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SCSL-04-14-T
(14879-14908)

14879

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Hon. Justice Pierre Boutet, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Benjamin Mutanga Itoe

Interim Registrar: Mr. Lovemore Munlo SC

Date filed: 8 February 2006

THE PROSECUTOR **Against** **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

PUBLIC

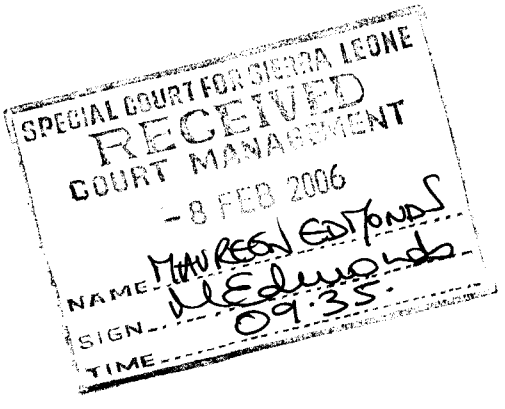
PROSECUTION RESPONSE TO FIRST ACCUSED'S URGENT MOTION FOR LEAVE TO FILE ADDITIONAL WITNESS AND EXHIBITS LISTS

Office of the Prosecutor:
Christopher Staker
James C. Johnson
Kevin Tavener
Nina Jørgensen

Court Appointed Defence Counsel for Norman
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Alusine Sani Sesay
Clare DaSilva *(Legal Assistant)*

Court Appointed Defence Counsel for Fofana
Victor Koppe
Arrow J. Bockarie
Michiel Pestman
Andrew Ianuzzi *(Legal Assistant)*

Court Appointed Defence Counsel for Kondewa
Charles Margai
Yada Williams
Ansu Lansana
Martin Michael *(Legal Assistant)*



I. INTRODUCTION

1. The Prosecution files this Response to the "First Accused's Urgent Motion for Leave to File Additional Witness and Exhibit Lists" filed on 1 February 2006 ("Motion").[1]

2. In the Motion, Counsel for the First Accused seeks leave:

   (i) to add 13 witnesses to the First Accused's witness list;

   (ii) to add 16 exhibits to the First Accused's exhibits list.

II. BACKGROUND

3. On 21 October 2005, the Trial Chamber issued an *Order Concerning the Preparation and Presentation of the Defence Case* ("Order")[2] in which it ordered the Defence to file specific materials no later than 17 November 2005. On 17 November 2005, the Defence filed its Joint Defence Materials together with a request for partial modification of the Order.[3] On 28 November 2005, the Trial Chamber issued a *Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case* ("Consequential Order")[4] ordering the Defence to file by 5 December a number of materials including their lists of witnesses and exhibits.

4. The witness and exhibit lists for the First Accused were filed on 5 December 2005 ("original witness and exhibits lists").[5] The original witness list included 77 names and the original exhibits list included 23 exhibits.

5. The Consequential Order stipulated that the Defence would only be permitted to add witnesses or exhibits to its list upon a showing of good cause.

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[1] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-549, "First Accused's Urgent Motion for Leave to File Additional Witness and Exhibits Lists", 1 February 2006.

[2] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-474, "Order Concerning the Preparation and Presentation of the Defence Case", ("Order"), 21 October 2005.

[3] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-482, "Joint Defence Materials Filed pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification thereof", 17 November 2005.

[4] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-489, "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case", 28 November 2005 ("Consequential Order").

[5] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-499, "Defence Witness and Exhibit Lists for the First Accused as per the Consequential Order for Compliance of 28th November 2005 Concerning the Preparation and Presentation of Defence Case", 5 December 2005.

6. The Defence argues that the proposed additional witnesses and exhibits are material to its case and were not available by the 5 December 2005 deadline.

III. ARGUMENT

A. Good Cause

7. The Defence submits that it encountered difficulties in its investigative and witness tracing efforts due to the failure of the First Accused to cooperate with his Defence team and a consequent failure of potential witnesses to cooperate without instruction from the First Accused. The Defence argues that in January 2006, the attitudes of witnesses changed upon the First Accused's decision to appear as a witness in his own defence and that they have since provided statements indicating that their testimony is material to the defence of the First Accused. The Defence indicates that the proposed additional exhibits were made available by the witnesses that came forward after the 5 December 2005 deadline.[6]

8. The Special Court has developed a considerable amount of jurisprudence on the definition of "good cause" and, being informed by the *Nahimana* decision[7] that is relied upon by the Defence, the relevant factors as identified by the Special Court include:[8]

   (i) materiality of the evidence sought to be added;

   (ii) relevance of the evidence to determining the issues at stake;

   (iii) contribution of the evidence to serving and fostering the overall interest of the law and justice;

   (iv) absence of prejudice to the other party;

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[6] Motion, para. 13.

[7] *Prosecutor v. Nahimana et al*, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses", 26 June 2001.

[8] *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T-167, "Decision on Prosecution Request for Leave to Call Additional Witnesses", 29 July 2004; *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T-213, "Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund", 1 October 2004; *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-320, "Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements", 11 February 2005, paras 34 and 35; *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-399, "Decision on Prosecution Request for Leave to Call an Additional Expert Witness", 10 June 2005; *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-365, "Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Hawa Bangura) pursuant to Rule 73*bis*(E), and on Joint Defence Notice to Inform the Trial Chamber of its Position vis-à-vis the Proposed Expert Witness (Mrs. Bangura) pursuant to Rule 94bis", 5 August 2005.

(v) on-going investigations;

(vi) the new evidence could not have been discovered or made available at an earlier point in time notwithstanding the exercise of due diligence.

Additional Witnesses

9. The Prosecution submits that the Motion fails to examine and address these factors adequately.

10. The Motion appears to seek to address point (vi) above, in arguing that the new evidence could not have been discovered earlier because of the First Accused's failure before January 2006 to cooperate with his Defence team, and because of the resulting unwillingness of witnesses to agree to come forward. Similarly, the Motion appears to seek to address point (v) above, in arguing that Defence investigations were still ongoing at the time of the 5 December 2005 deadline for the filing of witness and exhibit lists.[9] In assessing these factors, it would in the Prosecution's submission be appropriate for the Trial Chamber to have regard to (1) the fact that the First Accused is himself the author of the circumstance that is said to have prevented his Defence from identifying these witnesses and exhibits at an earlier time; and (2) the amount of time that was available to the Defence prior to 5 December 2005 for the preparation of the defence case.

