SEPARATE OPINION OF JUDGE O-GON KWON

1. I agree with the majority in the outcome of the Decision in denying the Application. However, I disagree with the majority in two aspects of the reasoning: (I) the approach to materials in the possession of the Prosecution before the close of its case-in-chief and the reluctance to adopt a "miscarriage of justice standard" to such material; and (II) the application of the reasonable diligence standard to certain material.

I. Miscarriage of justice standard and materials in possession of the Prosecution before the close of its case-in-chief

2. The majority denies re-opening of the Prosecution's case-in-chief in relation to items 26, 31, 32, 69, 70, 71, 73, 74, parts of 64 and the unnumbered statement dated 24 January 2004 which were in the Prosecution's possession before the close of its case in 25 February 2004.[1] The majority finds that material in the Prosecution's possession before the close of its case cannot constitute a basis for re-opening and rejects the Prosecution's submission that the miscarriage of justice standard could be applied to such material in the exercise of the Trial Chamber's discretion.[2] I disagree with the finding that such material *per se* cannot serve as a basis for re-opening. Further, I am of the opinion that the miscarriage of justice standard articulated by the Appeals Chamber in reviewing additional evidence at the appellate level can be applied *mutatis mutandis* at the trial level under certain circumstances.

3. There is no disagreement that re-opening would generally be precluded where material is obtained before the close of the Prosecution's case. In exceptional circumstances, however, I am of the opinion that such material can serve as a basis for re-opening in the exercise of the Trial Chamber's discretion. As the Prosecution proposes, I find support in the Appeals Chamber's position on the admissibility of additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence: although, as a general principle, material available at trial will not be admitted as additional evidence on appeal, under certain exceptional circumstances, such material may be admitted at the Appeals Chamber's discretion when a heightened standard is met.[3] Under Rule 115, evidence that was unavailable during trial, and

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[1] The majority also denies the addition of proposed witnesses B-235 and Goran Stoparić. *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case, 13 December 2005 ("Decision"), para. 23; *Milošević*, Confidential Annex to Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case, 13 December 2005 ("Confidential Annex"), paras. 2–10.

[2] Decision, paras. 20–23.

[3] Rule 115(B) itself only speaks to evidence unavailable at trial and makes no reference to evidence available at trial. *But see Prosecutor v. Mejakić et al.*, Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defense Motion to Admit Additional Evidence before the Appeals Chamber pursuant to Rule 115, 16 November 2005, para. 11 ("The Appeals Chamber maintains an inherent power to admit new evidence on appeal which *does not* satisfy the requirements of

which could not have been discovered despite the exercise of due diligence, is admitted if it *could* have had an impact on the verdict; evidence that was available at trial, however, is subject to a heightened standard: it is admitted if it *would* have affected the verdict because its exclusion would lead to a miscarriage of justice.[4]

4. In rejecting the application of the miscarriage of justice standard, the majority appears to be concerned about the impropriety of presenting the Trial Chamber's opinion on the ultimate question of an accused's responsibility for the crimes charged.[5] However, I see no reason why the miscarriage of justice standard could not be applied *mutatis mutandis* in the trial stage in a review for re-opening on the basis of material in the Prosecution's possession before the close of its case. That is to say, rather than inquiring whether the material would change the final verdict, the pertinent query would be whether the material has a direct impact on the guilt or innocence of the Accused, so that its exclusion would lead to a miscarriage of justice.

5. In addition to the foregoing, I find that it would be against the interests of judicial economy if material available at trial, which could not serve as a basis for re-opening because it was in the Prosecution's possession before the close of its case, were to be admitted during the appellate stage as additional evidence pursuant to Rule 115.

6. In applying the miscarriage of justice standard, however, I do not see that the exclusion of item 26, 31, 32, 69, 70, 71, 73, 74, parts of 64 or the unnumbered statement dated 24 January 2004 has such a direct impact on the guilt of the Accused that its exclusion would lead to a miscarriage of justice. Therefore, I agree with the majority in denying the Application for re-opening of the Prosecution's case in relation to the above items.

II. Application of the reasonable diligence standard to certain items in the Application

7. The majority finds that the Prosecution has not met its burden in showing it exercised reasonable diligence with respect to items 6, 30, 75, 79, 80, 81, 83, 84, 88 and 89.[6] I do not agree with these findings of the majority as explained in the following paragraphs. However,

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due diligence and unavailability, only in the most exceptional circumstances, namely, to avoid a miscarriage of justice.") (emphasis added).

[4] *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Decision on Naletilić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005, paras. 12–13. The reason for heightened standard with respect to available evidence is to "ensure the finality of judgements and the application of maximum effort by counsel at trial to obtain and present relevance evidence," while at the same time "not permit a factually erroneous conviction to stand, thereby safeguarding an equally important interest of accuracy in judgements." *Ibid.*, para. 13 (citing *Prosecutor v. Krstić*, Case No. IT-98-33-A, Reasons for the Decisions on Applications for Admission of Additional Evidence, 6 April 2004, para. 12).

