615) SCSL-04-14-T (18371A- 18412) 18371A.

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

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 9 June 2006

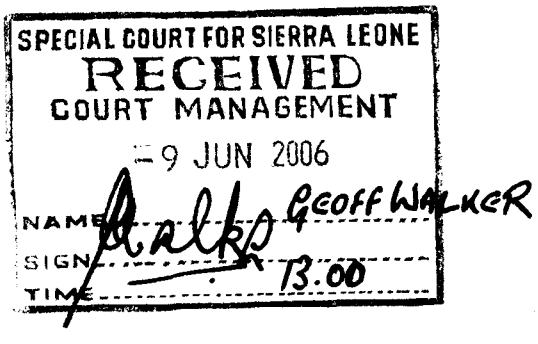
THE PROSECUTOR **Against** **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

PUBLIC

PROSECUTION RESPONSE TO NORMAN MOTION TO DEFER FURTHER EVIDENCE AND CLOSING OF HIS CASE TO SEPTEMBER-DECEMBER TRIAL SESSION

Office of the Prosecutor:
Mr. Christopher Staker
Mr. James C. Johnson
Mr. Joseph Kamara



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

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

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

I. INTRODUCTION

1. The Prosecution files this Response to the "Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session", filed on behalf of the First Accused on 6 June 2006 ("**Motion**"),[1] noting the Trial Chamber's "Order for Expedited Filing" of 7 June 2006.[2]
2. The Prosecution notes the response filed on behalf of the Second Accused.[3] The Prosecution also notes the document entitled "Report About Prospective Defence Witness Major-General Abdu-One Mohammed of Nigeria", filed by the Defence for the First Accused ("**Defence**") on 7 June 2006 ("**Defence Legal Assistant's Report**").[4]
3. In its Motion, the Defence makes the following requests:
   a) to defer the calling of three outstanding witnesses (H.E. President Kabbah, Maj-Gen Abdul One Mohamed and Mr. J. A. Carpenter) to the next trial session (the "**First Defence Request**");
   b) to call two additional witnesses in the next trial session (the "**Second Defence Request**");
   c) to close the Defence case on behalf of Norman after the presentation of all the evidence in his defence, including the cross-examination of any witnesses called by Norman's co-accused, any rejoinder evidence of the co-accused, and any evidence ordered by the Court (the "**Third Defence Request**");
   d) to file information pursuant to Rule 92*bis* not later than 21 days after the cross-examination of all witnesses to be called on behalf of Norman's co-accused (the "**Fourth Defence Request**").
4. The Prosecution opposes the Motion for the reasons set out below. However, the Prosecution notes that the position regarding the calling of HE President Kabbah will be determined by the Trial Chamber in its decision on the Defence's request for a subpoena.

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[1] SCSL-04-15-608, RP (18326-18335). The Prosecution notes that the Motion is single-spaced contrary to the Practice Direction on Filing Documents before the Special Court for Sierra Leone, 27 February 2003 as amended, Article 4(G). Similarly, the list of authorities fails to provide a case number or internet link for the case cited.
[2] SCSL-04-14-T-69,RP 18436-18337.
[3] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-610, "Fofana Response to Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session", 7 June 2006 (RP 18338-18339).
[4] SCSL-04-14-T-612, RP 18434-18346.

II. ARGUMENT

(A) The First Defence request: The three outstanding witnesses

General submissions

5. The Prosecution submits that as a general principle:

(a) Where a party wishes to call a witness or tender documents in evidence, but cannot secure the attendance of that witness or obtain those documents, the proceedings cannot be delayed indefinitely until such time as that witness or those documents may become available.

(b) A party is under an obligation to exercise all due diligence to ensure that witnesses, documents and other evidence are available at the appropriate time during the trial.[5] In the case of witnesses, the Defence in this case has filed a document setting out the order in which witnesses are to be called, and the Defence is required to exercise all due diligence to ensure that each witness on the list is available to testify immediately after the previous witness on the list has finished testifying.[6] The exercise of due diligence involves, amongst other things, (1) informing the Trial Chamber of any problem that may affect the discharge of this obligation as soon as the party is aware of it; and (2) seeking the assistance of the Trial Chamber to overcome the problem where appropriate, for instance, by requesting the Trial Chamber to issue subpoenas, or requests for assistance to governmental authorities to assist in locating documents and making them available.

(c) Where, despite the exercise of all due diligence, a party is unable to call a particular witness, or produce a particular document, at the appropriate time during the trial, the Trial Chamber may grant the party an adjournment or postponement to allow more time

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[5] See, for instance, *Prosecutor v. Krstić,* IT-98-33-A, "Decision on Application for Subpoenas", Appeals Chamber, 1 July 2003, paras. 14-15; *Prosecutor* v. *Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence", Appeals Chamber, 15 October 1998, para. 38, 48-50. (dealing with the unrelated question of the admission of additional evidence on appeal, but affirming the general duty of due diligence on the part of the Defence in obtaining and presenting all necessary evidence at trial)A diligent will party will make every effort to obtain all the evidence it believes it needs before the commencement of its case, and if, during the presentation of its case, it finds that unexpected developments have arisen which suggest the necessity and appropriateness of obtaining new evidence which can support its case, it must further investigate without delay in order to produce the newly obtained evidence before the close of the case.If the party has reason to believe that it will be unable to conclude its investigation before the close of its case, it must inform the Chamber as promptly as possible so that the Chamber may rule on any procedural consequence this may have: *Prosecutor* v. *Hadžihasanović and Kubura*, IT-01-47-T, "Decision on the Prosecution's Application to Re-Open its Case", T. Ch. II, 1 June 2005, paras. 38-42.

[6] Indeed, the Defence has been informed of the need to have stand-by witnesses, should the need arise: see, for instance, Transcript, 16 February 2006, p. 52 (lines 23-26).

for this to occur. In deciding whether it would be reasonable to grant such an adjournment, the factors to be considered by the Trial Chamber will include the following: (1) the length of the adjournment that is requested, and its impact on the proceedings as a whole, including on the other accused; (2) the degree of certainty that the witness or document will indeed be available at the end of the adjournment; (3) the relevance and importance of the witness or document in question; and (4) the efforts that have been made by the party to date to secure the attendance of the witness or to obtain the document, including the extent to which the party has promptly advised the Trial Chamber of difficulties as they have arisen, and sought its assistance as appropriate.

(d) Where the Trial Chamber does not consider that it would be reasonable in all the circumstances to grant an adjournment, the party may be required to close its case without calling that witness or without tendering that document. In such a case, if the witness were to become available or if the document were obtained by the party prior to the end of the trial proceedings, the party could apply to reopen its case in order to call that witness or to produce that document. For a motion by a party to reopen its case to be granted, the party would have to satisfy the Trial Chamber with appropriate evidence and arguments that the witness or document in question was genuinely not available earlier despite the exercise of due diligence, and that the evidence is relevant. Any such motion to reopen must be made at the earliest opportunity.[7]

6. The Prosecution notes that in the present case, the First Accused has had a considerable amount of time to prepare his defence and to obtain the necessary evidence. It is over 2 years since the Prosecution case began, nearly 11 months since the Prosecution case closed, and nearly 8 months since the Trial Chamber's Rule 98 decision.

H.E. President Kabbah

7. The Prosecution notes that the Trial Chamber has expressed its intention to deliver its decision in the matter of the subpoena on Tuesday 13 June 2006.[8] The Prosecution

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[7] See generally *Prosecutor* v. *Delalić et al.*, IT-96-21-A, Judgment, App. Ch., 20 February 2001, para. 283; *Prosecutor* v. *Blagojević et al.*, IT-02-60-T "Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92 bis in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose", T. Ch. I Section A, 13 September 2004, para. 8; *Prosecutor* v. *Hadžihasanović and Kubura*, IT-01-47-T, "Decision on the Prosecution's Application to Re-Open its Case", T. Ch. II, 1 June 2005, paras. 35-42.
[8] Trial Transcript, 7 June 2006.

accepts that if this witness were to be called, it would not be feasible to do so before the conclusion of the trial session on 16 June.

Maj-Gen Abdul One Mohamed

8. From the information provided by the Defence, it appears that this witness is presently unable to testify due to health reasons, and it would seem that the Defence does not know with any certainty when he will be able to testify, if at all. On 2 May 2006, counsel for the First Accused stated that he was "still hopeful" that this witness would be available to testify.[9] Counsel for the Defence has stated that this witness's medical condition will not permit him to testify before the Special Court before he undergoes certain medical treatment in Germany,[10] and that the witness would be in Germany from the middle of June to the end of July.[11] Counsel for the Defence indicated that a report would be filed by a Defence legal assistant explaining why the witness could not testify *before* he goes to Germany.[12] In fact, the Defence Legal Assistant's Report that was subsequently filed does not address this question at all. Certainly there is nothing to suggest that the witness or the Defence have received any medical opinion to the effect that the witness is presently not medically fit to testify.
9. Furthermore, the Defence Legal Assistant's Report does not state with any certainty when this witness will undergo medical treatment, and when his health might permit him to testify. According to that Report, he will travel to Germany in "the first or second week of June", but only "if the paper work is complete". His return date is said to be scheduled for the last week of July, but this is qualified by the words "all things being equal". The Report states that the witness is willing to testify in September, but no specific information is given to provide a basis for concluding that the witness's medical condition will permit him to do so by then. Certainly there is nothing to suggest that the witness or the Defence have received any medical opinion to the effect that if the witness undergoes the medical treatment as scheduled, he can be expected to be medically fit to testify by September. From the information provided, there certainly appears to be a

[9] Transcript, 2 May 2006, p. 21 (lines 23-24).
[10] Transcript, 29 May 2006, p. 20 (lines 5-9); 7 June 2006, p. 5 (lines 7-14).
[11] Transcript, 29 May 2006, p. 20 (lines 1-4).
[12] Transcript, 2 June 2006, pp. 102 (line 24) – 103 (line 1); 7 June 2006, p. 5 (lines 15-23).

possibility that if medical treatment is delayed (for instance because of problems with the "paper work"), or if the witness's recovery takes longer than he expects, he may still be unfit to testify in September.

10. In all of the circumstances, the Prosecution submits that it would not be reasonable to grant the Defence request for a further postponement to call this witness in September. Considerable delays have been caused in these proceedings already due to unavailability of this witness and the other proposed Defence witness referred to below, and there is no certainty that further delays will not be caused in the future if the Defence is permitted to plan to call this witness in September. Additionally, the relevance and importance of this witness has not been explained by the Defence, which has merely asserted that this witness is "absolutely crucial and indispensable" and "in possession of some extremely valuable evidentiary material"[13] without any further elaboration.