11. In the Motion, there is no analysis as to points (i) and (ii) above beyond the material contained in Annex A to the Motion. The brevity of the summaries in Annex A makes it difficult to assess the materiality and relevance of the proposed additional witnesses and exhibits. More importantly, the brevity of the summaries in Annex A make it difficult to assess whether the testimony of the proposed additional witnesses duplicates or overlaps with the testimony of witnesses that are already on the witness list. Allowing the addition of all thirteen witnesses would result in a list consisting of 90 names for the First Accused alone. The Trial Chamber has previously expressed concern at the existing number of witnesses on the Defence witness lists, and has called upon the Defence teams to make every effort to reduce the size of their lists.[10] In the light of these concerns, to the extent

[9] See Motion, para. 10, where the Defence states "[t]he Norman Defence Team filed its lists on the 5th of December 2005 while still investigating and tracing witnesses."

[10] See Transcript of Status Conference of 25 November 2005, p. 31, where the Presiding Judge stated: "we are seriously concerned by the number of witnesses that are intended to be called at this particular moment...I want to

that the testimony of any proposed new witness is duplicative of the testimony of any witness who is already on the Defence witness list, the Prosecution submits that consideration should be given to the possibility of removing one or more of the existing witnesses from the witness list upon the addition of any new witness whose testimony would cover similar topics. This approach is supported by case law from the ICTY. For instance, one Trial Chamber of the ICTY, in response to a Prosecution request for eleven additional witnesses to give evidence by deposition, ordered the Prosecution "to provide the Trial Chamber with reasons as to why the evidence of each of the additional witnesses ... is necessary despite the multiple other witnesses testifying to similar facts, and to explain why these witnesses should not be removed from the Witness List entirely, or put on an alternative, or substitute witness list".[11]

12. The Defence states that granting the Motion will not result in prejudicial delay. While it may be true, with reference to point (iv) above, that granting the Motion at this early stage of the Defence case is unlikely to cause immediate prejudice to the Prosecution, the Prosecution submits that the Trial Chamber should take account of the broader risk of prejudice to the Prosecution, and possibly to the other Accused, in having to prepare for the cross-examination of such a large number of witnesses on the basis of very general summaries.

13. The Motion,[12] citing an ICTY decision in the *Jelisić* case,[13] states that the interests of justice require that any evidence necessary to ascertain the truth be presented and subjected to examination by the parties.[14] The Motion thereby appears to seek to address point (iii) above. However, this statement in the *Jelisić Decision* does not mean that each party has an unqualified right to call as much evidence as it unilaterally determines. Where the addition of new witnesses requires a showing of "good cause", it will be for

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make it clear, 149 witnesses [for all three Accused] is way too much and we're not prepared to hear and listen to 149 witnesses". See also Transcript of Status Conference of 11 January 2006, pp. 30-33.

[11] *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, "Order for Clarification Regarding Prosecutor's Motion to Take Additional Depositions for Use at Trial (Rule 71)", 4 May 2001. See further paragraph 13 below.

[12] Motion, para. 12.

[13] The Motion gives an incomplete citation of the ICTY decision in question, and does not annex a copy of that decision. The Prosecution believes that the decision to which the Defence refers is *Prosecutor v. Jelisić*, "Decision on the Prosecutor's Motion to Add a Few More Witnesses According to Rule 73(E) Dated 17 and 24 March 1999", IT-95-10-T, Trial Chamber, 27 April 1999 ("***Jelisić Decision***"). A copy of that decision is annexed to this response.

[14] Motion, para. 12.

the Trial Chamber to determine the extent to which the proposed additional evidence is material and relevant to the issues at stake, and whether or not the proposed additional evidence is duplicative of other evidence. In exercising its discretion, the Trial Chamber will have to balance these considerations with other considerations, such as those referred to in the final sentence of paragraph 10 above, and the last three sentences of paragraph 11 above. In this respect, the Prosecution notes that in the *Jelisić Decision* relied upon by the Defence, the Trial Chamber only gave the Prosecution permission to add three of its proposed four additional witnesses. The Trial Chamber found that the fourth proposed additional witness was to be called to give evidence covering similar topics to those covered by a witness who was already on the witness list; the Trial Chamber held that the Prosecutor had to decide which of the two would be the most appropriate to call. Thus, the *Jelisić Decision* would support the approach of only allowing new witnesses to be added if they are in substitution of any existing witnesses whose evidence is to cover similar topics.

Additional Exhibits

14. In determining whether the Defence has established good cause for the addition of the proposed additional exhibits, the Trial Chamber will have regard to all relevant factors, including those referred to in paragraph 8 above. The Prosecution submits that these have not been adequately addressed in the Motion, for the reasons given in paragraphs 9-13 above.

15. The Defence argues that the proposed additional exhibits rebut the Prosecution theory of command responsibility. The Defence cites a 1971 decision of the Colorado Court of Appeals to the effect that leave to amend the exhibit list in that case ought to have been granted to prevent a manifest injustice to the applicant.[15]

16. The Motion argues that this decision of the Colorado Court of Appeals was "cited with approval" by the ICTR in a decision in the *Nahimana* case given on 9 October 2002.[16] In fact, the Motion appears to cite the relevant authority of the ICTR incorrectly. This decision of the Colorado Court of Appeals was in fact referred to by a Trial Chamber of

[15] Motion, paras 13-14.
[16] Motion, para 14.

the ICTR in *Prosecutor v. Ndayambaje*[17] In this decision, contrary to what the Motion asserts, the ICTR Trial Chamber does not cite the Colorado Court of Appeals "with approval", but rather, makes a passing reference to the fact that the decision of the Colorado Court of Appeals had been referred to in the submissions of the Prosecution.

17. The Prosecution fails to grasp the relevance of the decision of the Colorado court except to the extent that it is authority for the proposition that key exhibits which are material to guilt or innocence ought to be considered by a court. On the basis of the list provided by the Defence, it is difficult for the Prosecution to comment on the materiality of the proposed exhibits, or to comment on whether these exhibits are duplicative of other evidence in the case. Similarly, until the Prosecution is provided with these or indeed any of the proposed Defence exhibits, it is unable to state whether or not it has any objections as regards authenticity.

B. Fair Trial

18. The Defence cites Article 17(4) of the Statute of the Special Court in full, and asserts that the fundamental human right to put up a defence, with particular reference to the right to adequate time to prepare, will be violated if leave is not granted to add the proposed witnesses and exhibits.

19. The Prosecution submits that to the extent that this argument is intended to support the argument that there is "good cause", it adds little. The Prosecution does not dispute that the Defence has the right to adequate time to prepare and to bring the best possible evidence before the Trial Chamber. However, if the Defence wishes to argue that it has previously not been given adequate time to prepare, it is for the Defence to satisfy the Trial Chamber that this is the case. Similarly, if the Defence wishes to argue that the proposed additional witnesses are the "best possible evidence" in the case, it is also for the Defence to satisfy the Trial Chamber of this.

