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	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991	Case No.	IT-02-54-T
		Date:	13 December 2005
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IN THE TRIAL CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: **Mr. Hans Holthuis**

Decision of: **13 December 2005**

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

DECISION ON APPLICATION FOR A LIMITED RE-OPENING OF THE BOSNIA AND KOSOVO COMPONENTS OF THE PROSECUTION CASE WITH CONFIDENTIAL ANNEX

Office of the Prosecutor

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The Accused

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THIS 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 seized of an "Application for Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case" ("Application"), and hereby renders its decision thereon.

I. Procedural History

1. On 25 February 2004, the Office of the Prosecutor ("Prosecution") brought its case in chief against Slobodan Milošević ("Accused") to a close.[1]

2. On 12 July 2004, the Prosecution filed a confidential and *ex parte* "Prosecution Notice of Potential Forthcoming Request to Re-Open its Case in relation to Srebrenica Allegations" ("Notice"), in which it indicated that "there is a possibility that the Prosecution will ask to re-open its case at some stage in relation to certain evidence pertaining to the charges in the Bosnia component of the indictment against the Accused, particularly those charges relating to Srebrenica."[2] The Notice concluded with the statement that "[s]hould the Prosecution seek to re-open its case, such an application will be filed as soon as possible."[3]

3. On 18 July 2005, the Prosecution filed an "Application for Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case" ("Application"), with a confidential Annex A entitled "Items for which the Prosecution Seeks a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case" ("Application Annex"). An "Addendum and Clarification" to the Application was filed on 26 July 2005 ("Addendum"), in which the Prosecution presents additional information with regard to one of the documents listed in the Application Annex, corrects an error in the Application Annex, and requests that a document inadvertently omitted from its earlier filings be incorporated into the Application Annex and included in the Chamber's consideration of the Application. The Application included a request that the Chamber order that the Notice be made *inter partes*, but ostensibly retain its confidential status. The Chamber will grant this request.

4. On 31 August 2005, Assigned Counsel filed their "Submissions in Response" to the Application ("Response"), along with a confidential Annex A ("Response Annex") setting forth their detailed objections to the items for which the Prosecution seeks re-opening. The Assigned Counsel also

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[1] *Prosecutor v. Milošević*, Case No. IT-02-54-T, Prosecution Notification of the Completion of Its Case and Motion for the Admission of Evidence in Written Form", 25 February 2004.

[2] Notice, para. 1.

[3] *Ibid.*, para. 11.

request leave to file a response in excess of the page limits, noting that such length is necessary "in order to deal comprehensively with the issues raised and the extensive materials relied upon by the Prosecution".[4] A Corrigendum to the Response was filed on 6 September 2005, and consisted of a single paragraph that is intended to correct assertions made in paragraphs 8 and 17 of the Response.

5. The Prosecution filed a Reply to the Response on 7 September 2005 ("Reply"), in which it also seeks leave to reply under Rule 126 *bis*. An addendum to the Reply was filed by the Prosecution on 9 September 2005 ("Reply Addendum"), but included no separate request for leave to file.

6. The Trial Chamber believes that its decision is aided by consideration of all the arguments raised and information provided by the parties. The Prosecution is therefore granted leave to file the Reply and the Reply Addendum, and the Chamber accepts the filing of the over-sized Response by the Defence.

II. Applicable Law

7. Rule 85 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), which governs the order of presentation of evidence in trial proceedings, provides in relevant 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:
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> (i) evidence for the prosecution;
> (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.

8. Although the Rules do not specifically so provide, the jurisprudence of the Tribunal recognises that a Trial Chamber may grant leave to the Prosecution to re-open its case "in order to present new evidence not previously available to it."[5]

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[4] Response, para. 7.

[5] *Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998 ("*Čelebići* Trial Decision"), para. 26. *See also Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 279 (beginning its discussion of the *Čelebići* Trial Decision by noting this holding, and neither overturning nor qualifying it); *Prosecutor v. Blagojević and Jokić*, Case No. 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, 13 September 2004 ("*Blagojević and Jokić* Trial Decision"), para. 7 (basing the Trial Chamber's competence to permit the re-opening of a case on Rule 89(C)). Note that the jurisprudence contemplates the possibility that an accused may also seek to re-open his or her case. *See, e.g., Čelebići*

9. There are therefore two separate circumstances in which the Prosecution may seek to introduce further evidence after the close of its case in chief: it may seek to introduce evidence to rebut the defence case, and it may seek to introduce new evidence by re-opening its case in chief. Two different legal standards apply,[6] and both the timing of the request and the substantive content of the evidence are factors in deciding whether the relevant standard is satisfied. Although the Application seeks only the re-opening of the Prosecution's case in chief, and does not request rebuttal as an alternative form of relief, the Chamber considers that a brief discussion of both legal standards will clarify the issues for determination with regard to disposition of the Application and serve as guidance to the parties.