Mr. J. A. Carpenter

11. The Defence was granted leave upon a showing of good cause to add this witness to its core list on 6 April 2006.[14] The possibility that the documents proposed to be tendered by this witness could be tendered pursuant to Rule 92*bis* has been taken up by the Chamber on several occasions, including on 29 May 2006.[15] On 1 June 2006, the Defence counsel indicated that he had not been able to speak to the witness but would try again the following day.[16] The Defence states in its Motion that it wishes to retain this witness on its list as a potential witness until material still being obtained from Parliament through him and still being analysed reach a satisfactory Rule 92*bis* status for it to be unnecessary to call the witness.[17]
12. From the information provided by the Defence, it is unclear what is the nature of the problem with this witness. The documents appear to relate to "resolutions and/or any visited publication resulting there from"[18] and ought to be readily available. If the witness is refusing to appear, which does not appear to be the case, the Defence should

[13] Motion, para. 5.
[14] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-585, "Decision on the First Accused's Urgent Motion for Leave to File Additional Witness and Exhibit Lists", 6 April 2006.
[15] Transcript, 29 May 2006, pp. 16-17. See also Transcript, Status Conference, 5 April 2006, pp. 21-23.
[16] Trial Transcript, 1 June 2006, 88.
[17] Motion, para. 13.
[18] Trial Transcript, 29 May 2006, 17.

have sought a subpoena well before the end of the current session. If the person or authority having custody of the documents is unwilling to hand them over, custody of the documents may similarly be sought by an order of the Court. If the documents are otherwise unobtainable, the Defence should proceed to close its case without tendering the evidence, subject to a subsequent application to re-open should the new evidence become available.

13. The Prosecution submits that the Defence has failed to provide any adequate explanation for the delay in relation to this witness, or a detailed account of the steps that have been taken by the Defence in relation to this witness, or any details on the basis of which the Trial Chamber could be satisfied that this witness would be in a position to testify or to produce the documents sought by the Defence at any specific time in the future, and in particular, by September. Nor does the Defence explain in any detail the importance of relevance of this witness. This Defence application should accordingly be rejected.

(B) The Second Defence request: Additional witnesses

14. In its Order concerning the preparation and presentation of the Defence case dated 28 November 2005,[19] the Trial Chamber stated: "Should the Defence seek to add any witnesses to [its] list after the 5th of December, 2005, it may be permitted to do so only upon good cause being shown."

15. The Defence is seeking to add two as yet unnamed witnesses to its list. It is not clear from the Motion whether these proposed witnesses are already on the core or back-up lists or "from elsewhere outside of them".[20] Indeed, it is not clear if the Defence has even identified the additional witnesses in view of the statement in paragraph 4 of the Motion that "A few weeks after the closing of the present trial session would be enough to finally uncover such witnesses so as to select from among them the one who will clinch the present gaps in the evidence".

16. If the two proposed additional witnesses are not on the Defence core or back-up list, then this request should be dismissed outright. The Defence has made no serious attempt to

[19] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-489, "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case", 28 November 2005.
[20] Motion, para. 1(b).

show good cause for the purposes of the Trial Chamber's 28 November 2005 Order.[21] Nor has the Defence explained why such an application was not made earlier.

17. If the Defence request is in fact one to move two back-up witnesses to the core list, the request should be rejected on the ground that the Defence has failed to indicate which core witnesses the back-up witnesses will be replacing. The Defence is aware of the practice set by the Trial Chamber whereby a "back-up" witness "is designed to make up lists for the deficiency in the 'core' list" and may only be called if a "core" witness is unable to testify.[22] In any event, the Trial Chamber can hardly grant a Defence application to move two back-up witnesses to the core list if the Defence does not identify the particular witnesses in question.

(C) The Third Defence request: Closing of Defence case

18. As noted by the Defence, Rule 82(A) provides that "in joint trials, each accused shall be accorded the same rights as if he were being tried separately". These rights include the rights in Article 17(4)(e) of the Statute.[23] The Defence case on behalf of a particular accused in a joint trial consists of the evidence brought by that accused, whether through live evidence or documentary evidence. Once an accused has completed the presentation of such evidence, the case for that accused closes. Any evidence favourable to a particular party subsequently elicited during cross-examination of witnesses called by other accused may of course be relied upon in closing submissions and will be taken into consideration by the judges at the conclusion of the proceedings. If necessary and appropriate, a party that has closed its case may seek to bring evidence in rebuttal or to re-open its case to bring new evidence in accordance with the Rules and the discretionary powers of the Trial Chamber. This procedure preserves the fair trial rights of the

[21] The only justification given by the Defence is in the second and third sentences of paragraph 4 of the Motion, to the effect that there are some lacunae in the Defence evidence because some of the proposed Defence witnesses have proved "elusive and ultimately untraceable". However, the reason for having a Back-up List is to deal with this eventuality. These two sentences contain far too little information (and no evidence) for the Trial Chamber to be able to conclude that good cause has been established. If it is the case that the Defence has not even identified the proposed additional witnesses, the Motion does not establish a case for allowing the Defence to postpone the closing of its case in order to be able to undertake further investigations to identify new witnesses.

[22] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-585, "Decision on the First Accused's Urgent Motion for Leave to File Additional Witness and Exhibit Lists", 6 April 2006, 3.

[23] That is, the right to "examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her".

Accused. The fact that the case against the three co-accused is marked by a certain "cohesivity [sic], interdependence and virtual indivisibility of the evidence" does not alter the position: that is inevitably the case in a joint trial.

19. It is not clear what the Defence expects to gain by keeping its case open until the closing arguments stage, or what prejudice it claims it will suffer if it does not. Clearly, the Defence may not continue to apply to call additional witnesses indefinitely. The Prosecution submits that the Trial Chamber must reject the suggestion that Rule 86(A) [closing arguments] means that the "different modes and stages of presentation of evidence in Rule 85(A)...including...rebuttal and rejoinder evidence and any evidence ordered by the Trial Chamber, should...be garnered in before any party may close his case".[24]

20. The Defence misinterprets the decision relied upon in the case of *Prosecutor v Delalic.*[25] In that Decision, the ICTY Trial Chamber rejected a request by the first accused in a joint trial to conclude his evidence, make closing arguments and proceed to a judgment and possibly sentence before the second accused started his defence case. The Trial Chamber stated that "an accused person in a joint trial is subject to the collective rights of the group in the overall interests of justice for ensuring an expeditious and fair trial" which meant that closing arguments would take place after the presentation of all the evidence, i.e. all the evidence on the part of the Prosecution and each co-accused.[26] This decision in no way suggests that the first accused in a case can keep his or her case open until the end of the cases of the other accused.

21. The closing of the individual (Defence or Prosecution) case is a necessary procedural step marking the end of the presentation of evidence by one party in order to proceed to the next phase, which in this case is the commencement of the Defence case of the Second Accused.[27] This procedural step does not interfere with the rights of the First Accused or

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[24] Motion, para. 10.
[25] *Prosecutor v Delalic* et al., IT-96-21, "Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges against Him", Trial Chamber, 1 July 1998.
[26] Ibid, para. 41.
[27] The procedural histories of various ICTY and ICTR judgments set out this logical sequence. See e.g. *Prosecutor v Nahimana* et al, ICTR-99-52-T, "Judgment and Sentence", Trial Chamber, 3 December 2003, para. 94: The Prosecution closed its case on 12 July 2002 after calling 47 witnesses. The Defence for Nahimana opened its case on 18 September 2002 with the testimony of the accused Nahimana. After calling 10 additional witnesses, the Defence for Nahimana's case was held over on 14 January 2003 until such time as the remaining witnesses could arrive in Arusha to testify. On 15 January 2003, the Defence for Ngeze commenced the presentation of its case, calling 32

the quality of the evidence elicited during the cross-examination of the witnesses of the co-accused, or indeed rebuttal evidence or evidence ordered by the Chamber.

(D) The Fourth Defence request: Rule 92*bis* Information

22. For the reasons given in section (C) above, the Prosecution submits that there is no possibility for the Defence to delay the closing of its case in order to file information pursuant to Rule 92*bis* after the cross-examination of all witnesses called on behalf of the co-accused. There is no basis upon which the tendering of relevant documentary evidence that is known to the Defence can be postponed in the manner proposed by the Defence. The Defence ought to file any Rule 92*bis* information in the current trial session, and ought to have expected to do so given the Presiding Judge's comments related to the intention for the First Accused's case to close in the current session.[28]

III. CONCLUSION

23. For these reasons the Prosecution submits that all of the Defence requests should be rejected, save that any decision as to the calling of HE President Kabbah will need to await the Trial Chamber's decision on the Defence's request for a subpoena. The Defence should be required to file any Rule 92*bis* information in the current trial session.

Filed in Freetown,
9 June 2006

For the Prosecution,

Christopher Staker
Deputy Prosecutor

Joseph Kamara
Senior Trial Attorney

witnesses, including the accused Ngeze. It closed its case on 29 April 2003. The Defence for Barayagwiza opened its case on 1 May 2003 and closed its case the same day after calling one witness. Following the testimony of two additional witnesses called by the Defence for Nahimana, it closed its case on 8 May 2003. The joint trial concluded on 9 May 2003 after 238 trial days.

[28] Cited in Motion, para. 8.

Index of Authorities

A. Orders, Decisions and Judgments

SCSL Cases

1) *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-610, "Fofana Response to Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session", 7 June 2006 (RP 18338-18339).

2) *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-489, "Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case", 28 November 2005.

3) *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-585, "Decision on the First Accused's Urgent Motion for Leave to File Additional Witness and Exhibit Lists", 6 April 2006, 3.

ICTR and ICTY Cases

4) *Prosecutor v. Krstić,* IT-98-33-A, "Decision on Application for Subpoenas, Appeals Chamber, App. Ch., 1 July 2003, paras. 14-15; [http://www.un.org/icty/krstic/Appeal/decision-e/030701.htm]

5) *Prosecutor v. Tadić*, IT-94-1-A, "Appeals Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence", App. Chamber, 15 October 1998, para. 38, 48-50. [http://www.un.org/icty/tadic/appeal/decision-e/81015EV36285.htm]

6) *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, "Decision on the Prosecution's Application to Re-Open its Case", T. Ch. II, 1 June 2005, paras. 35-42, 38-42. [http://www.un.org/icty/hadzihas/trialc/decision-e/050601.htm]

7) *Prosecutor* v. *Delalić et al.,* IT-96-21-A, Judgment, App. Ch., 20 February 2001, para. 283; [http://www.un.org/icty/celebici/appeal/judgement/index.htm] This authority exceeds 30 pages. The relevant section is attached.

8) *Prosecutor v. Blagojević et al.*, IT-02-60-T , "Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92 bis in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose", T. Ch. I Section A, 13 September 2004, para. 8;

9) *Prosecutor v Nahimana* et al, ICTR-99-52-T, "Judgment and Sentence", Trial Chamber, 3 December 2003, para 94.
[http://69.94.11.53/ENGLISH/cases/Ngeze/judgement/mediatoc.pdf]
This authority exceeds 30 pages. The relevant section is attached.

10) *Prosecutor v Delalic* et al., IT-96-21, "Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges against Him", Trial Chamber, 1 July 1998.
[http://www.un.org/icty/celebici/trialc2/decision-e/80701MS2.htm]

A. TRANSCRIPTS

Transcript, 16 February 2006, p. 52 (lines 23-26).

Trial Transcript, 7 June 2006. p. 5 (lines 7-14).

