in the record of interview, the Accused stated at the end that "no threat, promise or inducement" had been made to him in order to convince him to give the answers and the interview had been fair and correct.[60] On the basis of this evidence, the Trial Chamber found "that the position of the Prosecution at the time in relation to the Accused's application for provisional release did not amount to an inducement that affected the voluntariness of the interview".[61]

38. Prosecutorial offers that serve as inducements to the accused's cooperation may, if the inducement is sufficiently powerful, render statements made pursuant to that cooperation involuntary. In other cases, however, the inducement is simply an incentive; the fact that the accused may have taken this incentive into account when deciding whether to cooperate does not mean that the defendant was not acting voluntarily. Under the circumstances of this case, the Appeals Chamber is not satisfied that the Trial Chamber erred in finding that the statement of the Prosecution that the Appellant's cooperation "could have a positive influence on the Prosecution's position in respect of an application for provisional release" did not have the effect of rendering the Appellant's participation in the interview involuntary. While that statement may have provided an incentive to the Appellant to cooperate, it is not unreasonable to conclude that it did not have the effect of rendering that participation involuntary.

39. However, although the Prosecution's statement may not have been of such a nature as to coerce the Appellant into cooperating with the Prosecution, it does not undermine its nature as an inducement understood as an incentive to cooperate. This was a relevant factor to be considered by the Trial Chamber in considering whether to permit the tender of the record of interview from the bar table, and the Trial Chamber erred in failing to take it into consideration when exercising its discretion to admit the record of interview.

40. Further, the Appeals Chamber is not satisfied that the Trial Chamber adequately dealt with the Appellant's claim that, prior to giving the interview, a statement was given by the Prosecution that the indictment might be withdrawn if the Appellant provided information showing that that

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[57] *Prosecutor v Franko Simatović*, Case No: IT-03-39-AR65.2, Decision on Prosecution's Appeal Against Decision on Provisional Release, 3 December 2004, para. 9.
[58] Impugned Decision, para.14.
[59] *Ibid*, para.12.
[60] *Ibid*, para. 14.
[61] *Ibid.*

course was warranted. In dealing with this allegation, the Trial Chamber noted that at one point in the interview the Appellant and his Defence counsel raised the issue of certain agreements reached with the Prosecutor and asked for a break in the interview in order to clarify whether those agreements reached with the Prosecution were to be respected.[62] After the break the interview continued without any clarification on the record of what those alleged agreements were. The Trial Chamber placed no emphasis upon this break in the interview and the Appeals Chamber finds that it erred in failing to do so. The break in the record of interview indicated that the Appellant's cooperation was conditioned on his understanding that certain agreements had been reached. This break in the record and the statements made by the Appellant and his counsel prior to that break provide some support to the Appellant's argument that he would not have cooperated absent those agreements. The Appeals Chamber is satisfied that the Trial Chamber erred in failing to take this factor into account in its assessment of the voluntariness of the interview.

41. The purpose of requiring that an interview with an accused be recorded is to ensure that the accused's rights are respected at all times. Rule 43(ii) provides that, in the event of a break in the course of questioning, the fact and time of the break shall be recorded. While the Rules do not explicitly require, when an interview is stopped to address an on-the-record question of the Appellant that clearly implicates the potential non-voluntariness of the interview, that the parties " get an answer to the question on reached agreement so that we know how to proceed", the interview should recommence with a full explanation of what has occurred in the break and what understanding had been reached by the parties. It is only in this way that the Chamber can be satisfied that the rights of accused are in fact protected.

42. In determining that there was nothing improper about what occurred in the interview, the Trial Chamber relied upon statements made by the Prosecution at a Status Conference to the effect that it had never intended to withdraw the indictment, and a letter from the Prosecutor that at her meeting with Mr Halilović on 11 October 2001, "the issue of a potential withdrawal of the indictment against Mr Halilović was not even touched upon".[63] However, these statements made after the fact cannot remedy the failure of the Prosecution to ensure at the time of the interview that the Appellant and his Counsel were not labouring under the misapprehension that should the Appellant cooperate and clear himself of the charges, there was a possibility of a withdrawal of the Indictment by the Prosecutor. Whether or not the Prosecution did give such a statement is not clear; however, on the evidence of the record of interview there is a reasonable possibility that the

[62] *Ibid*, para. 15.
[63] *Ibid*, para. 15.