[17] *Prosecutor v. Ndayambaje,* ICTR-96-8-T, "Decision on Prosecutor's Motion to Modify Her List of Exhibits", 14 December 2001, para. 3.

IV. CONCLUSION

20. It is a general principle of international criminal procedure that it is for a party asserting a right to prove its entitlement to that right.[18] Thus, if the Defence seeks to add witnesses and exhibits to its witnesses and exhibits list, it is for the Defence to satisfy the Trial Chamber that it has "good cause" to do so. In particular, it is for the Defence to satisfy the Trial Chamber of all relevant matters to be considered by the Trial Chamber, including those referred to in paragraph 8 above. From the Motion, it is in the Prosecution's submission difficult to ascertain objectively the extent to which the proposed additional witnesses and exhibits are relevant, material and not duplicative of the evidence of the existing witnesses. Furthermore, in determining whether an Accused has shown "good cause", the Trial Chamber should, in exercising its discretion, also take into account in the overall balancing exercise such factors as those referred to in the final sentence of paragraph 10 above, and the last three sentences of paragraph 11 above.

21. The Prosecution reserves its right to state its objections to the authenticity of any exhibits once they are disclosed.

Filed in Freetown,
8 February 2006

For the Prosecution,

James C. Johnson
Chief of Prosecutions

Kevin Tavener
Senior Trial Attorney

[18] See, for instance, by analogy, *Prosecutor v. Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of Time-Limit and Admission of Additional Evidence", 15 October 1998, paras. 52-53; *Prosecutor v. Delic*, IT-96-21-R-R119, "Decision on Motion for Review", 25 April 2002, para. 17.

INDEX OF AUTHORITIES

1. *Prosecutor v. Norman, Fofona, Kondewa,* SCSL-4-14-T-549, First Accused's Urgent Motion for Leave to File Additional Witness and Exhibits Lists, 1 February 2006.
2. *Prosecutor v. Norman, Fofona, Kondewa,* SCSL-2004-14-T-474, Order Concerning the Preparation and Presentation of the Defence Case, 21 October 2005.
3. *Prosecutor v. Norman, Fofona, Kondewa*, SCSL-2004-14-T-482, Joint Defense Materials Filed pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification thereof, 17 November 2005.
4. *Prosecutor v. Norman, Fofona, Kondewa,* SCSL-04-14-T-489, Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 28 November 2005.
5. *Prosecutor v. Norman, Fofona, Kondewa,* SCSL-04-14-T-499, Defence Witness and Exhibit Lists for the First Accused as per the Consequential Order for Compliance of 28th November 2005 Concerning the Preparation and Presentation of the Defence Case, 5 December 2005.
6. *Prosecutor v. Nahimana et al,* Case No.ICTR-99-52-I, Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses, 26 June 2001, (http://65.18.216.88/default.htm)
7. *Prosecutor v. Norman, Fofona, Kondewa,* SCSL-04-14-T-167, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004.
8. *Prosecutor v. Norman, Fofona, Kondewa,* SCSL-04-14-T-213, Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund, 1 October 2004.
9. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-320, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005.
10. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-399, Decision on Prosecution Request for Leave to Call an Additional Expert Witness, 10 June 2005.

11. *Prosecutor v. Brima, Kamara, Kanu,* SCSL-04-16-T-365, Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Haba Bangura) pursuant to Rule 73bis (E), and on Joint Defence Notice to Inform the Trial Chamber of its Position vis-à-vis the Proposed Expert Witness (Mrs. Bangura) pursuant to Rule 94bis, 5 August 2005.
12. *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, Decision on the Defence Motion for the Re-Examination of Witness DE, 19 August 1998 (http://65.18.216.88/ENGLISH/cases/KayRuz/decisions/dcs9808.htm)
13. *Prosecutor v. Norman, Fofona, Kondewa,* Transcript of Status Conference, p. 31, 25 November 2005.
14. *Prosecutor v. Norman, Fofona, Kondewa,* Transcript of Status Conference, pp. 30-33, 11 January 2006.
15. *Prosecutor v. Jelisić,* IT-95-10-T, Decision on the Prosecutor's Motion to Add a Few More Witnesses According to Rule 73 (E) Dated 17 and 24 March 1999, 27 April 1999.
16. *Prosecutor v. Ndayambaje,* ICTR-96-8-T, Decision on Prosecutor's Motion to Modify Her List of Exhibits, 14 December 2001. (http://65.18.216.88/default.htm)
17. *Prosecutor v. Tadić,* IT-94-1-A, Decision on Appellant's Motion for the Extension of Time-Limit and Admission of Additional Evidence, 15 October 1998. (http://www.un.org/icty/tadic/)
18. *Prosecutor v. Delic,* IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002.
19. *Prosecutor v. Naletilić and Martinović,* IT-98-34-T, Order for Clarification Regarding Prosecutor's Motion to Take Additional Depositions for Use at Trial (Rule 71), 4 May 2001.

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-95-10-T

Date: 27 April 1999
English
Original: French

14889

IN THE TRIAL CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Fouad Riad
Judge Almiro Simões Rodrigues

Registrar: **Mr. Jean-Jacques Heintz, Deputy Registrar**

Decision of: **27 April 1999**

THE PROSECUTOR

v.

GORAN JELISIĆ

DECISION ON THE PROSECUTOR'S MOTIONS TO ADD A FEW MORE WITNESSES ACCORDING TO RULE 73(E) DATED 17 AND 24 MARCH 1999

The Office of the Prosecutor:

Mr. Geoffrey Nice
Mr. Vladimir Tochilovsky

Defence Counsel:

Mr. Veselin Londrović
Mr. Michael Greaves

TRIAL CHAMBER I 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 (hereinafter "the Tribunal");

NOTING the Motion of the Prosecutor to add a few more witnesses according to Rule 73(E) of the Rules filed on 17 March 1999 (hereinafter "the Motion of 17 March 1999");

NOTING the Motion of the Prosecutor to add one more witness according to Rule 73(E), dated 24 March 1999 (hereinafter "the Motion of 24 March 1999");

NOTING the corrigendum to the Motion of the Prosecutor to add a few more witnesses dated 17 March 1999 which was presented on 7 April 1999;

PURSUANT to Article 21 of the Statute and Rule 73 *bis* of the Rules of Procedure and Evidence (hereinafter "the Rules");