Transcript, 2 May 2006, p. 21 (lines 23-24).

Transcript, 29 May 2006, p. 20 (lines 1-4),(lines 5-9), pp. 16-17

Transcript, 2 June 2006, pp. 102 (line 24) – 103 (line 1); 7 June 2006, p. 5 (lines 15-23).

Transcript, Status Conference, 5 April 2006, pp. 21-23.

Trial Transcript, 1 June 2006, 88.

UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

Or. : Eng.

TRIAL CHAMBER I

Before Judges: Navanethem Pillay, presiding
Erik Møse
Asoka de Zoysa Gunawardana

Registrar: Adama Dieng

Judgement of: 3 December 2003

THE PROSECUTOR

V.

FERDINAND NAHIMANA
JEAN-BOSCO BARAYAGWIZA
HASSAN NGEZE
Case No. ICTR-99-52-T

JUDGEMENT AND SENTENCE

Counsel for the Prosecution
Mr Stephen Rapp
Ms Simone Monasebian
Ms Charity Kagwi
Mr William Egbe
Mr Alphonse Van

Counsel for Ferdinand Nahimana
Jean-Marie Biju-Duval
Diana Ellis, Q.C.

Counsel for Jean-Bosco Barayagwiza
Mr Giacomo Barletta-Caldarera

Counsel for Hassan Ngeze
Mr John Floyd III
Mr René Martel

87. According to an oral decision on 15 May 2001 issued pursuant to a request from the Accused, Ngeze would be allowed to conduct the cross-examination of the Prosecution witnesses under the careful control of the Chamber and only after his counsel had completed his cross-examination. This would be a temporary measure until the issues relating to the Accused's Counsel were resolved. Ngeze was allowed to put questions in cross-examination to Witnesses EB on 17 May 2001, AHI on 11 September 2001 and Alison Des Forges on 9 July 2002. Ngeze was not allowed to cross-examine Witness Thomas Kamilindi. In respect of Witness Omar Serushago, the Chamber decided on 27 November 2001 that Ngeze should write down five questions for the Chamber's consideration as to relevancy. With respect to Witness Jean-Pierre Chrétien, Ngeze was directed on 4 July 2002 to put his questions through his Counsel. On 3 March 2003, Ngeze requested that he be allowed to put ten questions to each Defence witnesses. The Chamber directed him to consult with his Counsel in this regard.

4.8 Expedition of Proceedings

88. In an effort to expedite the proceedings, which were being delayed by unnecessarily prolonged examination and cross-examination, the Chamber issued a scheduling order on 5 June 2002 allocating the time that would be given to each Counsel for the cross-examination of the following six Prosecution witnesses, and stipulated the date for the commencement of the Defence cases. A scheduling order was also issued on 26 March 2003 specifying dates for the close of the Defence cases.

89. The Chamber notes that the delay in the trial was contributed to by the Prosecution through its piecemeal disclosure, changes in its team, amendments to the Indictments and changes to its witness list. As a result, the Chamber issued the scheduling order on 5 June 2002 to direct the Prosecution towards closing its case in an efficient manner.

90. The Trial and Appeals Chambers considered that some of the motions or appeals filed by Defence Counsel were frivolous or an abuse of process, and in those cases ordered the non-payment of fees associated with the application or costs thereof, pursuant to Rule 73(E). Some of these applications have been discussed above.

91. Throughout the case, Counsel repeatedly sought to reverse the rulings of the Trial and Appeals Chambers by filing reconsideration motions or motions that put forward the same arguments previously rejected by the Chambers, albeit under a different title. In addition to the motions and appeals discussed above, Counsel for Ngeze filed two reconsideration motions on 1 and 2 April 2003 regarding the scheduling order dated 26 March 2003, and a reconsideration motion on 9 April 2003 regarding Witness JF-55. Counsel for Nahimana filed a reconsideration motion on 10 April 2003 regarding assistance from Rwanda. In addition, oral applications were often made during trial regarding the same issues that had already been determined by the Chamber, leading to delays in the progress of the trial.

92. Through the use of stipulations agreed between Prosecution and Defence Counsel, issues were agreed between the parties so as to obviate the need for calling certain witnesses to prove those issues.[8]

93. On 1 August 2003, Counsel for Nahimana filed a motion for an amendment of the Scheduling Order dated 26 March 2003, requesting that the Defence have the right of rejoinder to Prosecution's Reply Closing Brief by curtailing the period of time within which the Prosecution could file its Reply Brief to all three Defence Closing Briefs to a week. The Chamber dealt with the matter by giving an opportunity to the Defence to respond to the Reply Brief in Closing Arguments, during which they were permitted the right of rejoinder.

4.9 The Trial

94. The joint trial of Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze commenced on 23 October 2000 with the Prosecution's opening statements. The Prosecution closed its case on 12 July 2002 after calling 47 witnesses. The Defence for Nahimana opened its case on 18 September 2002 with the testimony of the accused Nahimana. After calling 10 additional witnesses, the Defence for Nahimana's case was held over on 14 January 2003 until such time as the remaining witnesses could arrive in Arusha to testify. On 15 January 2003, the Defence for Ngeze commenced the presentation of its case, calling 32 witnesses, including the accused Ngeze. It closed its case on 29 April 2003. The Defence for Barayagwiza opened its case on 1 May 2003 and closed its case the same day after calling one witness. Following the testimony of two additional witnesses called by the Defence for Nahimana, it closed its case on 8 May 2003. The joint trial concluded on 9 May 2003 after 238 trial days. The Prosecution's Closing Brief was filed on 25 June 2003. The Defence for the three accused filed their Closing Briefs on 1 August 2003, and the Prosecution filed a Reply Brief on 15 August 2003. The Prosecution's Closing Brief was 324 pages long, the Nahimana Defence's 440 pages, the Barayagwiza Defence's 239 pages, the Ngeze Defence's 226 pages, and the Prosecution's Reply 158 pages. In addition, Ngeze filed his own Closing Brief of 176 pages. Closing arguments were heard from 18 August to 22 August 2003, wherein Counsel for the three accused were given the opportunity to respond to the Prosecution's Brief and Closing Arguments, after which the accused Ngeze personally addressed the Chamber.

5. Evidentiary Matters

95. Pursuant to Rule 89(A) of the Rules, the Chamber is not bound by national rules of evidence, but by the Rules of the Tribunal. Where the Rules are silent, the Chamber is to apply rules of evidence which best favour a fair determination of the matter before it and which are consonant with the spirit of the Statute and the general principles of law, as

[8] *See e.g.*, Stipulation of the Parties Regarding What Would be the Testimony of Crystal Nix-Hinds, Denise Minor and Gregory Gordon, dated 11 December 2002; and Stipulation between Prosecution and Ngeze Defence Regarding Proposed Admission of Translations of Articles/Excerpts from Kangura, dated 19 May 2003.

18386

IN THE APPEALS CHAMBER

Before:
Judge David Hunt, Presiding
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar:
Mr Hans Holthuis

Judgement of: 20 February 2001

PROSECUTOR

V.

Zejnil DELALIC,
Zdravko MUCIC (aka "PAVO"),
Hazim DELIC and Esad LANDŽO (aka "ZENGA")

("*CELEBICI* Case")

JUDGEMENT

Counsel for the Accused:

Mr John Ackerman and Ms Edina Rešidovic for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:

Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

18397

268. (ii) Whether the Trial Chamber erred in excluding rebuttal or fresh evidence

269. As discussed above, the Prosecution submitted "in the alternative" that the Appeals Chamber should grant leave to the Prosecution to present "additional" evidence that was wrongly excluded by the Trial Chamber.[404] The nature of the "alternative" was described as follows:

> The issue is an issue of an error of law. The issue is whether or not the Trial Chamber applied the correct test for the admission of rebuttal or fresh evidence . If they applied the incorrect test and it's an error of law, then the Trial Chamber erred.[405]

270. As noted above, the Appeals Chamber deals with this argument as an independent allegation of an error of law on behalf of the Trial Chamber.

271. At the request of the Trial Chamber during the case of the last of the accused to present his defence, the Prosecution filed a notification of witnesses proposed to testify in rebuttal. It proposed to call four witnesses, one relating to the case against Landžo and the others relating to the case against Delalic, one of whom was a Prosecution investigator being called essentially to tender a number of documents "not previously available to the prosecution".[406] Oral submissions on the proposal were heard by the Trial Chamber on 24 July 1998 ,[407] and the Trial Chamber ruled that, with the exception of the witness relating to the case against Landžo, the proposed evidence was not rebuttal evidence, but fresh evidence, and that the Prosecution had not put forward anything which would support an application to admit fresh evidence .[408] This decision was reflected in a written Order which noted that "rebuttal evidence is limited to matters that arise directly and specifically out of defence evidence".[409]

272. The evidence which was not admitted by the Trial Chamber related to Delic, Mucic and Delalic, but the Prosecution submission that the exclusion constituted an error invalidating the decision is limited in application to the effect of this evidence on its case against Delalic. Its overall purpose was to show that Delalic had the requisite degree of control over the Celebici camp. The three proposed witnesses, and the documents they sought to adduce, were as follows:

> (i) Rajko Đordic, Sr, to testify as to his release from the Celebici camp pursuant to a release form signed by Delalic and dated 3 July 1992. It was proposed that the witness produce and authenticate the document. This was intended to rebut the evidence of defence witnesses that Delalic was authorised to sign release documents only in exceptional circumstances when the members of the Investigative Commission were not present in Celebici.
>
> (ii) Stephen Chambers, an investigator of the Office of the Prosecutor, to present "documentary evidence not previously available to the Prosecutor" which had been seized from the State Commission for the Search for the Missing in Sarajevo and from the home and work premises of an official of the State Commission for Gathering Facts on War Crimes in Konjic. This was said to rebut the testimony of witnesses that Delalic, as commander of Tactical Group 1, had no authority over the Celebici camp.[410]
>
> (iii) Professor Andrea Stegnar, a handwriting expert, to give expert testimony in relation to a number of the recently obtained documents alleged to bear the signature of the accused. This was not argued to have any independent rebuttal basis.[411]

18398

273. The Trial Chamber characterised the nature of rebuttal evidence as "evidence to refute a particular piece of evidence which has been adduced by the defence", with the result that it is "limited to matters that arise directly and specifically out of defence evidence."[412] This standard is essentially consistent with that used previously and subsequently by other Trial Chambers.[413] The Appeals Chamber agrees that this standard – that rebuttal evidence must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated – is correct. It is in this context that the Appeals Chamber understands the Trial Chamber's statement, made later in its Decision on Request to Reopen, that "evidence available to the Prosecution *ab initio*, the relevance of which does not arise *ex improviso,* and which remedies a defect in the case of the Prosecution, is generally not admissible."[414] Although the Appeals Chamber would not itself use that particular terminology, it sees, contrary to the Prosecution submission,[415] no error in that statement when read in context.