Appellant was labouring under that misapprehension, and the Prosecution failed to avail itself of the opportunity to make it abundantly clear in the record of interview that this was not the case.

43. In the Impugned Decision, the Trial Chamber found that the alleged statements made to the Appellant "could not in any case amount to 'agreements' that could induce the Accused to give information that might contain self-incriminating evidence, but merely indicate the Prosecution's intent to conditionally withdraw the indictment should the evidence appear insufficient to support its case".[64] In making this finding, the Trial Chamber referred to the statements made by the Defence that "promises were made to Mr Halilović that, should he fully cooperate with the prosecution, (...) and (...) should he be able to convince the prosecution of his innocence, the indictment would be withdrawn," and statements made by Mr Balijagić in a letter to the Disciplinary Panel of the Tribunal that "(t)he representatives of the prosecution (had informed him) that (...) if Mr Halilović proves that he was not the commanding officer of the 'Operation Neretva 93' the prosecution shall withdraw the indictment".[65]

44. When a suspect is detained by police, it is quite usual for the police in seeking to interview that suspect to represent that should he or she be able to provide evidence capable of casting doubt on the suspicions of the police about his or her involvement in an alleged crime, then the matter could be closed. In that situation, there is nothing improper about the police attempting to persuade a suspect to cooperate, provided that the suspect is fully apprised of his or her rights. However, when a person moves from being a suspect to an accused, in most instances the possibility of charges not being pressed is lost. The indictment seeks to establish a *prima facie* case, and the accused will be required to meet that case at trial. This same situation applies to accused charged at this Tribunal. The confirmation of an indictment by a confirming Judge pursuant to Rule 47 means that the Prosecution has established a *prima facie* case against an accused to the satisfaction of one of the Judges at this Tribunal. Once that process has occurred, for an indictment against an accused to be withdrawn, the Prosecution must make application pursuant to Rule 51 to the conforming Judge or a Judge assigned by the President. It is not to be assumed that such a withdrawal would be granted by a Judge without that Judge being satisfied that continuation of that prosecution is no longer warranted. In this circumstance, it is not entirely clear whether the Prosecution should be able to induce an accused to cooperate by an offer of withdrawal of an indictment without full explanation to the accused of what that process entails. In any event, it is also not clear whether such a statement could be said to have the effect of rendering an accused's participation in a record

[64] *Ibid*, para. 16.
[65] *Ibid.*

of interview involuntary. In this case, the Appellant claims that that was indeed the effect of the Prosecution's statement.

45. The Prosecution strongly denies having offered such an inducement and the Trial Chamber accepted those denials. However, the Appeals Chamber has already expressed its discomfort with the break in the interview and lack of clarification following the break in the interview. Upon this basis alone, the Appeals Chamber is satisfied that the Trial Chamber erred in failing to consider that the break in interview did raise the reasonable possibility that the Appellant, in giving the interview, was labouring under the misapprehension that his cooperation could lead to the withdrawal of the indictment against him. This factor is relevant in considering whether it was fair to the Appellant to allow the record of interview to be admitted from the bar table. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to take this factor into account in determining whether or not to admit the record of interview.

46. Further, in light of the evidence raised by the Appellant in relation to the voluntariness of the interview, it was incumbent on the Trial Chamber to fully explore the circumstances surrounding the taking of that interview. While the Trial Chamber itself did not refer to Rule 92 of the Rules[66] it appears that the Trial Chamber was applying the principle underlying that Rule in reaching its decision. That Rule does permit the Trial Chamber to accept that a duly recorded interview with an accused is voluntary, moving the burden to establish otherwise to the accused. In this case, however, the requested break in the interview itself should have been sufficient to raise the concern of the Chamber to explore more fully the voluntariness of that interview. This does not necessarily require the holding of a *voir dire*, although there may be certain advantages in doing so.