CONSIDERING that the Prosecutor, pursuant to Sub-rule 73 *bis* (E) of the Rules, requests permission to add four additional witnesses to the list initially submitted in accordance with Sub-rule 73 *bis* (B)(iv) of the Rules; that the names of the witnesses and the summary of the facts about which they would, if necessary, testify appear in the Motions of 17 and 24 March 1999;

CONSIDERING that Sub-rule 73 *bis* (E) provides that after commencement of the trial, the Prosecutor may, if she considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary her decision as to which witnesses are to be called;

CONSIDERING, however, that Sub-rule 73 *bis* (D) of the Rules states that the Trial Chamber may call upon the Prosecutor to reduce the number of witnesses if it considers that an excessive number of witnesses are being called to prove the same facts; that pursuant to Sub-rule 73 *bis* (C) of the Rules, the Trial Chamber may call upon the Prosecutor to shorten the estimated length of the examination-in-chief for some witnesses;

CONSIDERING that the Trial Chamber holds it to be in the interests of justice that any evidence necessary to ascertain the truth be presented to it and subject to examination by the parties;

CONSIDERING, however, that the Trial Chamber deems that such interests must not prejudice the principle that the accused has the right to be tried without undue delay;

CONSIDERING that the Prosecutor asserts that the additional witnesses will, if necessary, shed light on the alleged genocidal intent of the accused at the time of the facts ascribed to him;

CONSIDERING, however, that in her Motion of 17 March 1999, the Prosecutor concedes that one of the four additional witnesses will be called to give evidence "covering the same or similar topics to those covered by his brother who is presently on the witness list" even if the latter were to be more familiar with the details of the events in question;

CONSIDERING that in view of the foregoing, as the case now stands, the Trial Chamber does not deem it necessary to hear both the additional witness and his brother whose name already appears on the initial list; that the Prosecutor must decide which of the two would be the most appropriate to call.

FOR THE FOREGOING REASONS,

AUTHORISES the Prosecutor to add the following witnesses to the initial list:

- Nermin SULJAGIĆ
- Paul BASHAM;
- Osman KAVAZOVIĆ.

ORDERS the Prosecutor to call only Mustafa RAMIĆ or his brother Ibrahim RAMIĆ as a witness.

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

Done this twenty-seventh of April 1999
At The Hague
The Netherlands

(signed)

Claude Jorda
Presiding Judge, Trial Chamber I

(Seal of the Tribunal)

IT-96-21-R-R119
D122 - D110
25 APRIL 2002

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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: IT-96-21-R-R119

Date: 25 April 2002

Original: English

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge David Hunt
Judge Asoka de Zoysa Gunawardana
Judge Fausto Pocar
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Decision of: 25 April 2002

PROSECUTOR

v

Hazim DELIĆ

DECISION ON MOTION FOR REVIEW

Counsel for the Prosecutor:

Mr Norman Farrell

Counsel for the Defence:

Mr Salih Karabdić and Mr Tom Moran for Hazim Delić

The background to the application

1. Hazim Delić (the "Applicant") has filed a motion "to open review of proceedings" and to quash his conviction on Count 3 of the indictment.[1]

2. The Applicant stood trial with others upon charges relating to crimes alleged to have been committed over a period of some months during 1992, at the Čelebići camp in the Konjic municipality of Bosnia and Herzegovina. The Applicant was the deputy commander of the Čelebići camp, and he was found guilty by the Trial Chamber of grave breaches of the Geneva Conventions and of violations of the laws or customs of war for his direct participation in crimes including murder, torture and inhuman treatment. These involved severe beatings of detainees, resulting in the death of two of them, the rape of two female detainees, the use of an electrical shock device on detainees and contributing to an atmosphere of terror in the camp.[2]

3. Count 3 concerned the death of one Želijko Milošević ("Milošević"). Count 3 alleged, as a grave breach of the Geneva Conventions, that the Applicant personally selected Milošević from an area known as Tunnel 9 where he was detained, brought him outside and then (with others) severely beat him as a result of which Milošević died. The prosecution case was a circumstantial one, there being no evidence accepted by the Trial Chamber from anyone who saw the Applicant actually take part in the beating. The prosecution case was largely accepted by the Trial Chamber, and its findings are described more fully in the judgement of the Appeals Chamber on the Applicant's appeal from his conviction.[3]

4. The Applicant's argument on that appeal was that the evidence of the only two witnesses who identified him as being directly involved in the death of Milošević, by calling Milošević out of the tunnel, was incredible. He argued that the evidence of each of the two witnesses was inconsistent with the evidence of the other, and that the evidence of both of them was inconsistent with that of other prosecution witnesses.[4] The Appeals Chamber examined the evidence at the trial and the Applicant's complaints concerning that evidence in considerable

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1 Hazam Delić's Motion for the Review of Proceedings, 15 Jan 2002 ("Motion"), par 9. A redacted version of the Motion was filed on 27 Mar 2002.
2 *Prosecutor v Delalić et al*, IT-96-21-T, Judgement, 16 Nov 1998 ("Trial Chamber Judgement"), par 1253.
3 *Prosecutor v Delalić et al*, IT-96-21-A, Judgement, 20 Feb 2001, par 462.
4 *Ibid*, par 471.

detail.[5] It also referred to what it described as "compelling evidence" before the Trial Chamber that the Applicant had made specific threats to Milošević warning him that he would be "coming for him" on the evening when he was killed,[6] and to "consistent evidence" given by witnesses that the Applicant had singled Milošević out for frequent interrogation and repeated beatings.[7] The Trial Chamber had accepted that (on the day of the beatings which were the subject of the count) the Applicant had beaten Milošević for refusing to make a confession to visiting journalists, and had told him specifically that he would come for him that night.[8] The Appeals Chamber held that it was not unreasonable for the Trial Chamber to have accepted the fundamental features of the two witnesses of the Applicant's involvement in the beating and to have found, on the totality of the evidence, that the Applicant had murdered Milošević.[9] His appeal in relation to this conviction was accordingly dismissed.[10]

The application

5. The Applicant seeks to have the judgements of both the Trial Chamber and the Appeals Chamber reviewed in relation to his conviction on Count 3. As the issue of his guilt on that count was finally determined by the Appeals Chamber, it would not be appropriate for the Trial Chamber's judgement to be reviewed. The Appeals Chamber's consideration on the Motion has therefore been limited to whether its own judgement should be reviewed.