10. The *Čelebići* Appeals Chamber formulated the standards that apply for each as follows. "Rebuttal evidence must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated";[7] where evidence is intended to establish a matter which is "a fundamental part of the case the Prosecution was required to prove", however, "[s]uch evidence should be brought as part of the Prosecution case in chief and not in rebuttal."[8] Moreover, even if the evidence could not have been adduced earlier because it was not in the Prosecution's possession during its case in chief, its character as newly obtained evidence does not render it admissible in rebuttal if it does not meet this standard. In the words of the Appeal Judgement, that character "merely puts it into the category of fresh evidence, to which a different basis of admissibility applies."[9]

11. Elaborating on the basis applicable to such newly obtained evidence, the Appeals Chamber stated 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."[10] By noting that "the burden of proving that reasonable diligence was exercised in

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Appeal Judgement, para. 283 (using the phrase "party making the application" in its statement of the applicable standard).

[6] For the purposes of this decision, evidence which is admissible when used in cross-examination of a defence witness is not included in this general description of evidence presented after the close of a case in chief.

[7] *Čelebići* Appeal Judgement, *supra* note 5, para. 273. Although this phrasing seems to introduce an element of reasonable anticipation that was absent from the Trial Chamber's definition of rebuttal evidence, the Appeals Chamber's reformulation does in fact capture other elements of the test that appeared elsewhere in the Trial Chamber's decision. *Čelebići* Trial Decision, *supra* note 5, para. 23.

[8] *Čelebići* Appeal Judgement, *supra* note 5, para. 275.

[9] *Ibid.*, para. 276.

[10] *Ibid.*, para. 283. The most recent Trial Chamber decision on an application for re-opening went so far as to identify certain "elements ... underpin[ning] the notion of due diligence", essentially listing certain steps that any diligent party would take to ensure that it had certain evidence at the appropriate time. *See Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Decision on the Prosecution's Application to Re-Open Its Case, 1 June 2005 ("*Hadžihasanović and Kubura* Trial Decision"), paras. 38–42. The Chamber cited neither Tribunal nor external authority for its specific prescriptive propositions, however, and it appears that these comments were inspired by the particular failings of the Prosecution in that case. *See Ibid.*, paras. 51–67, 70–74, 79–82, 86–90, 96–100, 104–108.

obtaining the evidence lies on the Prosecution,"[11] the Appeals Chamber affirmed the *Čelebići* Trial Chamber, which had held that this burden "rests squarely" on the party seeking to adduce the evidence.[12]

12. Even if the reasonable diligence standard is satisfied, however, Trial Chambers retain a general discretion under Rule 89(D) to deny re-opening if the probative value of the proposed evidence is substantially outweighed by the need to ensure a fair trial.[13] With respect to this weighing exercise, the Tribunal's jurisprudence clearly establishes that "it is only in exceptional circumstances where the justice of the case so demands" that a Trial Chamber should exercise its discretion to allow the Prosecution to adduce 'fresh' evidence after the parties to a criminal trial have closed their case.[14]

13. Three factors have been identified in the jurisprudence as being "highly relevant to the fairness to the accused of admission of fresh evidence",[15] of which only the first two are applicable to this single-defendant case: (1) the stage of the trial at which the evidence is sought to be adduced; (2) the potential delay in the trial that admission of the evidence could cause, including the appropriateness of a possible adjournment in the overall context of the trial; and (3) the effect of bringing new evidence against one accused in a multi-defendant case.[16] With regard to the first factor, following the *Čelebići* Trial Chamber's lead, subsequent decisions on motions to re-open have paraphrased or clarified "the advanced stage of the trial" as meaning "the later in the trial that the application is made the less likely the Trial Chamber is to accede to the request".[17]

For these reasons, those elements are not included here as part of the standard as derived from Tribunal jurisprudence, though they may be useful factors for a Trial Chamber to consider when evaluating an application to re-open.

[11] *Čelebići* Appeal Judgement, *supra* note 5, para. 286.

[12] *Čelebići* Trial Decision, *supra* note 5, para. 26.

[13] *Čelebići* Appeal Judgement, *supra* note 5, para. 283. The Trial Chamber had expressed this balancing test differently, stating that "[w]hile it is axiomatic that all evidence must fulfil the requirements of admissibility, for the Trial Chamber to grant the Prosecution permission to re-open its case, the probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused." *Čelebići* Trial Decision, *supra* note 5, para. 27. Although these tests may appear identical in substance, the Appeals Chamber specifically rejected any reference to "prejudice" to the accused, preferring instead its formulation of "fairness to the accused" as the counterbalancing consideration. *Čelebići* Appeal Judgement, *supra* note 5, paras. 283, 288.