274. The Trial Chamber's particular reasons for rejecting the evidence as rebuttal evidence, as expressed in the oral hearing on 24 July, were, in relation to category (i), that the other evidence heard by the Trial Chamber was that Delalic had signed such documents only on behalf of the Investigating Commission and not in his own capacity. As the relevant release document also was acknowledged to state that Delalic was signing "for" the Commission,[416] the Trial Chamber queried how it could be considered to rebut what had already been put in evidence.[417] The Trial Chamber appeared to assess the document as having such low probative value in relation to the fundamental matter that the Prosecution was trying to prove – namely, Delalic's authority to release prisoners in his own capacity – that it could not be considered to rebut the defence evidence identified by the Prosecution. This assessment was reasonably open to the Trial Chamber.

275. In relation to category (ii), the Trial Chamber rejected the characterisation of the evidence as rebuttal evidence on the basis that it was better characterised as fresh evidence. While it may have been desirable for the Trial Chamber to state more specifically its view as to why the evidence did not refute a particular matters arising directly and specifically out of defence evidence, the Appeals Chamber agrees that it was open to regard the evidence as not being evidence in rebuttal. It is first noteworthy that the Prosecution, in applying to adduce the evidence, described it first as "fresh evidence, not previously available to the prosecution"[418] and gave only a fairly cursory description of how in its view the evidence rebutted defence evidence. It said that the evidence would rebut the evidence of witnesses "who all stated that Zejnil Delalic as Commander of Tactical Group 1 had no *de facto* authority, or any other authority whatsoever" over the Celebici camp.[419] Thus the evidence was intended to establish that Delalic did in fact exercise such authority. As such, it went to a matter which was a fundamental part of the case the Prosecution was required to prove in relation to its counts under Article 7(3). Such evidence should be brought as part of the Prosecution case in chief and not in rebuttal. As the Trial Chamber correctly observed, where the evidence which "is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it", it is inappropriate to admit it in rebuttal, and the Prosecution "cannot call additional evidence merely because its case has been met by certain evidence to contradict it." [420]

276. Where such evidence could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time, this does not render it admissible as rebuttal evidence. The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it

into the category of fresh evidence, to which a different basis of admissibility applies. This is essentially what the Trial Chamber found. There is therefore no merit in the Prosecution's submission that the evidence should have been admitted as "the reason for not adducing it during the Prosecution's case [was] not due to the failure to foresee the issues that may arise during the Defence case." [421] The issue as to whether the evidence should have been admitted as fresh evidence is considered below.

277. The admission of the testimony of the handwriting expert referred to in category (iii) essentially relied on the admission of the category (ii) evidence, so it need not be further considered.

278. Following the Trial Chamber's rejection of the evidence as rebuttal evidence , the Prosecution filed an alternative request to re-open the Prosecution case.[422] The Trial Chamber rejected this alternative orally,[423] issuing its written reasons on 19 August 1998.[424] The Prosecution filed applications under Rule 73 for leave to appeal the Order of 30 July and the Decision of 4 August, on 6 August and 17 August, respectively. A Bench of the Appeals Chamber denied leave to appeal in respect of both applications on the basis that it saw no issue that would cause such prejudice to the case of the Prosecution as could not be cured by the final disposal of the trial including post-judgement appeal, or which assumed general importance to the proceedings of the Tribunal or in international law generally, these being the two tests established by Rule 73(B) regarding the granting or withholding of leave to appeal.[425]

279. In its Decision on Request to Reopen the Trial Chamber, after considering the basis on which evidence could be admitted as rebuttal evidence, acknowledged the possibility that the Prosecution "may further be granted leave to re-open its case in order to present new evidence not previously available to it." It stated:

> Such fresh evidence is properly defined not merely as evidence that was not in fact in the possession of the Prosecution at the time of the conclusion of its case, but as evidence which by the exercise of reasonable diligence could not have been obtained by the Prosecution at that time. The burden of establishing that the evidence sought to be adduced is of this character rests squarely on the Prosecution.[426]

280. The Trial Chamber also identified the factors which it considered relevant to the exercise of its discretion to admit the fresh evidence. These were described as:

> (i) the "advanced stage of the trial"; i.e., the later in the trial that the application is made, the less likely the evidence will be admitted;
>
> (ii) the delay likely to be caused by a re-opening of the Prosecution case, and the suitability of an adjournment in the overall context of the trial; and
>
> (iii) the probative value of the evidence to be presented.[427]

281. Taking these considerations into account the Trial Chamber assessed both the evidence and the Prosecution's explanation for its late application to adduce it and concluded that the Prosecution had not discharged its burden of proving that the evidence could not have been found earlier with the exercise of reasonable diligence .[428] In addition, it found that the admission of the evidence would result in the undue protraction of the trial for up to three months, as the testimony of further witnesses to authenticate the relevant documents could be required as well as the evidence of any

witnesses that the defence should be permitted to bring in response.[429] Finally, the Trial Chamber assessed the evidence to be of minimal probative value , consisting of "circumstantial evidence of doubtful validity", with the result that its exclusion would not cause the Prosecution injustice.[430] It concluded generally that "the justice of the case and the fair and expeditious conduct of the proceedings enjoins a rejection of the application."[431]

282. The Prosecution does not challenge the Trial Chamber's definition of fresh evidence as evidence which was not in the possession of the party at the time and which by the exercise of all reasonable diligence could not have been obtained by the relevant party at the conclusion of its case. Nor does it challenge the "general principle of admissibility" used by the Trial Chamber.[432]

283. The Appeals Chamber agrees that the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application . If it is shown that the evidence could *not* have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings. These latter factors can be regarded as falling under the general discretion, reflected in Rule 89 (D) of the Rules, to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial. Although this second aspect of the question of admissibility was less clearly stated by the Trial Chamber, the Appeals Chamber, for the reasons discussed below, considers that it applied the correct principles in this respect.

284. The Prosecution contends that although the Trial Chamber was correct in requiring proof of the exercise of reasonable diligence, it should have found that it had exercised such diligence.[433] The Trial Chamber took the view, having considered the reasons put forward by the Prosecution , that the Prosecution had not discharged its burden of demonstrating that even with reasonable diligence the proposed evidence could not have been previously obtained and presented as part of its case in chief. It implicitly expressed its opinion that the Prosecution had not pursued the relevant evidence vigorously until after the close of the Defence case.[434] The Prosecution submits that this finding was "factually incorrect" and represented "a misapprehension of the facts in relation to the efforts of the Prosecution to obtain this evidence", but does not more than reiterate the description of the efforts to obtain the evidence which it had already provided to the Trial Chamber.[435] It does not identify how, in its view, the Trial Chamber's conclusion on the facts were so unreasonable that no reasonable Trial Chamber could have reached it. It is not suggested that the Trial Chamber did not consider the Prosecution's explanation . No such suggestion could be made in light of the obvious demonstrations both in the hearing of the oral submissions on the issue[436] and the Decision on the Request to Reopen[437] that the Trial Chamber did consider the explanations the Prosecution was putting to it. In the Appeals Chamber's view, even making considerable allowances to the Prosecution in relation to the "complexities involved in obtaining the evidence",[438] it is apparent that there were failures to pursue diligently the investigations for which no adequate attempt to provide an explanation was made.

285. Two examples demonstrate this problem. A number of the documents which were sought to be admitted had been seized in June 1998 from the office and home of Jasminka Dzumhur, a former official of the State Commission for Exchange in Konjic and the Army of Bosnia and Herzegovina 4th Corps Military Investigative Commission.[439] The material provided by the Prosecution in its Request to Reopen to explain its prior effort to obtain documents and

information from Ms Džumhur includes the statement that:

> Between late 1996 and early 1997, the Prosecution contacted Jasminka Dzumhur three times. She consistently refused to provide a statement, but on one occasion, *briefly showed an investigator an untranslated document concerning the transfer of duties in Celebici prison in November 1996*, signed by Zdravko Mucic and Zejnil Delalic. *She said she had other documents, but none of the documents were provided to the Prosecution.*[440]

With this knowledge, obtained in November 1996, that Ms Džumhur held documents which they considered would be relevant to their case, the next step apparently taken by the Prosecution was four to five months later in mid-April 1997, when it made a formal request for assistance to the Government of Bosnia and Herzegovina.[441] The Prosecution received a response on 23 July 1997, following a reminder in June 1997. On the material provided by the Prosecution, it was almost five months later that it took the next step of issuing a second request to the Government of Bosnia and Herzegovina, which received a relatively rapid response in early January, by providing certain documents.[442] Given that the trial had opened in March 1997, it was open to the Trial Chamber to regard the lapse of these periods of time between the taking of active steps to pursue the documents during after the trial had actually commenced as an indication that reasonable diligence was not being exercised.

286. Secondly, in a case such as the present where the evidence is sought to be presented not only after the close of the case of the Prosecution but long after the close of the case of the relevant accused, it was necessary for the Prosecution to establish that the evidence could not have been obtained, even if after the close of its case, at an earlier stage in the trial. The application to have the new evidence admitted was made many months after the Prosecution gained actual knowledge of the location at which the relevant documents were likely to be held. The information provided by the Prosecution, in its "Alternative Request to Reopen the Prosecution's Case", indicated that the Prosecution gained possession of certain documents from the State Commission for the Search for the Missing on 27 March 1998, which indicated that the relevant documents were in the possession of Jasminka Džumhur. It was not until 5 May 1998 that the Prosecution took any further step in trying to obtain the documents, when it "informed the authorities that various requests concerning the contacting of officials and former officials of Konjic Municipality, including Jasminka Džumhur remained outstanding". An application for a search warrant was made to a Judge of the Tribunal on 10 June 1998, after Delalic's defence case had closed. Even making allowances for the complexities of such investigations, allowing a period of over five weeks to elapse between becoming aware of the location of the documents and taking any further active step to obtain them, in light of the advanced state of the defence case, cannot be considered to be the exercise of reasonable diligence. If the Prosecution was in fact taking steps to obtain the information at that time, it did not disclose them to the Trial Chamber and cannot now complain at the assessment that it did not exercise "reasonable diligence" in obtaining and presenting the evidence earlier. Given that the burden of proving that reasonable diligence was exercised in obtaining the evidence lies on the Prosecution, it was open to the Trial Chamber to decide on the information provided to it by the Prosecution that it has not discharged that burden.