6. The basis of the Applicant's Motion is the discovery of "a new fact",[11] in the form of a statement which had been given by another detainee of the Čelebići camp (who has been referred to as "Witness W") to the Office of the Prosecutor ("OTP") before the trial, on 24 February 1996. In this statement, Witness W says that he was present when Milošević was called out of Tunnel 9 and that, at the time, he recognised the voice of his former neighbour, a Čelebići camp guard named Jusuf Zahirović.[12] In a subsequent filing, however, the Applicant has withdrawn the description of Witness W and the guard as neighbours, and replaced it with the assertion that

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5 *Ibid*, pars 469-481.
6 *Ibid*, pars 482-483.
7 *Ibid*, par 484.
8 *Ibid*, par 484.
9 *Ibid*, pars 485-486.
10 *Ibid*, par 487.
11 Motion, par 3.
12 Statement of Witness W annexed to the Motion ("Statement"), p 3.

they were "in close relations".[13] Witness W also says that he went to school with the Applicant,[14] but this too has been withdrawn by the Applicant in his subsequent filing, and it has been replaced by the assertion that all three of them (Witness W, the guard and the Applicant) "knew amongst themselves from childhood".[15] The Motion asserts that Witness W would therefore have recognised the Applicant's voice if it had been he who had called Milošević out.[16] The existence of this fact (the statement of Witness W) is then said in the Motion to have been "known neither to the Appeals Chamber nor to the Trial Chamber",[17] and it is claimed that it could have been a decisive factor in reaching the decision [as to the Applicant's guilt].[18]

7. The Motion is founded in Article 26 of the Tribunal's Statute, which provides:

> **Article 26**
> **Review proceedings**
>
> Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.[19]

The Rules of Procedure and Evidence ("Rules") make the following relevant provisions:

> **Rule 119**
> **Request for Review**
>
> Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.

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[13] Hazim Delić's Corrected Non Confidential Reply to Prosecution Response, 27 Mar 2002 ("Further Reply"), par 9. Paragraph 9 of the original Further Reply, 7 Mar 2002, reads:

> That inmate knew Delić and the mentioned guard for a long time. They went together to the same school. The inmate and that guard were neighbours. [...]

The "corrected" version, for which no explanation has been given, reads:

> **Witness W** knew Delić and Jusuf Zahirović "Zaha" for a long time. **[redacted] They knew among themselves from childhood. Witness W** and Zahirović "Zaha" were **[redacted] in close relations.** [...]

[14] Statement, pp 2, 4.

[15] Further Reply, par 9. See footnote 13.

[16] Motion, par 4.

[17] *Ibid*, par 5. The Appeals Chamber has ignored the unintended double negative in the text of the Motion.

[18] *Ibid*, par 6.

[19] The reference to a "convicted person" in Article 26 was to indicate that each of the parties to the original proceedings has the right to seek a review, not that the provision is to apply only after a conviction has been entered – just as Article 25 ("Appellate proceedings"), which also refers to "persons convicted", permits appeals from interlocutory decisions: *Barayagwiza v Prosecutor*, ICTR-97-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 Mar 2000 ("*Barayagwiza* Decision"), pars 47-48.

Rule 120
Preliminary Examination

If a majority of Judges of the Chamber constituted pursuant to Rule 119 agree that the new fact, if proved, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

8. The combined effect of these provisions of the Statute and the Rules is that the moving party must satisfy four criteria:

(a) there must be a new fact;

(b) that new fact must not have been known to the moving party at the time of the original proceedings;

(c) the lack of discovery of the new fact was not through the lack of due diligence on the part of the moving party; and

(d) that new fact could have been a decisive factor in reaching the original decision.[20]

Review proceedings are available only in relation to a final judgement (in the sense of one which terminates the proceedings).[21]

Rule 115 and Rule 119

9. Before considering the application of these four criteria to the present case, it is important to emphasise that, despite some similarities between a review pursuant to Rule 119 and an appeal based upon new evidence admitted pursuant to Rule 115, a very clear distinction has been drawn between the two procedures. For this purpose, reference needs to be made also to Rule 115:

Rule 115
Additional Evidence

(A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing.

(B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

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[20] *Barayagwiza* Decision, par 41. The Applicant has referred to the decision of the Appeals Chamber in *Semanza v Prosecutor*, ICTR-97-20-A, Decision, 31 May 2000, as being relevant to the review procedures, but that decision concerned an appeal, not a review.

[21] *Barayagwiza* Decision, par 49; *Prosecutor v Bagilishema*, ICTR-95-1A-A, Decision (Motions for Review of the Pre-Hearing Judge's Decisions of 30 November and 19 December 2001), 6 Feb 2002 ("*Bagilishema* Decision"), p 2.

10. In the case of additional evidence (referred to in Rule 115), the evidence may be known to the moving party at the time of the original proceedings but not available. In the case of a new fact (referred to in Rule 119), it is necessary for the moving party to show that the new fact was not known to it at the time of the original proceedings. This is an important distinction. The requirement of due diligence is the most obvious *similarity* between the two procedures. Notwithstanding that Rule 119 refers expressly to due diligence and Rule 115 does not, the requirement in Rule 115 that the moving party demonstrate that the additional material proffered was not available at the trial requires that party to establish also that the evidence could not have been discovered through the exercise of due diligence.[22] In this regard, the requirements of the two rules are therefore the same. There is a *similarity*, although a difference in degree, between the requirement in the review procedure that the additional material proffered could have been a decisive factor in reaching the original decision and the requirement in the appeal procedure involving additional evidence that the additional material will be admitted if the interests of justice so requires. The requirement in the appeal procedure has been interpreted as meaning that the additional material must be relevant to a material issue, credible and such that it could have the effect of showing that the conviction was unsafe.[23]

11. The clear *distinction* which has been drawn between the two procedures relates to the nature of the additional material which may be considered in each. Where the additional material proffered consists of a new fact – that is, a fact which was *not* in issue or considered in the original proceedings – a review pursuant to Rule 119 is the appropriate procedure, which must be taken before the Chamber which gave the final judgement upon the relevant issue.[24] If the material proffered consists of additional evidence relating to a fact which *was* in issue or considered in the original proceedings, this does not constitute a "new fact" within the meaning of Rule 119, and the review procedure is not available.[25] The distinction is thus between a fact which was not in issue or considered in the original proceedings (a "new fact" within the meaning of Rule 119) and additional evidence of a fact which was in issue or considered in the original proceedings but which evidence was not available to be given in those proceedings ("additional evidence" within the meaning of Rule 115). That distinction does not depend upon

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[22] *Prosecutor v Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 Oct 1998 ("*Tadić* Rule 115 Decision"), pars 35-45; *Prosecutor v Kupreškić et al*, IT-95-16-A, Appeal Judgement, 23 Oct 2001 ("*Kupreškić* Appeal Judgement"), par 50.