[5] Decision, para. 22.

[6] Decision, paras. 25, 28, 30; Confidential Annex, paras. 12, 15, 19, 20.

for reasons similar to those discussed in the Decision in the application of the balancing test to other items,[7] I agree with the outcome of the Decision in denying the Application regarding these items since I find that the probative value of each item does not outweigh the need to ensure a fair trial.

A. Item 6

8. The majority finds that the Prosecution did not exercise reasonable diligence with respect to Item 6 because (i) the Prosecution did not make any attempts to compel production of the material pursuant to Rule 54 *bis* despite its repeated tries to obtain it; (ii) there is a considerable gap between the earlier 1998 and 2001 requests and the remaining requests that led to the provision of the material in 2005; and (iii) the Prosecution failed to provide an explanation to the Trial Chamber for the Prosecution's apparent resignation to the authorities' refusal to provide the material.[8] Since the reasonable diligence test inquires whether the material could have been identified and presented during the Prosecution's case with reasonable diligence, I find that the majority is, in effect, finding that the requests to the authorities in 1998 and 2001 do not constitute reasonable diligence because the authorities would not have complied before the end of the Prosecution's case and that the Rule 54 *bis* mechanism would have produced the material. However, I see the former as the benefit of hindsight and the latter as speculation.[9] Moreover, I do not see how the earlier 1998 and 2001 requests can be, in essence, negated because the Prosecution did not use the Rule 54 *bis* mechanism and there is a gap with the subsequent requests.

B. Item 30

9. The majority finds that the Prosecution did not exercise reasonable diligence with respect to Item 30 because (i) the request to search the archives from the relevant authorities (*i.e.* mid 2003) was too late into the Prosecution's case and (ii) the Prosecution has not offered any explanation to the Trial Chamber as to why it did not request assistance earlier from the authorities.[10] Since the reasonable diligence test inquires whether the material could have been identified and presented during the Prosecution's case with reasonable diligence, I find that the majority is, in effect, finding that an earlier request and consequent access would have allowed the Prosecution to obtain the material before the close of its case. However, I see this as speculation and find it particularly concerning since a suggestion has been made that the

[7] *See* Decision, paras. 37–38; Confidential Annex, para. 21.

[8] Decision, para. 30, Confidential Annex, para. 12.

[9] If additional explanation is necessary from the moving party, it is well within our discretion to order the party, if able, to provide such explanation.

material may not have been in the archives until 2004. Further, I do not see why the previous two missions[11] to search the archives are not considered in the evaluation of the exercise of the Prosecution's reasonable diligence and more emphasis is put on the timing of the request by the Prosecution to the relevant authorities.[12]

C. Item 75

10. The majority finds that the reasonable diligence standard has not been met with respect to item 75 because the Prosecution has not offered any explanation as to why it did not begin earlier.[13] However, I see a resulting inconsistency in light of the fact that the majority finds that the reasonable diligence standard has been met with respect to other items, *i.e.*, items 37, 76, parts of item 64 and witness B-345.[14] This is the case since the identification and presentation of item 75 came about mainly due to the discovery of item 37 and witness B-345. It would appear inconsistent to find that the Prosecution could not have identified and presented item 37 and witness B-345 with reasonable diligence, yet find that item 75 could have been identified and presented with reasonable diligence.[15]

D. Items 79, 80, 81, 83, 84, 88 and 89 (Personnel Files)

11. The majority finds that the Prosecution did not exercise reasonable diligence with respect to Items 79, 80, 81, 83, 84, 88 and 89 because (i) the Prosecution waited too long (*i.e.*, end of 2003 or early 2004) after the commencement of its case to begin the process of obtaining the materials and (ii) the Prosecution did not make any attempts to compel production of the material pursuant to Rule 54 *bis*.[16] However, for the same reasons given in relation to items 6 and 30,[17] I find that the Prosecution has met its burden in showing it exercised reasonable diligence with respect to these items.

[10] Decision, para. 25; Confidential Annex, para. 15.
[11] The Prosecution obtained the item on its third mission to search the archives.
[12] *See supra*, note 8.
[13] Decision, para. 28; Confidential Annex, para. 19.
[14] *See* Decision, para. 27; Confidential Annex, para. 28.
[15] *See supra*, note 8.
[16] Decision, para. 25; Confidential Annex, para. 20.
[17] *See supra*, paras. 8–9.

12. It is for the foregoing reasons that I disagree with the majority in two aspects of the reasoning, but agree with the majority in the outcome of the Decision in denying the Application.

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

Judge O-Gon Kwon

Dated this thirteenth day of December 2005
At The Hague
The Netherlands

[Seal of the Tribunal]