287. The Prosecution further submits that the Trial Chamber erred in the exercise of its discretion in certain of the matters it took into account. As the Trial Chamber's finding that reasonable diligence had not been exercised was a sufficient basis on which to dispose of the application, it is not strictly necessary to determine this issue, but as the Trial Chamber expressed its views on this aspect of the application , the Appeals Chamber will consider it here. The Prosecution argues that

relevant and probative evidence is only excluded when its admission is substantially outweighed by the need to ensure a fair trial, and cites the provisions of certain national systems in support of this. In relation to these provisions which the Prosecution has selectively drawn from only three national jurisdictions, it can be observed that even if they were to be accepted as a guide to the principles applicable to this issue in the Tribunal, two of them simply confer a discretion on the Trial Chamber *exceptionally* to admit new evidence. The provision cited from the Costa Rican Code of Criminal Procedure states that:

> *Exceptionally*, the court *may* order [...] that new evidence be introduced if, during the trial proceedings new facts or circumstances have arisen that *need to be established.*[443]

The provision relied on from the German Code provides for the admission of new evidence "if this is absolutely necessary".[444]

288. The Trial Chamber stated the principle as being that:

> While it is axiomatic that all evidence must fulfil the requirements of admissibility , for the Trial Chamber to grant the Prosecution permission to reopen its case, the probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused. Great caution must be exercised by the Trial Chamber lest injustice be done to the accused, and it is therefore only in exceptional circumstances where the justice of the case so demands that the Trial Chamber will exercise its discretion to allow the Prosecution to adduce new evidence after the parties to a criminal trial have closed their case.[445]

The Prosecution argues that the statement of the Trial Chamber that "the probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused" incorrectly states the applicable principle, which is that stated in Rule 89(D), namely that the need to ensure a fair trial substantially outweighs the probative value of the evidence.[446] The reference by the Trial Chamber to the potential "prejudice caused to the accused " was not, in the view of the Appeals Chamber, the appropriate one in the context . However it is apparent from a reading of the rest of the Decision on Request to Reopen that the Trial Chamber, in referring to prejudice to the accused was turning its mind to matters which may affect the fairness of the accused's trial. This is apparent both from the reference, in the passage cited above, to the need to avoid "injustice to the accused" and the concluding statement in the decision:

> In our view, the justice of the case and the fair and expeditious conduct of the proceedings enjoins a rejection of the application.[447]

289. The Prosecution also argues that the Trial Chamber erred in its assessment of the probative value of the evidence. It contends that the Trial Chamber erred in finding that the evidence was inferential and equivocal.[448] The Prosecution relies on a statement by the Trial Chamber that the documents "cannot be probative".[449] Although this was perhaps unfortunate terminology, it is apparent from the Trial Chamber's decision that after considering the evidence it was of the view not that it could not be probative but that the documents "contain circumstantial evidence of doubtful validity ".[450] This was an assessment not that the documents were incapable, as a matter of law, of having probative value , but that, having regard to their contents which did not disclose direct evidence of the matters in dispute but, at best, gave rise to "mere inferences",[451] the

documents had a low probative value. This assessment, and more specifically the exercise of balancing the particular degree of probative value disclosed by the documents against the unfairness which would result if the evidence were admitted , is a matter for the Trial Chamber which will not be interfered with on appeal in the absence of convincing demonstration of error. No such demonstration has been made.

290. The Prosecution also specifically challenged the Trial Chamber's conclusion that the trial had reached such a stage that the evidence should not be admitted .[452] The stage in the trial at which the evidence is sought to be adduced and the potential delay that will be caused to the trial are matters highly relevant to the fairness to the accused of admission of fresh evidence. This consideration extends not only to Delalic as the accused against whom the evidence was sought to be admitted, but also the three co-accused whose trial would be equally delayed for reasons unrelated to themselves. The Appeals Chamber does not understand the Trial Chamber to have taken the stage of the trial into account in any sense other than its impact on the fairness of the trial of the accused, and, in the circumstances, the Appeals Chamber regards the Trial Chamber as having been fully justified in taking the very late stage of the trial into account . The Prosecution sought to have this evidence admitted not only after the close of its own case, but well after the close of the defence case of Delalic and only very shortly before the close of the case of the last accused. The Prosecution contends that "none of the accused objected to the potential presentation of the evidence of Mr Chambers."[453] This assertion is clearly incorrect. At the hearing of oral submissions on whether the evidence could be admitted as rebuttal or fresh evidence, counsel for Delalic stated :

> His Honour Karibi-Whyte has said what I was thinking and that is that we're in the second year of this trial, and, perhaps, the third or fourth year of investigations concerning these matters. And the Prosecution, despite what they say, despite what reasons they may offer, I think is a matter of law. *It's unfair at this point to produce documents in June, 1998.*[454]

The defence for Delalic also expressed its opposition to the presentation of the fresh evidence in its written response to the request to reopen.[455]

291. The Prosecution also argued that the Trial Chamber was wrong in its finding that the admission of the evidence would cause three months' delay:

> The Prosecutor calculated that the three remaining proposed witnesses would take , on direct examination, less than four hours. It is respectfully submitted that the Trial Chamber's estimation that this would likely postpone the trial for three months is not borne out, given that there were only three witnesses and approximately 22 documents, some only supporting documents for the search warrant.[456]

This submission is disingenuous. The time which the Trial Chamber needed to take into account in determining the effect on the accused was not limited to the time which it may take to examine the three witnesses. The Trial Chamber found that, given the nature of the documents, it was likely that the testimony of further witnesses would be required to authenticate the relevant documents. It would also be necessary to allow for the defence to call appropriate witnesses in response.[457] Further, as noted by the Trial Chamber, the Prosecution had stated in its Request to Reopen, after acknowledging that the defence may need to call witnesses:

In addition, the Prosecution would seek leave to call witnesses to rebut the testimony of those brought by the Defence.[458]

292. In light of these considerations, it was open to the Trial Chamber – which, having presided over the trial which had already taken over eighteen months, was well-placed to assess the time required taking into account practical considerations such as temporary witness unavailability – to conclude that the likely delay would be up to three months. In light of this finding, it is apparent that the Trial Chamber considered that the admission of the evidence would create a sufficiently adverse effect on the fairness of the trial of all of the accused, that it outweighed the limited probative value of the evidence. As a secondary matter, it is also apparent that the Trial Chamber was concerned to fulfil its obligation under Article 20 of the Statute to ensure the trial was expeditious.[459] In light of these considerations, the decision not to exercise its discretion to grant the application was open to the Trial Chamber.

293. For the above reasons, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber committed any error in the exercise of its discretion . This aspect of this ground of appeal relating to the exclusion of evidence by the Trial Chamber is therefore also dismissed, and with it this ground of appeal in its entirety.

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13 SEPTEMBER 2004

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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 Former Yugoslavia since 1991

Case No. IT-02-60-T

Date: 13 September 2004

Original: English

IN TRIAL CHAMBER I, SECTION A

Before: **Judge Liu Daqun, Presiding**
Judge Volodymyr Vassylenko
Judge Carmen Maria Argibay

Registrar: **Mr. Hans Holthuis**

Decision of: **13 September 2004**

PROSECUTOR

v.

VIDOJE BLAGOJEVIĆ
DRAGAN JOKIĆ

PARTLY CONFIDENTIAL
(CONFIDENTIAL ANNEX)

DECISION ON PROSECUTION'S MOTION TO ADMIT EVIDENCE IN REBUTTAL AND INCORPORATED MOTION TO ADMIT EVIDENCE UNDER RULE 92 *bis* IN ITS CASE ON REBUTTAL AND TO RE-OPEN ITS CASE FOR A LIMITED PURPOSE

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Vidoje Blagojević
Mr. Miodrag Stojanović and Mr. Branko Lukić for Dragan Jokić

I. INTRODUCTION

1. Trial Chamber I, Section A, ("Trial 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 ("Tribunal") is seised of the "Prosecution's Motion to Admit Evidence in Rebuttal under Rule 85 (A) and Incorporated Motion to Admit Evidence under Rule 92 *bis* in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose," filed confidentially on 26 August 2004 ("Motion") in accordance with the Trial Chamber's Scheduling Order of 30 July 2004.

2. The Defence for Dragan Jokić filed its "Response to the Prosecution's Motion to Admit Evidence in Rebuttal under Rule 85 (A) and Incorporated Motion to Admit Evidence under Rule 92 *bis* in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose" confidentially on 2 September 2004 ("Jokić Response"). The Defence for Vidoje Blagojević filed "Vidoje Blagojević's Redacted Response to the Prosecution's Motion to Admit Evidence in Rebuttal under Rule 85 (A) and Incorporated Motion to Admit Evidence under Rule 92 *bis* in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose" confidentially on 3 September 2004 ("Blagojević Response").[1]

3. The Prosecution commenced the presentation of evidence in its case on 14 May 2003 and concluded on 27 February 2004. The Blagojević Defence concluded the examination of its last witness on 25 June 2004.[2] The Jokić Defence concluded presentation of evidence in its case on 23 July 2004.

II. APPLICABLE LAW

A. Evidence in Rebuttal

4. Rule 85 ("Presentation of the Evidence") of the Rules of Procedure and Evidence ("Rules") provides, in part:

> (A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:
>
> (i) evidence for the prosecution;

[1] The Defence for Vidoje Blagojević had filed its response on 2 September 2004 in accordance with the Trial Chamber's Scheduling Order of 30 July 2004. This response, however, exceeded the 10-page limit for responses provided for in the Practice Direction of 5 March 2002 (IT/184/Rev.1). Accordingly, upon an oral Order by the Trial Chamber, the Defence filed this redacted response in conformity with the Practice Direction.

[2] The Trial Chamber called for a hearing on 9 September 2004 to permit Vidoje Blagojević to make a statement pursuant to Rule 84 *bis*.

(ii) evidence for the defence;

(iii) prosecution evidence in rebuttal;

(iv) defence evidence in rejoinder;

(v) evidence ordered by the Trial Chamber pursuant to Rule 98; and

(vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

5. In the *Čelebići* case, the Appeals Chamber established the standard for the admission of rebuttal evidence, stating that such evidence "must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated".[3] The Appeals Chamber further held that the Prosecution "cannot call additional evidence merely because its case has been met by certain evidence to contradict it".[4]

6. The Appeals Chamber cited with approval prior decisions by various Trial Chambers in relation to rebuttal evidence.[5] The Trial Chamber concurs with the *Kordić* Trial Chamber that "only highly probative evidence on a significant issue in response to Defence evidence and not merely reinforcing the Prosecution case in chief will be permitted. Evidence on peripheral and background issues will be excluded."[6] The Trial Chamber emphasises that the purpose of permitting evidence in rebuttal is not to provide the Prosecution with an opportunity to simply reinforce or fill gaps in the evidence presented during its case-in-chief; the Prosecution is under a duty to adduce all evidence critical to the proving of the guilt of the accused by the close of its case. As the Appeals Chamber held in the *Čelebići* case, evidence which goes to a matter that forms a fundamental part of the case the Prosecution was required to prove in relation to the charges brought in the Indictment should be brought as part of the Prosecution case-in-chief and not in rebuttal.[7]

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[3] *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga"* ("*Čelebići*"), Case No. IT-96-21-A, Judgment, 20 February 2001 (*Čelebići* Appeal Judgment), para. 273.

[4] *Čelebići* Appeal Judgement, para. 275, referring to the *Čelebići* Trial Chamber's Decision on the Prosecution's Alternative Request to Re-Open the Prosecution's Case, 19 August 1998, para. 23 ("*Čelebići* Trial Chamber Decision").

[5] See, e.g., *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Transcript 29 May 1998, page 3676; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/2, Confidential Decision on Prosecutor's Motion in Respect of Rebuttal Witness and Witness Protection Issued Pertaining to Disclosure and Testimony of Witness, 19 June 1998; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, Trial Transcript of 18 October 2000; and *Čelebići* Trial Chamber Decision.

[6] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Oral Decision of 18 October 2000 ("*Kordić* Oral Decision"), Transcript 26647.