[23] *Kupreškić* Appeal Judgement, pars 52, 68-69. The test had previously been formulated in the *Tadić* Rule 115 Decision (at par 71) as "*would probably* show that the conviction was unsafe".

[24] *Tadić* Rule 115 Decision, par 30; *Barayagwiza* Decision, par 42, *Kupreškić* Appeal Judgement, par 48.

[25] *Tadić* Rule 115 Decision, par 32; *Barayagwiza* Decision, par 42; *Kupreškić* Appeal Judgement, par 48.

when it was that the "new fact" came into existence. The conjunction of the first and second criteria stated in par 8, *supra*, makes it clear that a fact which was not in issue or considered in the original proceedings does not fail to be a "new fact" simply because it existed before the original proceedings took place.[26]

Compliance with Rule 119

12. The Appeals Chamber is not satisfied that the Applicant has demonstrated –

(a) that the evidence which Witness W could give constitutes a "new fact" within the meaning of Rule 119; or

(b) that such evidence was unknown to him at the time of the trial and that it could not have been discovered through the exercise of due diligence.

(a) A new fact?

13. It is obvious that there may be difficulty in some cases in making the distinction between a new fact and additional evidence of a fact which is not new, as the discussion of the first new fact considered in the *Barayagwiza* Decision demonstrates.[27] It is a difficulty which the Applicant has failed to overcome in this application. The fact in issue at the trial and in the appeal was whether it was the Applicant who beat Milošević, and a material fact relevant to that fact in issue was whether it was the Applicant who called Milošević out to be beaten. That material fact was also in issue at the trial and in the appeal. Evidence to establish it was given by two witnesses, and that evidence was strongly contested by the Applicant at the trial. The statement of Witness W is additional evidence of that material fact, but it is not of itself a new fact. There is no foundation for the Applicant's attempts to characterise as a new fact the evidence of Witness W either as to the identity of the person who called out[28] or as to the ability of the witness to recognise the voice of the guard or the voice of the Applicant.[29]

(b) Unknown and not discoverable by due diligence?

14. It is convenient to consider these two criteria together but, before doing so, it is necessary to consider a preliminary argument by the Applicant in relation to them, that Article 26 of the

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[26] *Barayagwiza* Decision, par 44.
[27] *Ibid*, pars 54-55.
[28] Appelant's [*sic*] Reply to the Prosecution Response, 5 Feb 2002 ("Reply"), pars 7-8. A redacted version was filed on 27 Mar 2002.
[29] *Ibid*, par 9.

Statute requires only that the new fact was known to neither the Trial Chamber nor the Appeals Chamber.[30] That is manifestly not so. As the Appeals Chamber observed in the *Barayagwiza* Decision,[31] proceedings for the review of a judgement given in the International Criminal Tribunals are no more than the adoption of a facility available at both international and national levels which has been described as a –

> [...] necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal.[32]

Rule 119 has not added any requirement to this facility.

15. A party is required to put forward his best possible case at the trial, and he is not permitted to hold back evidence in reserve for use in an appeal if he is unsuccessful at the trial.[33] The appeal process is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial.[34] The knowledge and due diligence of counsel is generally treated as that of the accused for the purposes of both criteria.[35] As a general rule, an accused person is bound by the way in which the trial is conducted on his behalf. Counsel have a wide discretion as to the manner in which proceedings are conducted, and decisions made by counsel in the exercise of that discretion frequently involve difficult problems of judgement, including a choice as to the best tactics to be adopted. The Appeals Chamber will not intervene because other counsel might have made different decisions as to the conduct of the trial or even because such decisions made at the trial are seen in retrospect to have been wrong. It is only when the decision made was of such a nature in the circumstances of the case as to have led to a miscarriage of justice that this Chamber will not hold the accused accountable for his counsel's

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[30] Motion, pars 5, 7; Reply, par 9.

[31] *Barayagwiza* Decision, pars 37-40.

[32] *Report of the International Law Commission on the Work of its 46th Session*, Official Records, 49th Session, Supplement No 10 (A/49/10), at p 128.

[33] *Prosecutor v Kupreškić et al*, IT-95-16-A, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, 26 Feb 2001 ("*Kupreškić* Rule 115 Decision"), par 15. (This Decision was given on a confidential basis, but a redacted version was filed on 30 May 2001.) The proposition it states related to the admissibility of evidence pursuant to Rule 115, but it is equally applicable to the review procedure pursuant to Rule 119.

[34] *Prosecutor v Erdemović*, IT-96-22-A, Judgement, 7 Oct 1997, at par 15. That was a decision concerning Rule 115, but the proposition was applied by the Appeals Chamber to Rule 119 also, in the *Barayagwiza* Decision, at par 43.

[35] *Tadić* Rule 115 Decision, par 50; *Kupreškić* Appeal Judgement, par 50.

conduct.[36] The accused must therefore establish that the evidence which it is said that Witness W could give was not known to himself or to counsel both at the trial and in the appeal and that this was not through lack of due diligence on the part of counsel or himself. If he suggests that the evidence was not put before the Tribunal through lack of due diligence, he must establish that its exclusion would lead to a miscarriage of justice.

16. The Applicant has declined to admit that the evidence which Witness W could give was "available" before the trial or that it was discoverable through the exercise of due diligence.[37] The prosecution has produced a document signed on 18 December 1996 by Mr Karabdić (lead counsel for the Applicant both then and now), acknowledging that he (Mr Karabdić) had received a statement of Witness W from the OTP on 22 November 1996. His signature was witnessed. The prosecution has also produced evidence in the form of a declaration by one Wolfgang Sakulin, based upon unchallenged OTP records, that the statement which Mr Karadić received on that date was in fact the statement made by Witness W on 24 February 1996. The only reply from the Applicant was –

> 6. Delić thinks that Mr Sakulin's Declaration does not prove that he was in possession of the mentioned document.
>
> 7. Delić remarks again that by the mentioned statement, a new fact unknown to the Appeals Chamber and the Trial Chamber is presented. That is in accordance with Article 26 of the Statute.[38]