(iii) Reliability of the Interview

47. The Appellant claims that the Trial Chamber failed to make a finding as to whether the record of interview was sufficiently reliable to be admitted and that in failing to do so, the Trial Chamber erred.[67] The Appellant argues that the Trial Chamber's error seems to be based upon the erroneous view that the reliability of an exhibit is relevant only to its weight and not to its admissibility.[68] The Appellant says that precedent of the Appeals Chamber make clear that this is not correct. Before admitting the record of interview, the Trial Chamber must be satisfied that the

[66] A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.
[67] Appeal, para. 51.
[68] *Ibid*, para. 52.

evidence is reliable and in considering its reliability, it may consider both the content of the evidence and the circumstances in which it arose.[69]

48. The Appellant says that if the Trial Chamber had considered reliability, it would have found that the record was not sufficiently reliable to be admitted. He argues that such a finding would have necessarily followed consideration of the circumstances in which the interview was taken: (i) the inducement offered to Mr Halilović, (ii) length of the interview, (iii) the fact that Mr Halilović was imprisoned at all times during the interview and was under the apprehension that his release depended upon full cooperation with the prosecution, including his being interviewed, (iv) the fact that the prosecution did not keep any records of meetings between members of the OTP and counsel for the accused, and (v) lack of effective representation on the part of counsel (see below). The Appellant argues therefore that the Trial Chamber erred in admitting the record of interview.[70]

49. The Appellant also claims that the Trial Chamber erred when "after having examined the content of the interview", it found that "the admission into evidence of the record of interview cannot be considered contrary to the demands of a fair trial".[71] The Appellant claims that the Trial Chamber should have excluded the record of interview pursuant to Rule 89(D) as being unfair to him. The Appellant says that "not being able to explain, qualify or otherwise comment on the evidence contained in the record where necessary, short of renouncing his right to silence, Mr Halilović is being gravely prejudiced".[72]

50. Taking account of all these circumstances, the Appellant says that the Trial Chamber should have exercised its discretion pursuant to Rules 89(D) and 95 and excluded the record of interview, "both to ensure a fair trial for the accused and to prevent the admission of evidence obtained by methods which cast substantial doubt on its reliability and damage the integrity of the proceedings".[73] The Appellant says that the Trial Chamber erred in failing to do so and that the Appeals Chamber can exercise those powers for itself and should do so in this case.[74]

51. In Response, the Prosecution argues that the complaint of the Appellant is a failure on the part of the Trial Chamber to explicitly state that it found the interview to be reliable before admitting it into evidence. It argues that it is implicit in the Impugned Decision that the Trial Chamber did consider the interview, once it determined it to be voluntary to also be reliable. It says

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[69] *Ibid*, para. 53.
[70] *Ibid*, para. 54.
[71] *Ibid*, para.55.
[72] *Ibid*, para. 57.
[73] *Ibid*, para. 58.
[74] *Ibid*, para. 58.

that no error has been demonstrated by the Appellant.[75] With respect to the argument of the Appellant that the Trial Chamber erred in failing to exercise its discretion to exclude the interview pursuant to Rules 89(D) and 95, the Prosecution argues that this is a discretionary exclusion whereby an otherwise relevant and probative piece of evidence may be excluded "if its probative value is substantially outweighed by the need to ensure a fair trial".[76] It says that the Appellant has failed to identify how the Trial Chamber erred in failing to exclude the interview on discretionary grounds once it had determined that it was voluntary and thus relevant and probative.[77]

Analysis

52. In the Impugned Decision, the Trial Chamber found that the record of interview was admissible because it had been conducted in full accordance with the relevant Rules and that no inducement had been offered to undermine the voluntariness of the interview.[78] As such, the Trial Chamber was satisfied that the interview was sufficiently reliable for it to be admissible.

53. Further, in light of the circumstances found by the Trial Chamber, Rule 95, which provides: "no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings," was inapplicable as a basis to exclude the record of interview.

54. However, the Appeals Chamber has found that the Trial Chamber erred in failing to consider that the statement to the Appellant by the Prosecution that his cooperation with it could have a positive influence on the Prosecution's position regarding any application he may make for provisional release did constitute an inducement and that it erred in failing to take into account the break in the interview as establishing the reasonable possibility that the Appellant was labouring under some misapprehension as to the possible outcome of his agreeing to be interviewed. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to take into account relevant considerations when exercising its discretion to admit the record of interview.