[7] *Čelebići* Appeal Judgement, para. 275. The Appeals Chamber also observed that the Trial Chamber was correct in stating that "where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it, then the Trial Chamber will be reluctant to exercise its discretion to grant leave to adduce such evidence," referring to the *Čelebići* Trial Chamber Decision, para. 23.

B. Standard to Reopen a Case

7. The Appeals Chamber has held that "fresh evidence" may be adduced if certain criteria are established.[8] Rule 89 (C) provides that "a Chamber may admit any relevant evidence which it deems to have probative value." Rule 89 (D) provides that "a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial." The Trial Chamber recalls that Articles 20 and 21 of the Statute of the Tribunal provide, *inter alia*, that all accused shall be given a fair trial and tried without undue delay. To this end, Rule 90 (F) provides:

> The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:
>
> (i) make the interrogation and presentation effective for the ascertainment of the truth; and
>
> (ii) avoid needless consumption of time.

8. The *Čelebići* Appeals Chamber found that the primary consideration in determining an application for reopening a case is "whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it is shown that the evidence could *not* have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings."[9]

9. The burden of establishing that the evidence sought to be adduced could not have been found with the exercise of reasonable diligence rests "squarely" on the party seeking to re-open the case.[10]

10. When considering a motion to re-open a case, the *Čelebići* Trial Chamber found that the following factors are relevant, cited with approval by the Appeals Chamber:

1. the advanced stage of the trial, i.e. the later in the trial that the application is made the less likely the Trial Chamber is to accede to the request;

2. the delay likely to be caused by the re-opening of the Prosecution case, and the suitability of a possible adjournment in the overall context of the trial; and

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[8] *Čelebići* Appeal Judgement, para. 276: "Where such evidence could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time, this does not render it admissible as rebuttal evidence. The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different basis of admissibility applies."

3. the probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused.[11]

11. The Trial Chamber recalls that the Appeals Chamber held that the "stage in the trial at which the evidence is sought to be adduced and the potential delay that will be caused to the trial are matters highly relevant to the fairness to the accused of admission of fresh evidence."[12] In this regard, the Appeals Chamber considers as relevant the particular effect of bringing new evidence against one accused – and the subsequent evidence that may be called to challenge that evidence by the Defence – on the fairness of the trial of another accused in a multi-defendant case.[13]

III. DISCUSSION

12. In its Motion, the Prosecution seeks leave to call two witnesses in rebuttal. Furthermore, it requests permission to enter into evidence two witness statements under Rule 92 *bis* of the Rules as rebuttal evidence.

13. In addition, the Prosecution seeks that the Trial Chamber permits it to re-open its case for the limited purpose of leading evidence regarding alleged executions at the soccer stadium in Bratunac. The Prosecution seeks to call three witnesses to testify on this issue, one of whom it is also seeking to call to provide evidence in rebuttal.

14. The Trial Chamber will first discuss the motion for admission of evidence in rebuttal, before addressing the request to re-open the case. In order to protect the identity of the witnesses named in the Motion, the Trial Chamber refers to the witnesses by pseudonym, providing their identity in a confidential annex attached hereto.

A. Evidence in Rebuttal

15. In accordance with the *Čelebići* Appeals Chamber's ruling, the Trial Chamber will admit evidence in rebuttal if it relates to a significant issue, and not a peripheral or background issue, which arises directly out of evidence brought by the Defence which could not have been

[9] *Čelebići* Appeal Judgement, para. 283.
[10] *Čelebići* Trial Chamber Decision, para. 26.
[11] *Čelebići* Appeal Judgement, para. 280, referring to *Čelebići* Trial Chamber Decision, para. 27. See *id*, paras 281-293 for application of these factors by the Appeals Chamber.
[12] *Čelebići* Appeal Judgement, para. 290.
[13] *Id.*

anticipated. Evidence of low probative value or evidence relating to a fundamental part of the Prosecution's case-in-chief is thus not admissible in rebuttal.[14]

1. Witness A

16. The Prosecution seeks to admit the statement of Witness A under Rule 92 *bis* of the Rules, in order to "rebut the Blagojević defence assertion that shelling of Srebrenica had not occurred prior to 11 July 1995 and, thus, that Colonel Blagojević was not aware of the shelling of Srebrenica prior to that date."[15] The Prosecution submits that it could not have anticipated that the defence would dispute that the shelling began on 25 May 1995, in the face of documentary evidence to the contrary.[16]

17. In objecting to the admission of this statement, the Blagojević Defence submits that: (a) the Prosecution mischaracterizes the evidence; (b) the admission of the statement does not prove that Mr. Blagojević either ordered the shelling of Srebrenica or was necessarily aware that such an order was issued to units of the Bratunac Brigade; and (c) there are no charges against Vidoje Blagojević relating to that incident in the Indictment.[17]

18. The Prosecution submits that the statement of Witness A is intended to rebut evidence that Srebrenica was not shelled prior to 11 July 1995. This does not appear to be a contested issue in the trial. Furthermore, the Indictment does not charge Vidoje Blagojević with the shelling of Srebrenica on 25 May 1995. As such, the test of whether the evidence in question is a significant issue which arises directly out of the defence evidence or which could not reasonably have been anticipated is not satisfied. Furthermore, the Trial Chamber recalls that evidence on background issues generally will be excluded in rebuttal.[18] Therefore, the Trial Chamber finds that the statement of Witness A should not be accepted as evidence in rebuttal.

2. "Statement" of Helge Brunborg, Ewa Tabeau and Arve Hetland

19. The Prosecution seeks to introduce a statement, in the form of an expert report, prepared by Helge Brunborg, Ewa Tabeau and Arve Hetland, under both Rule 92 *bis* and Rule 94 *bis* of the Rules,[19] in order to rebut the testimony of the Defence demographic expert Dr. Radovanović. The three specific issues that are to be addresses in this statement are: (a) the allegation that the

[14] See, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance, 4 May 2001, para. 11.
[15] Motion, para. 2(i).
[16] Motion, para. 10 (i).
[17] Blagojević Response, para. 4.
[18] *Kordić* Oral Decision, T. 26647.
[19] Motion, para. 2. On 26 August 2004, the Prosecution filed the "Prosecution's Notice of Disclosure of Expert Witness Statement under Rule 94 *bis*," under seal.

methodology of the Prosecution's demographic expert, Helge Brunborg, is flawed; (b) that the expert report by the Prosecution's demographic expert contains duplicate records of missing persons; and (c) that the Prosecution's expert report and the ICRC list contain two fictitious names.[20]

20. The Prosecution submits that the new report rebuts the allegation that Helge Brunborg ignored or failed to use resources that were available in his assessment of the number of victims of Srebrenica, the allegation of which "could not have been anticipated by the Prosecution as there was no reason to believe that Dr. Radovanović would suggest that such sources could have been used in the circumstances arising out of the Srebrenica massacre."[21] Furthermore, in relation to the charge that two fictitious names are included in the Prosecution and ICRC missing persons lists, the Prosecution asserts that the evidence in the new report shows that Dr. Radovanović's methodology "lacks credibility and is flawed" and that it could not have anticipated her evidence as "there was no reason to believe that the Defence would suggest that names on the ICRC missing list were fictitious."[22] The Prosecution does concede that the Prosecution's list of missing persons does contain certain duplicate names which should be deleted.[23]

21. The Blagojević Defence objects to the admission of this statement. It submits that if the new report were to be admitted, then it want to cross-examine at least one of the experts who contributed to the report and will have to hire a demographic expert to challenge the proposed rebuttal evidence, which would cause "a significant delay."[24] Furthermore, the Blagojević Defence asserts that the evidence provided by its expert, Dr. Radovanović, could have been anticipated by the Prosecution based on the cross-examination of Helge Brunborg and the information requested of the Prosecution by Dr. Radovanović.[25]

22. As a preliminary matter, the Trial Chamber recalls that in its 7 November 2003 Decision, it found that Rule 94 *bis* is the *lex specialis* for expert witness statements, and therefore, when an expert report is tendered under both Rule 92 *bis* and Rule 94 *bis*, it will accept such report under Rule 94 *bis* only.[26]

23. The Trial Chamber has before it expert demographic reports submitted by both the Prosecution and Blagojević Defence.[27] Helge Brunborg and Svetlana Radovanović both appeared

[20] Motion, para. 2 (ii).
[21] Motion, para. 10 (ii).
[22] Motion, para. 10 (ii).
[23] Motion, para. 10 (ii).
[24] Blagojević Response, paras. 5-6.
[25] Blagojević Response, para. 7.
[26] Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003, para. 28.
[27] See Exhibits P725, P726 and D204/1.

before the Trial Chamber and were both subjected to cross-examination by the opposing party.[28] It is for the Trial Chamber to assess the probative value of both reports in light of the evidence before it; additional evidence to supplement or fill a gap in the evidence already before it is not appropriate. Moreover, as the Defence for Vidoje Blagojević asked numerous questions regarding methodology during cross-examination of the Prosecution demographer,[29] the Prosecution could have reasonably anticipated the evidence presented by the Defence demographic expert. The Trial Chamber therefore denies the Prosecution's Motion to admit this new demographic report into evidence in rebuttal.

3. Witness B

24. The Prosecution seeks to introduce *viva voce* evidence of Witness B, a member of the Bratunac Brigade Military Police. The Prosecution submits that Witness B assisted in guarding prisoners at the Vuk Karadžić school, and that while there, he saw two members of the 2nd Battalion of the Bratunac Brigade also guarding prisoners.[30] The Prosecution asserts that this evidence is to rebut the Blagojević Defence assertion that apart from the Military Police platoon, units from the Bratunac Brigade did not participate in the detention of prisoners.[31] The Prosecution argues that this "is a critical point because it establishes that Colonel Blagojević's soldiers participated in the detention of prisoners from which, together with other adduced evidence one can infer Blagojević's knowledge of and responsibility for, these prisoners."[32]

25. The Prosecution avers that it "could not have anticipated that the Defence would suggest that only the Military Police were involved in detaining prisoners."[33] It further asserts that "[t]his witness was only discovered recently despite diligent efforts to investigate members of the Brigade who were involved in the forcible confinements of the Bosnian Muslim men of Srebrenica," recalling the size of the investigation and the number of persons involved in the "massacre."[34]

26. At the time of filing its Response, the Blagojević Defence had not been served with the statement of Witness B, and therefore, it is not clear about the exact evidence to be presented by this witness.[35] The Blagojević Defence submits that the Prosecution's claim that it has been diligent in trying to locate witnesses such as Witness B is "unfounded and not supported by the

[28] Helge Brunborg testified on 3-4 February 2004 and Svetlana Radovanović testified on 21-22 June 2004.
[29] See for instance T. 7011-14; T. 7029-32 and T. 7041-44
[30] Motion, para. 4.
[31] Motion, paras 4 and 10 (iii)
[32] Motion, para. 10 (iii).
[33] Motion, para. 10 (iii).
[34] Motion, para. 10 (iii).