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[36] In both of the decisions cited in the previous footnote, the Appeals Chamber has stated that, where there has been gross negligence on the part of counsel in relation to the conduct of the trial, an accused will be permitted to raise the consequences of that conduct on appeal, but these statements should not be interpreted as restricting the power of the Appeals Chamber to take account of the conduct of counsel to instances of gross negligence. Current international humanitarian jurisprudence appears to support an appellate interference wherever either the new fact (for Rule 119) or the additional evidence (for Rule 115) is of such a nature that its exclusion would lead to a miscarriage of justice, without any limitation to the situation where counsel has been grossly negligent. Such an approach is demonstrated in the decisions referred to in par 18, *infra*. Guidance may also be gained from decisions of the European Court of Human Rights and of the (UN) Human Rights Committee – although caution must be used in relation to those decisions, as they deal with a State's responsibility for the conduct of counsel in a criminal trial, which is not quite the same issue as that with which this Tribunal is sometimes concerned. See *Eur Court HR, Kamasinski judgment of 19 December 1989, Series A no 168*, pars 65, 70, 91 (which establishes that the accused "must be identified with the counsel who acted on his behalf"); *Eur Court HR, Imbrioscia v Switzerland judgment of 24 November 1993, Series A no 275*, par 41; *Taylor v Jamaica* (705/96), 2 Apr 1998, par 6.2 (HRC); *Phillip v Trinidad and Tobago* (594/92), 20 Oct 1998, par 7.2 (HRC); *Campbell v Jamaica* (618/95), 20 Oct 1998, par 7.3 (HRC); Eur Court HR, Daud v Portugal judgment of 21 April 1998, *Reports of Judgments and Decisions* 1998-II, par 38.

[37] Reply, par 9. The text of par 9 continues: "Let the Prosecutor prove that if she wish, but that will be unuseful [*sic*] spending of time, Delić thinks."

[38] Further Reply.

17. An Applicant for a review pursuant to Rule 119 claims an entitlement to a right given to him by the Rules, and accordingly bears the burden of satisfying the Appeals Chamber as to the four criteria required by Rule 119,[39] including the criteria that the evidence which it is said that Witness W could give was *not* known to him or to counsel at the relevant time and that this was *not* through lack of due diligence on the part of counsel or himself. It is not for the prosecution to satisfy the Chamber that it *was* known to the Applicant or his counsel or that there *had* been a lack of due diligence. The failure of Mr Karabdić to deny that the relevant contents of Witness W's statement were known to him at that time, coupled with the final retreat in the submission signed by him to the untenable proposition that the Applicant did not have to establish that he did not know of the fact claimed to be new,[40] leads the Appeals Chamber to the inevitable conclusion that Mr Karabdić did indeed know, or could with due diligence have known, of the evidence which Witness W could give, both during the trial and at the appeal. The failure of the Applicant also to deny that he knew of that available evidence, coupled with the absence of any explanation from Mr Karabdić as to why he did not pass on this information which he received to the Applicant, again leads the Appeals Chamber to the inevitable conclusion that the Applicant has failed to establish that he did not know of that evidence or that the absence of that knowledge was not through lack of due diligence on his part.

Miscarriage of justice

18. The applicant has next argued that the Appeals Chamber should disregard his failure to establish these two criteria because of "miscarriage of justice, interests of justice and exceptional circumstances".[41] Reliance is placed upon what was said by the Appeals Chamber in the *Barayagwiza* Decision, which was concerned with an application for review:

> 65. In the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120,[42] that the fact be unknown to the moving party at the time of the proceedings before a Chamber, and not discoverable through the exercise of due diligence, as directory in nature. In adopting such a position, the Chamber has regard to the circumstance that the Statute itself does not speak to this issue.
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> 66. There is precedent for taking such an approach. Other reviewing courts, presented with facts which would clearly have altered an earlier decision, have felt bound by the interests of justice to take these into account, even when the usual requirements of due

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[39] This was stated by the Appeals Chamber in relation to the four criteria which Rule 115 requires to be satisfied, in the *Tadić* Rule 115 Decision, at par 52. The same reasoning necessarily applies to the four criteria which Rule 119 requires to be satisfied for that right to be exercised by an applicant.

[40] See par 14, *supra*.

[41] Reply, par 9; Further Reply, pars 10-13.

[42] Rule 120 of the Rules of Procedure and Evidence of the ICTR is to the identical effect of Rule 119 of the Rules of the ICTY.

> diligence and unavailability [*scil* lack of knowledge] were not strictly satisfied. Whilst it is not in the interests of justice that parties be encouraged to proceed in a less than diligent manner, "courts cannot close their eyes to injustice on account of the facility of abuse".[43]

Reference is then made by the Appeals Chamber to the situation in England and Wales and in Canada, and the Appeals Chamber continued:

> 69. The Appeals Chamber does not cite these examples as authority for its actions in the strict sense. The International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned. However, the Chamber notes that the problems posed by the Request for Review have been considered by other jurisdictions, and that the approach adopted by the Appeals Chamber here is not unfamiliar to those separate and independent systems. To reject the facts presented by the Prosecutor, in the light of their impact on the Decision, would indeed be to close ones [*sic*] eyes to reality.

A similar approach has been adopted in this Tribunal in relation to an appeal based upon additional evidence, in which it was said that "the Appeals Chamber maintains an inherent power to admit such [additional] evidence even if it was available at the trial, in cases in which its exclusion would lead to a miscarriage of justice".[44]

19. It must be accepted that cases can arise in which there is injustice if material which "would clearly have altered an earlier decision"[45] is excluded because of non-compliance with the two criteria being considered. The Applicant has presented no clearly identified argument as to why the exclusion of the evidence which it is said that Witness W could give would lead to a miscarriage on that basis, or on any basis. It is true, as the Applicant points out,[46] that the case against him in relation to Count 3 was a circumstantial case. It must also be accepted that the voice identification was what may be described as the most immediate of the circumstances upon which the prosecution relied. The evidence which Witness W could give must, however, be considered in the light of all the other evidence in the case, or (in the case of the Appeals Chamber) in the light of the other evidence in the case which had been accepted by the Trial Chamber – that the Applicant had previously singled Milošević out for frequent interrogation

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[43] [This footnote appears with the original text] *Berggren v Mutual Life Insurance Co*, 231 Mass at 177. The full passage reads: "The mischief naturally flowing from retrials based upon the discovery of alleged new evidence leads to the establishment of a somewhat stringent practice against granting such motions unless upon a survey of the whole case a miscarriage of justice is likely to result if a new trial is denied. This is the fundamental test, in aid of which most if not all the rules upon the matter from time to time alluded to have been formulated. Ease in obtaining new trials would offer temptations to the securing of fresh evidence to supply former deficiencies. But courts cannot close their eyes to injustice on account of facility of abuse."

[44] *Prosecutor v Jelisić*, IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 Nov 2000, p 3; *Kupreškić* Rule 115 Decision, par 18.

[45] *Barayagwiza* Decision, par 66.

