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

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991

Case: IT-96-21-R-R119

Date: 25 April 2002

Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr Hans Holthuis

Decision of: 25 April 2002

PROSECUTOR

v

Hazim DELIĆ

DECISION ON MOTION FOR REVIEW

Counsel for the Prosecutor:

Mr Norman Farrell

Counsel for the Defence:

Mr Salih Karabdić and Mr Tom Moran for Hazim Delić

The background to the application

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

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

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

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

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

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

The application

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

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

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

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

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

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

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

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

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

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

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

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

[14] Statement, pp 2, 4.

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

[16] Motion, par 4.

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

[18] *Ibid*, par 6.

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

Rule 120
Preliminary Examination

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

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

(a) there must be a new fact;

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

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

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

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

Rule 115 and Rule 119

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

Rule 115
Additional Evidence

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

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

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

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

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

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

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

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

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

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

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

Compliance with Rule 119

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

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

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

(a) A new fact?

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

(b) Unknown and not discoverable by due diligence?

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

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

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

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

Rule 119 has not added any requirement to this facility.

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

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

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

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

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

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

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

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

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

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

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

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

[38] Further Reply.

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

Miscarriage of justice

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

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

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

[40] See par 14, *supra*.

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

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

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

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

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

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

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

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

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

[45] *Barayagwiza* Decision, par 66.

[46] Further Reply, par 8.

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

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

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

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

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

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

Disposition

23. The Motion is dismissed.

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

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

Judge Mohamed Shahabuddeen
Presiding

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

[Seal of the Tribunal]