(iv) Ineffective Representation by Counsel

55. Finally, the Appellant argues that the Trial Chamber erred in finding that the Accused was effectively represented by his Defence Counsel at the time of the interview. The Appellant says that

[75] Response, para. 41.
[76] *Ibid*, para. 44.
[77] *Ibid*, para. 45.
[78] Impugned Decision, para. 18.

the Trial Chamber failed to consider any of the evidence presented by it concerning the incompetence of Mr Balijagić and that the Trial Chamber erred when failing to consider that evidence and attach weight to it.[79] He claims further that the Trial Chamber erred in concluding that he was effectively represented at the time of giving the interview. He says that the general incompetence of Mr Balijagić is duly recorded. On 29 October 2002, Prosecution lead counsel stated that:

> On the Defence side, as you know, Your Honour, nothing, literally nothing happened other than what can be described as a total mess caused by the accused and his previous Defence counsel, Mr Balijagić.[80]

The Registrar's decision to withdraw Mr Balijagić as counsel for the Appellant stated that:

> **CONSIDERING** that in view of the incoherent and partly conflicting statements of Mr Balijagić regarding his representation, and the other available information which seems to put in doubt the quality of the representation of the accused by Mr Balijagić, it does not appear that the accused is adequately represented at this time and that this situation could have adverse consequences for the accused;[81]

The Appellant says that Mr Balijagić asked to withdraw from the case on 12 April 2002, due to his difficulty in representing the Appellant's interests.[82]

56. The Appellant claims that Mr Balijagić failed to file any motion on the form of the indictment on the basis that the indictment would be withdrawn and took no other steps to make the case trial ready. He argues that the few steps he did take proved to be contrary to his interests and gives the example of an agreement concluded by Mr Balijagić with the Prosecution in relation to "agreed facts" which was declared void by the Trial Chamber at the pre-trial stage on the basis that the Appellant had not been effectively represented at the time.[83]

57. The Appellant claims further that the participation of Mr Balijagić during the record of interview was "inappropriate and ineffective" and that his interventions "were for the most part unprofessional and incoherent, at times verging on the irrational".[84] Accordingly, he says that contrary to the findings of the Trial Chamber the representation of Mr Balijagić "was in fact destructive and contrary to his clients best interests".[85] The Appellant says that the Trial Chamber failed to consider all the evidence showing the incompetence of Mr Balijagić and erred in

[79] Appeal, para. 65.
[80] *Ibid*, para. 67.
[81] *Ibid*, para. 68.
[82] *Ibid*, para. 69.
[83] *Ibid*, para. 70.
[84] *Ibid*, para. 71.

concluding that he was effectively represented at the time of the interview. He argues that the Appeals Chamber should exercise its discretion and exclude the record of interview.[86]

58. The Appellant further claims that the Trial Chamber erred in failing to render a reasoned opinion on the issue of his representation by Mr Balijagić and that this failure breached his entitlement to a reasoned opinion under the Statute of the Tribunal and international law in general.[87]

59. The Appellant argues that in determining whether the record of interview was voluntary, the Trial Chamber should also have considered the absence of effective representation. The Appellant claims had it done so, it could not have admitted the record of interview. He refers to an analogous situation in *Blagojević et al* in which doubts were raised about the effectiveness of the representation of Mr Jokić at the time he was interviewed by the OTP. The Appellant says that the Trial Chamber properly found in that case that:

> it is unable to rely on the interviews with Dragan Jokić as an indisputably reliable source of information upon which to determine issues in this case and has concerns in relation to Mr Jokić's legal representation at the interviews, the Trial Chamber declines to admit the statements into evidence at this stage.[88]

The Appellant says that the Trial Chamber should have made the same finding in his case and erred by not doing so.[89]

60. In Response, the Prosecution says that the Appellant actually produced no evidence to establish that Mr Balijagić provided incompetent representation during the interview.[90] It argues that the Registrar's decision withdrawing Mr Balijagić's representation contains nothing of relevance to the Appellant's representation during the interview. It says that there is no error in the Trial Chamber's finding that the record of interview "shows that the Accused was effectively represented by Defence counsel".[91] The Prosecution argues further that the pre-trial record shows effective representation by Mr Balijagić in making his provisional release application.[92]

Analysis

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[85] *Ibid*, para. 71.
[86] *Ibid*, para. 72.
[87] *Ibid*, para. 73.
[88] *Ibid*, para. 78.
[89] *Ibid*.
[90] Response, paras. 49-50.
[91] *Ibid*, para. 51.