[46] Further Reply, par 8.

and repeated beatings, that he had beaten Milošević that day for refusing to make a confession to visiting journalists and that he had specifically told Milošević thereafter that he would come for him that night.

20. No attempt has been made by the Applicant to demonstrate the credibility of the evidence which it is said that Witness W could give. The probative value of voice recognition evidence by a non-expert witness, in the absence of any evidence that the speaker's voice possessed very distinctive characteristics, depends entirely upon the degree of familiarity which the witness has with the speaker. The two principal assertions made by Witness W in his statement which were relevant to this issue (that he was a neighbour of the guard and had gone to school with the Applicant) have now been withdrawn by the Applicant and replaced with the vaguest of terms in the Motion and in the Further Reply (particularly that they were "in close relations"), which are unsupported by any detail or statement of evidence.[47] It is not known how long before this incident it had been since Witness W had heard the Applicant speak to any extent, or to what degree he was familiar with the guard's voice even though he may have "known" him since childhood. This does not assist the Appeals Chamber in determining whether the exclusion of the evidence of Witness W would lead to a miscarriage of justice.

21. Nor has any explanation been forthcoming from the Applicant as to why the evidence of Witness W, which the Appeals Chamber is satisfied was available to him at the trial, was not called at that stage. The decision not to call him may have been based upon a well founded fear that other evidence which he could give would have incriminated the Applicant on other counts. Witness W says, for example, that he saw the Applicant beating one Slavko Šuškić with a baton and a rifle butt, apparently just before he died, and that the Applicant was the one who had beaten Šuškić the most.[48] The Applicant had been charged with the murder or wilful killing of Šuškić, but found guilty only of wilfully causing him great suffering or serious injury to body or health.[49] The description of the relevant evidence given by the Trial Chamber refers only to the Applicant having a "blunt weapon with him", and not to him beating Šuškić with a rifle butt or having beaten Šuškić the most.[50] The evidence of Witness W could have produced a basis for the Applicant's conviction for the murder of Šuškić. On the face of it, the presence of that

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[47] Paragraph 6, *supra*.
[48] Statement, p 3.
[49] Counts 11 and 12.
[50] Trial Chamber Judgement, par 864. This count was not the subject of the Applicant's appeal against conviction.

material in Witness W's statement may have provided a very good tactical reason why the Applicant did not call him at the trial. Nor has any explanation been forthcoming from the Applicant as to why the evidence of Witness W was not put before the Appeals Chamber in his appeal against his conviction on Count 3. In order to establish a miscarriage of justice in the present case, it is for the Applicant to demonstrate that it was not a deliberate tactic not to call Witness W as a witness at the trial or not to raise this issue in the appeal.

22. In all these circumstances, the Appeals Chamber is not satisfied that the failure of the Applicant to rely upon the evidence of Witness W until this late stage has led to a miscarriage of justice. The Applicant has accordingly failed to establish the second and third criteria required by Rule 119 as well as the first. It is therefore unnecessary to consider the fourth criterion (that the new fact could have been a decisive factor in reaching the original decision) beyond what has already been said.

Disposition

23. The Motion is dismissed.

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

Dated this 25th day of April 2002,
At The Hague,
The Netherlands.

Judge Mohamed Shahabuddeen
Presiding

Judge David Hunt **Judge Asoka de Zoysa Gunawardana** **Judge Fausto Pocar** **Judge Theodor Meron**

[Seal of the Tribunal]

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-98-34-PT
Date : 4 May 2001
Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr Hans Holthuis**

Decision of: **4 May 2001**

THE PROSECUTOR
v.
MLADEN NALETILIĆ aka "TUTA"
and
VINKO MARTINOVIĆ aka "ŠTELA"

ORDER FOR CLARIFICATION REGARDING PROSECUTOR'S MOTION TO TAKE ADDITIONAL DEPOSITIONS FOR USE AT TRIAL (Rule 71)

PARTLY CONFIDENTIAL

The Office of the Prosecutor:

Mr. Kenneth Scott

Counsel for the Accused:

Mr. Krešimir Krsnik, for Mladen NALETILIĆ
Mr. Branko Šerić, for Vinko MARTINOVIĆ

TRIAL CHAMBER I 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 (hereafter "Tribunal"):

BEING SEISED of the "Prosecutor's Motion to Take Additional Depositions for Use at Trial (Rule 71)" dated 11 April 2001 (hereafter "Motion");

RECALLING that, pursuant to a decision dated 10 November 2000, Trial Chamber I ordered that depositions could be taken of 23 named Prosecution witnesses for use at trial;

NOTING that, pursuant to the Motion, the Prosecutor seeks an order for eleven additional witnesses, who are named in Confidential Annex A to the Motion, to give evidence by way of deposition;

NOTING the Prosecutor's argument that the witnesses are suitable for depositions because one of the eleven witnesses proposed for deposition will not give any evidence directly implicating either of the accused in the crimes charged and the remaining ten witnesses will give evidence of a repetitive nature;

NOTING that the Prosecutor has proposed depositions for the eleven additional witnesses as a measure to expedite the proceedings;

CONSIDERING that the list of witnesses provided by the Prosecutor pursuant to Rule 65 *ter* (E) (iv) of the Rules of Procedure and Evidence of the Tribunal (hereafter "Rules") in October 2000 (hereafter "Witness List") indicates that the Prosecutor is contemplating calling a total of over 100 witnesses;

EMPHASISING that the objective of expediting the proceedings will be frustrated if the Prosecutor is permitted to use the deposition procedure for witnesses that should be removed from the Witness List entirely;

CONSIDERING that each aspect of the Indictment to be addressed by the additional witnesses proposed for deposition is covered by multiple other witnesses on the Prosecutor's Witness List, as set out in the attached Confidential Annex I;

EMPHASISING that, at present, the number of witnesses the Prosecutor proposes to call in order to address the majority of the sections in the Indictment appears excessive;

EMPHASISING further that the new Rule 73 *bis* (C) of the Rules permits the Trial Chamber, after having heard the Prosecutor, to set the number of witnesses the Prosecutor may call at trial;

FOR THE FOREGOING REASONS

HEREBY ORDERS the Prosecutor to provide the Trial Chamber with reasons as to why the evidence of each of the eleven additional witnesses proposed for deposition is necessary despite the multiple other witnesses testifying to similar facts, and to explain why these witnesses should not be removed from the Witness List entirely, or put on an alternative, or substitute witness list.

Done in both French and English, the English version being authoritative.
Done this 4th day of May 2001,
At The Hague,
The Netherlands.

Patricia M. Wald
Pre-Trial Judge, Trial Chamber I

(Seal of the Tribunal)