disclosure material."[36] In particular, the Blagojević Defence submits that as Witness B had been on its witness list and this witness's statement has been tendered into evidence pursuant to Rule 92 *bis*, the Prosecution has been aware of the existence of this witness since at least mid-May 2004.[37]

27. The Blagojević Defence further submits that is "disingenuous" for the Prosecution to claim that it could not have anticipated the Defence position since the Indictment only makes reference to Military Police guarding the prisoners.[38]

28. The Trial Chamber observes that a statement of Witness B tendered by the Blagojević Defence has been admitted into evidence pursuant to Rule 92 *bis*. It further observes that the Prosecution sought that this witness be called for cross-examination on the basis that "this witness's potential evidence goes directly to key issues raised in the indictment, such as the involvement of the Bratunac Brigade in dealing with the detained Muslim men in Bratunac town,"[39] but that the Trial Chamber denied this request.[40]

29. The Prosecution purportedly seeks to call Witness B to rebut the defence assertion that the only unit from the Bratunac Brigade guarding prisoners at the Vuk Karadžić school was the Military Police. The Trial Chamber is not convinced that this is an issue arising directly out of the defence evidence which could not reasonably have been anticipated. The Trial Chamber understands the Prosecution's aim to be broader than simply rebutting a defence claim: it seeks to introduce evidence that members of the 2nd Battalion of the Bratunac Brigade were guarding prisoners at the Vuk Karadžić school. Applying the Appeals Chamber standard, the Trial Chamber finds that the evidence proposed as rebuttal evidence touches upon a fundamental part of the Prosecution case, namely, the presence of troops from the Bratunac Brigade at a detention site where killings are alleged to have occurred. As Vidoje Blagojević is charged pursuant to Article 7(1) and 7(3) of the Indictment for crimes alleged to have occurred at this location, this evidence should have been brought as part of the Prosecution case-in-chief, not in rebuttal.[41]

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[35] Blagojević Response, paras 9-10. In particular, the Blagojević Defence submits that it is not clear if Witness B spoke with the members of the 2nd Battalion who are alleged to have been at the school, and if so, whether they indicated in what capacity they were there.
[36] Blagojević Response, para. 12.
[37] Blagojević Response, paras 11-12 and fn. 24.
[38] Blagojević Response, para. 13. The Blagojević Defence cites Indictment, para. 45.
[39] Prosecution's Response to Vidoje Blagojević's Motion to Amend Witness List and Incorporated Motion to Admit Evidence under Rule 92 *bis*, filed confidentially on 28 May 2004, page 5.
[40] Decision on Vidoje Blagojević's Motion to Amend Witness List and Incorporated Motion to Admit Evidence under Rule 92 *bis* (confidential), 17 June 2004.
[41] If the Prosecution intended that this evidence be considered as "fresh evidence" such that it requires the Trial Chamber to permit it to re-open its case, while recognising the difficulties the Prosecution is facing in an investigation of this scope, the Trial Chamber is not satisfied, based on the Prosecution's submissions, that it exercised the necessary diligence to locate this witness.

30. The Trial Chamber notes that paragraph 45 of the Indictment, cited by the Blagojević Defence, begins: "VRS and MUP officers and soldiers committed a number of opportunistic killings of Bosnian Muslim prisoners temporarily detained in Bratunac schools, buildings, and vehicles parked along the road." Paragraph 45 further alleges: "Members of the Bratunac Brigade Military Police Company under the command and control of Vidoje Blagojević and under the direction of Momir Nikolić participated in guarding the prisoners and escorting them to holding and execution sites in the Zvornik Brigade zone of responsibility." The Prosecution has not provided the Trial Chamber with a sufficient explanation as to why the evidence put forward by the Blagojević Defence in relation to this location could not reasonably have been anticipated.

31. Accordingly, the Trial Chamber therefore denies the Prosecution's Motion with respect to Witness B.

4. Bruce Bursik

32. The Prosecution seeks to call Bruce Bursik, an investigator with the Office of the Prosecutor, to testify about the exact location of certain members of the 2nd Company of the 2nd Battalion of the Bratunac Brigade as seen on a video tendered into evidence by the Prosecution[42] in order to rebut the testimony of several Defence witnesses from this unit who testified, according to the Prosecution, that they were not in "central" Potočari.[43] Mr. Bursik has "visited the sites depicted" in the video and therefore is "in a position to establish the exact locations of these soldiers in relation to the crime scene."[44] The Prosecution asserts that it "could not have anticipated that the defence witnesses would deny that they were at a particular location in Potočari despite having been captured on video tape" and that it is "necessary to present the precise location of these soldiers as a matter of record."[45]

33. The Blagojević Defence objects to this witness because he is not an eye-witness and cannot provide relevant additional evidence beyond which the Trial Chamber can see on the video or has already heard described by other witnesses.[46] Furthermore, the Blagojević Defence submits that the Prosecution could have called Mr. Bursik in its case-in-chief to present this evidence.[47]

34. The Trial Chamber finds that the evidence to be adduced by Bruce Bursik does not satisfy the standard for the admission of rebuttal evidence. As Mr. Bursik is not an eye-witness to the

[42] Prosecution Exhibit 21.
[43] Motion, para. 5.
[44] Motion, para. 5.
[45] Motion, para. 11.
[46] Blagojević Response, para. 16.
[47] Blagojević Response, para. 16.

events, and in light of all other evidence and information before the Trial Chamber in this case,[48] it does not find that his testimony is highly probative and related to a significant issue arising directly out of defence evidence. It is for the Trial Chamber to weigh and consider the evidence before it, including evidence which may be conflicting. Furthermore, Mr. Bursik could have been called during the Prosecution's case-in-chief to discuss Prosecution exhibit 21, as was a former investigator of the Office of the Prosecutor, Jean-Rene Ruez.

B. Re-Opening the Prosecution Case

35. The Prosecution seeks to re-open its case and present "fresh evidence" for the "limited purpose" of presenting evidence of executions in the Bratunac soccer stadium on 13 July 1995.[49] In assessing the proposed evidence the Trial Chamber will apply the test of whether, with reasonable diligence, this evidence could have been identified and presented in the Prosecution's case-in-chief. It will further consider the probative value of the proposed evidence and the fact that the presentation of evidence in the trial of Vidoje Blagojević and Dragan Jokić, which commenced on 14 May 2004, has concluded.

36. As a preliminary matter, the Trial Chamber observes that the Prosecution seeks to introduce both rebuttal and new evidence through Witness P-130. The Trial Chamber will consider both aspects of the Prosecution's Motion in relation to this witness below. Furthermore, as the evidence of the other two witnesses the Prosecution seeks to call should it be permitted to re-open its case, namely Witness B and Witness C, is largely to corroborate the testimony of Witness P-130, the Trial Chamber will consider the evidence of all witnesses below.

1. Evidence Related to the Soccer Stadium in Bratunac

37. The Prosecution seeks to re-call Witness P-130, who testified as a Prosecution witness in January 2004. The Prosecution submits that Witness P-130, an officer in the security branch of the Zvornik Brigade, will testify that Muslim prisoners were detained at the soccer stadium in Bratunac on 13 July 1995 and that some of these men were executed by members of the VRS army, including members of the Bratunac Brigade. Witness P-130 will further testify that he and two others – a member of the Bratunac Brigade Military Police and an officer from the Bratunac Brigade who has testified in the Prosecution's case-in-chief – killed some of the men at the stadium.[50] The

[48] The Trial Chamber recalls that the Prosecution cross-examined the witnesses cited in its Motion.
[49] Motion, para. 6.
[50] Motion, para. 6(i).

Prosecution submits that this is evidence of "another major crime scene... in the Bratunac Brigade area of responsibility, close to the Brigade Headquarters."[51]

38. The Prosecution submits that Witness B heard noises and shooting coming from within the soccer stadium in Bratunac, and therefore could corroborate the evidence of Witness P-130.[52] Additionally, it submits that Witness C will testify that he was near the Bratunac soccer stadium and saw Muslim men being beaten and shot in the stadium.[53]

39. The Prosecution asserts that the evidence of the executions in the soccer stadium also serves as rebuttal evidence, as one witness called by the Blagojević Defence testified that he never heard of any prisoners detained in the soccer stadium.[54]

40. The Blagojević Defence objects to calling Witness P-130 to either provide new evidence about executions in the soccer stadium or to provide rebuttal evidence about men being detained in the soccer stadium. On the latter point, the Blagojević Defence states that "[i]t has never been contested that prisoners were kept [in the football stadium in Bratunac]."[55] For this reason, the Blagojević Defence submits that the testimony of Witness B would not be critical to or supportive of P-130's testimony, as it is not contested that prisoners were held at the soccer stadium.[56]

41. In relation to the Prosecution's Motion to re-open the case to hear Witness P-130, the Blagojević Defence argues: (i) the Prosecution has failed to demonstrate how Witness P-130 "impulsively, came to the realization that he should confess to having committed perjury while testifying in the Prosecution's case-in-chief";[57] that the probative value of Witness P-130's testimony is directly affected because he "knowingly, voluntarily and intentionally misrepresented the truth when he previously testified under oath in this case";[58] and that while the Prosecution had expressed its intention to re-open its case on 24 May 2004, it did not do so until now, and that "it is unrealistic to expect the Defence to investigate the "fresh evidence" absent a decision from the Trial Chamber permitting the re-opening of the Prosecution's case."[59] The Blagojević Defence submits that Witness C's redacted statements are inconsistent with Witness P-130's testimony.[60] If the

[51] Motion, para. 6 (i). See also, Motion, para. 13.
[52] Motion, para. 6 (iii).
[53] Motion, para. 6 (ii).
[54] Motion, para. 7.
[55] Blagojević Response, para. 14.
[56] Blagojević Response, para 14.
[57] Blagojević Response, para. 18.
[58] Blagojević Response, para. 19.
[59] Blagojević Response, para. 20.
[60] Blagojević Response, para. 23.