61. In finding that the Appellant was sufficiently represented by Defence Counsel, the Trial Chamber noted that at the time of the interview, the Appellant was assisted by a Defence Counsel of his own choosing and assigned by the Registrar.[93] It found that he was informed of his rights in the presence of his Counsel and understood that any statements that he made may be used in evidence against him and that he was effectively represented throughout the interview.[94] However, while making these findings, the Trial Chamber did not address the issue of Mr Balijagić's actual competence to adequately represent the interests of the Appellant or explain why it did not consider that the evidence adduced by the Defence of Mr Balijagić incompetence was insufficient to establish that fact.

62. On the evidence placed before the Trial Chamber, the Appeals Chamber is not satisfied that the Trial Chamber gave sufficient weight to the evidence showing Mr Balilagić to be incompetent to represent the interests of the Appellant. Both the statements of the Prosecution and the decision of the Registrar to withdraw Mr Baliljagić as assigned Counsel to the Appellant clearly indicate that Mr Balijagić was incompetent to provide effective representation to the Appellant. Indeed, the Registrar's Order explicitly states that the withdrawal is based upon "available information which seems to put in doubt the quality of the representation of the accused" and states that "it does not appear that the accused is adequately represented". It cannot be reasonably assumed, as it appears that the Trial Chamber did presume, Mr Baliljagić developed his incompetence at some time after the interview. Accordingly, the Appeals Chamber is satisfied that the Trial Chamber erred in failing to take this factor into account in exercising its discretion to admit the record of interview.

Conclusion

63. The Appeals Chamber finds that the Trial Chamber erred in failing to take into account three relevant considerations. The Trial Chamber failed to take into account that the Prosecution's statement regarding its possible position concerning a future application for provisional release was an inducement, even though it was not of such a nature that coerced or overbore the will of the Appellant but acted as an incentive only. The Trial Chamber also failed to take into account the lack of clarification of the discussion that occurred regarding "agreements" with the Prosecution during the break in the record of interview and the reasonable possibility that the Appellant was labouring under the misapprehension that the indictment may be withdrawn should he cooperate. And the Trial Chamber failed to take into account the inadequate representation of the Appellant by Defence Counsel at the time of the record of interview.

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[92] Response, paras. 55-58.
[93] Impugned Decision, para. 18.

64. Where the Appeals Chamber is satisfied that a Trial Chamber has erred, the Appeals Chamber may substitute the exercise of its own discretion for that of the Trial Chamber if it considers it appropriate to do so. In the ordinary case involving an evidentiary question before a Trial Chamber, the Appeals Chamber may consider sending the matter back to the Trial Chamber with an order that it consider the factors identified as relevant by the Appeals Chamber and exercise its discretion afresh. In this case, however, the parties are awaiting the Appeals Chamber decision so that they may file their final submissions and close the trial. Accordingly, the Appeals Chamber has determined that it is more appropriate in this instance for it to substitute its discretion for that of the Trial Chamber.

65. Taking into account all of the circumstances, and considering the relevant factors identified above that the Trial Chamber failed to properly consider, the Appeals Chamber has determined to exercise its discretion pursuant to Rule 89(D) and exclude the record of interview from the Trial record in the interests of fairness to the Appellant. The Trial Chamber is therefore ordered to expunge the record of interview from the trial record.

Disposition

66. The Appeal is allowed and the record of interview rendered inadmissible in the trial of the Appellant.

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

Dated this 19th day of August 2005,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding

[Seal of the Tribunal]

[94] *Ibid*, para. 18.