Prosecution Motion is granted, the Blagojević Defence submits that it would need to call at least two witnesses in its re-joinder case.[61]

2. Evidence Related to Other Incidents and Locations in Bratunac and Zvornik Municipalities

42. Apart from the evidence related to the soccer stadium, the Prosecution submits that Witness P-130 will testify that Momir Nikolić told him that members of the Bratunac Brigade Military Police had "an assignment" at the Kravica warehouse, and that Witness P-130 then went to the Kravica warehouse with members of the Bratunac Brigade Military Police, where he saw bodies lying around the warehouse and Muslim men inside the warehouse. It is submitted that he will testify that he left the Kravica warehouse while others, including a member of the Bratunac Brigade Military Police, remained behind.[62]

43. Witness P-130 will further testify that he participated in overseeing the detention, transport and execution of Muslim prisoners in the Zvornik area. The Prosecution submits that he will testify that at least one member of the Bratunac Brigade Military Police – apparently the same person with whom he went to the Kravica warehouse – participated in some of the executions in the Zvornik area. The Prosecution asserts that this evidence further serves to rebut the Blagojević Defence position that members of the Bratunac Brigade were not involved in the killings in the Zvornik area.[63]

44. Finally Witness P-130 is expected to testify that he and members of the Zvornik Brigade Engineering Company assisted in the clean up and burial process at some execution sites. The Prosecution submits that these aspects of his testimony provide "additional information relating to the involvement of the Zvornik Brigade Engineering Company and the creation of mass graves in the Zvornik area."[64]

45. The Jokić Defence objects to calling Witness P-130, and particularly to the evidence related to the Zvornik Engineering Company's involvement in the clean-up and burial operations. The Jokić Defence submits that it is "hard to believe that the testimony of [Witness P-130] can be considered as 'evidence'", as it submits that his various statements and former testimony contain

[61] Blagojević Response, para. 21.
[62] Motion, para. 6(i). See also, Motion, para. 13.
[63] Motion, para. 7.
[64] Motion, para. 6(i). See also, Motion, para. 13.

substantial differences and that there is, therefore "no reliability to this so-called 'evidence'."[65] The Jokić Defence further calls on the Prosecution to indict Witness P-130 for perjury.[66]

46. The Jokić Defence challenges the Prosecution's assertion that no prejudice to the Defence would result from calling Witness P-130 at this stage of the proceedings,[67] stating that it was not informed that the Prosecution would move to re-open its case to call this witness and that therefore it will need additional time to prepare its rejoinder case.[68] If the Prosecution's Motion were granted, the Jokić Defence submits that it would need to call ten witnesses, who it identifies as either persons implicated as co-perpetrators by Witness P-130 or persons who gave contradicting evidence during the trial, to testify before the Trial Chamber.[69] The Jokić Defence contends that Dragan Jokić's rights under Articles 20 and 21 of the Statute would be jeopardized by the "substantial delay" caused by re-opening the Prosecution's case.[70]

47. Finally, the Jokić Defence challenges the characterisation of this evidence as rebuttal evidence. It argues that the evidence to be presented by Witness P-130 does not arise directly and specifically out of defence evidence, and that similar evidence has already been introduced by the Prosecution.[71]

3. Trial Chamber's Findings

(a) New Evidence

48. In relation to that evidence which the Prosecution describes as fresh evidence, namely evidence related to the Bratunac soccer stadium killings, evidence related to the Kravica warehouse and evidence relating to detentions, executions and mass burials between 15 and 18 July 1995, the Prosecution asserts that it "could not have known about this evidence before the close of its case" because Witness P-130 did not inform it of this information until 23 May 2004.[72] On this date, the Prosecution spoke with Witness P-130 "as part of the continuing investigation of the Srebrenica case," and this witness "acknowledged that he had not told the OTP and the Trial Chamber the entire truth regarding his knowledge and involvement in the criminal events after the fall of Srebrenica and that as a consequence, some of his prior statements and testimony were not true and

[65] Jokić Response, paras 6 and 8.
[66] Jokić Response, para. 7.
[67] See, Motion, para. 15.
[68] Jokić Response, para. 9.
[69] Jokić Response, para. 10
[70] Jokić Response, para. 11.
[71] Jokić Response, paras 12-13.
[72] Motion, para. 12.

complete."[73] While the Prosecution does not clarify which aspects of Witness P-130's former testimony are "not true and complete," it does assert that "[g]iven the importance of his prior testimony and current statements, it is crucial that the Trial Chamber hear all the information [Witness P-130] has to offer, in order to fully evaluate the information provided by [him]."[74]

49. The Prosecution avers that "without witnesses coming forward" it would not have known about this information and therefore, this evidence meets the first part of the test set out by the Appeals Chamber in *Čelebići*, namely that the evidence could not have been presented in the Prosecution's case-in-chief.[75] It submits that this evidence meets the second part of the *Čelebići* test in that the evidence of Witness P-130 is "highly probative", particularly as it "shows the overall co-operation among the different units of the VRS army in the murder operation," the probative value of which is not outweighed by any consideration relating to the need to ensure a fair trial.[76] The Prosecution further submits that evidence relating to an additional crime scene is significant as it "provides additional circumstantial evidence of Colonel Blagojević's knowledge of the murder operation as this was the first large scale massacre that occurred in his area of responsibility involving soldiers of his Brigade," and has historical significance which would contribute to the historical record.[77]

50. The Trial Chamber has numerous concerns about the evidence which the Prosecution seeks to introduce as new evidence by way of re-opening its case. While the Prosecution did bring this new information from Witness P-130 to the attention of the Defence and the Trial Chamber on 24 May 2004, there is no explanation of why it was only after the close of both Defence cases that the Prosecution actually moved to re-open its case.[78] Re-opening a case after the presentation of all evidence, especially when it may be expected that the Defence will be required to call witnesses in rebuttal, is likely to result in delay and therefore impacts on the right of the accused to a fair and expeditious trial.

51. The Prosecution maintains that "even though there was some evidence that men were detained at the soccer stadium, the Prosecution did not discover that the men were in fact murdered at the stadium without witnesses coming forward with this information" despite its investigations.[79] The Trial Chamber accepts that, as Witness P-130 did not tell the Prosecution all the information he

[73] Motion, fn. 19.
[74] Motion, fn. 19.
[75] Motion, para. 12.
[76] Motion, para. 14.
[77] Motion, para. 14.
[78] See Transcript of proceedings, 24 May 2004, T. 9751-53 (private session). See also, Transcript of proceedings, 25 May 2004, T. 9907-9916 and Transcript of proceedings, 22 July 2004, T. 12121-12123.
[79] Prosecution's Motion, para. 12 (references omitted).

now does either during prior interviews or during his testimony, the Prosecution could not have known about this information before its case was concluded. The Prosecution does not, however, provide any explanation on why it did not call Witness C during its case-in-chief – a witness who also is to testify that he saw men shot in the stadium. The Prosecution has not provided any additional information on what other efforts it has undertaken to investigate what happened at the soccer stadium, beyond relying on witnesses "coming forward" with information. It is not clear why the Prosecution did not investigate the events at the soccer stadium, if indeed it never has investigated this location, especially considering the information it has gathered regarding Muslim men being killed in and around detention sites in Bratunac. The Trial Chamber is not satisfied that the Prosecution acted with reasonable diligence in obtaining information concerning the soccer stadium.

52. The Trial Chamber finds the fact that Witness P-130 acknowlegdes that he did not give wholly truthful and complete testimony when appearing before it to be, at minimum, concerning. Furthermore, the Prosecution does not provide any explanation to the Trial Chamber on why Witness P-130 provides this information now – and indeed why he did not provide this information when he testified under oath in January 2004. As there are questions as to why Witness P-130 did not provide this information when he testified, the Trial Chamber believes that the Prosecution is under a certain obligation to assure the Trial Chamber that this new evidence is credible.[80] Recalling that evidence of limited probative value will not satisfy the requirements for re-opening a case, the issue of the probative value of Witness P-130's testimony is relevant.

53. One way which the Prosecution could have done this is to provide corroborating evidence from the persons identified by Witness P-130 as having taken part in the executions and other activities described. As one of the persons identified by Witness P-130 is another Prosecution witness, the Trial Chamber finds the absence of any information or explanation from the Prosecution on whether it spoke to this witness about Witness P-130's allegations or proposed testimony troubling. If the Prosecution did speak to this witness and the witness was unable to confirm Witness P-130's account, the Trial Chamber would have expected the Prosecution to inform it of this information. If the Prosecution did not speak to this witness, the Trial Chamber would have expected the Motion to provide an explanation of why it did not do so, as such a follow-up interview would be considered to be part of the Prosecution's duty to the Trial Chamber to present credible evidence, as well as part of its larger duty to act with reasonable diligence. That

[80] The Trial Chamber recognises that Witnesses B and C may be of some assistance, at least in relation to crimes alleged to have occurred at the soccer stadium.

the Defence can call this Prosecution witness to either rebut – or corroborate – the testimony of Witness P-130 is not sufficient.

54. Additionally, the Trial Chamber observes that the Bratunac soccer stadium, referred to by the Prosecution as "another major crime scene" is not mentioned in either the Indictment or the Prosecution's Pre-Trial Brief. The Trial Chamber would be hesitant to permit the Prosecution to adduce evidence of "another major crime scene" without the Accused being put on notice of the allegations against him.[81]

55. For the foregoing reasons, the Prosecution's Motion to re-open its case to call P-130, Witness B and Witness C is denied.

(b) Rebuttal evidence

56. In relation to the evidence proposed by the Prosecution to rebut the Defence evidence that men were never detained in the soccer stadium,[82] the Trial Chamber recalls that the Blagojević Defence submits that is has never contested the detention of men in the soccer stadium.[83] Accordingly, the evidence of Witness P-130 and Witness B on this point is unnecessary.

57. The Prosecution submits that the evidence of Witness P-130 related to the participation of at least one member of the Bratunac Brigade Military Police participating in executions in the Zvornik area is rebuttal evidence "given that the Blagojević defence position is that members of the Bratunac Brigade were not involved in the Zvornik killings."[84] The Prosecution does not identify specific evidence adduced during the Blagojević Defence but rather seeks to rebut the "defence position". Recalling the Appeals Chamber test for the admission of evidence in rebuttal, the Trial Chamber finds that evidence of the involvement of members of the Bratunac Brigade in killings in the Zvornik area is evidence which touches upon a fundamental part of the Prosecution case, and as such, should have been brought in the Prosecution's case-in-chief. Furthermore, the "defence position" on this point could have reasonably been anticipated. For these reasons, it is not appropriate to permit the Prosecution to call this evidence in rebuttal.

58. Finally, the "additional" evidence which the Prosecution seeks to adduce through Witness P-130 on the involvement of the Zvornik Brigade Engineering Unit appears to be presented in the Motion as both new evidence and rebuttal evidence. To the extent that it is presented as new

[81] See, e.g., *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 88.
[82] See, *supra* para. 39.
[83] See, *supra* para. 40.
[84] Motion, para. 7.

evidence, the Trial Chamber finds it is inadmissible for the reasons set out above.[85] To the extent that it is presented as rebuttal evidence, the Trial Chamber finds that it is inadmissible as this issue does not arise directly out of Defence evidence and it relates to a fundamental part of the Prosecution's case upon which it has already adduced evidence.

IV. DISPOSITION

FOR THE FOREGOING REASONS, the Trial Chamber hereby:

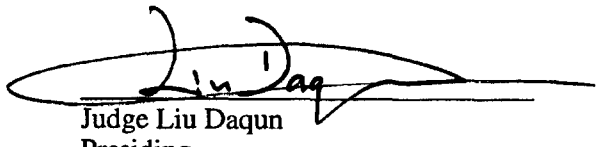
DENIES the Motion;

VARIES the Scheduling Order of 30 July 2004; and

ORDERS that:

1. Final Briefs shall be filed by Wednesday, 22 September 2004; and
2. Closing arguments shall be heard beginning on Wednesday, 29 September 2004, with each Party permitted 4.5 hours in which to present its argument, and 30 minutes for rebuttal or rejoinder arguments, if any.

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



Judge Liu Daqun
Presiding

Dated this thirteenth day of September 2004,
At The Hague
The Netherlands

[Seal of the Tribunal]

[85] See, *supra* paras 50, 52-53.