[14] *Čelebići* Trial Decision, *supra* note 5, para. 27; *quoted with approval in Čelebići* Appeal Judgement, *supra* note 5, para. 288. *See also Hadžihasanović and Kubura* Trial Decision, *supra* note 10, para. 47.

[15] *Čelebići* Appeal Judgement, *supra* note 5, para. 290.

[16] *See Čelebići* Trial Decision, *supra* note 5, para. 27; *Čelebići* Appeal Judgement, *supra* note 5, para. 290; *Blagojević and Jokić* Trial Decision, *supra* note 5, paras. 10–11.

[17] *Čelebići* Trial Decision, *supra* note 5, para. 27; *quoted in Čelebići* Appeal Judgement, *supra* note 5, para. 280; *Blagojević and Jokić* Trial Decision, *supra* note 5, para. 10; *Hadžihasanović and Kubura* Trial Decision, *supra* note 10, para. 45.

14. When assessing the current Application, therefore, the Trial Chamber has considered the following questions:

    i. Was the evidence obtained after the close of the Prosecution's case in chief ("newly obtained")? If not, then the test for re-opening is inapplicable, and the evidence is inadmissible for the purpose of a re-opened case in chief. The Chamber's conclusions with respect to this question are discussed below in Section IV of this Decision.

    ii. If the evidence was newly obtained, could this evidence have been identified and presented, through the exercise of reasonable diligence, during the Prosecution's case in chief? If so, then the evidence cannot be the basis for re-opening. The Chamber's conclusions with respect to this question are discussed below in Section V of this Decision.

    iii. If the evidence could not have been identified and presented through the exercise of reasonable diligence, should the Trial Chamber nevertheless exercise its discretion under Rule 89(D) to deny re-opening? The Chamber's conclusions with respect to this question are discussed below in Section VI of this Decision.

15. For those items of evidence that were newly obtained, the Chamber has engaged in the two-stage inquiry required by the test for re-opening. First, the Prosecution's submissions with regard to all the proposed items of evidence, which include the statements of those persons identified as prospective witnesses, were examined to determine whether the reasonable diligence standard had been satisfied. Any item that the Chamber determined could have been identified and presented during the Prosecution's case in chief, through the exercise of reasonable diligence, was deemed to have failed this stage of the re-opening test. Second, the Chamber then considered the items for which the reasonable diligence standard had been satisfied, and weighed each item's probative value against the potential detrimental effect that its admission as evidence in chief would have on the fairness of the trial. The Chamber's conclusions with regard to all items discussed in Section IV of this Decision are unanimous. In Section V, the conclusions with regard to items 15, 27, 35, 37, 42, 46, 47, 48, 49, 50, 51, 52, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 76, 77, 78, 82, 85, 86, and 87, and proposed witnesses B-345 and TA-378 are also unanimous; the conclusions with regard to items 13 and 21 are reached by a majority of Judges Kwon and Bonomy; and the conclusions with regard to the other items in this Section are reached by a majority of Judges Robinson and Bonomy. The conclusions with regard to the items discussed in Section VI are unanimous.[18] The interpretation of the legal standard of reasonable diligence in the context of this case that is included in Sections V represents the conclusions of a

[18] *See infra*, Section IV, p. 7; Section V, p. 10; Section VI, p. 14. More detailed discussions of the Chamber's evaluation of each item of evidence are included in the Confidential Annex to this Decision ("Confidential Annex").

majority of the Chamber, Judges Robinson and Bonomy. Judge Kwon's views on the reasonable diligence standard are set forth in a partial dissenting opinion appended to this Decision.

III. The Application

16. The Prosecution seeks the re-opening of its case in chief in order to present six new witnesses and fifty new documents.[19] These witnesses and documents fall into five categories, which the Application asserts "relate to key issues in the Prosecution's case":[20] a plan to ethnically cleanse Bosnia of its Muslim population dating from at least 1992; VJ involvement in the war in Bosnia between 1992 and 1995; MUP Serbia involvement in the Bosnia war between 1992 and 1995, including in the Srebrenica massacre; VJ personnel files of high ranking military officials involved in the wars in Bosnia; and VJ involvement in the Račak massacre in 1999.

17. In the Application, The Prosecution describes its proposed witnesses and their expected testimony as follows:

> One of these witnesses is B-235, a former VJ member who was on the witness list when the tragic circumstances of the ill-health of the Presiding Judge led to the Prosecution's early completion of its case. The second witness, B-345, is a new witness who can explain the content of the Scorpions videotape, the purpose of the Scorpions unit in the area, and introduce all the videotape-related exhibits. The third witness, Slobodan Stojković, is the Scorpion unit member who filmed the Scorpions videotape. He can authenticate the content of the videotape and identify the perpetrators of the killings with absolute certainty. The fourth witness, Goran Stoparić, was denied permission to testify days before the Prosecution completed its case. ... The fifth witness [known by the pseudonym TA-378] is a man who heard the killings of the Muslim prisoners as shown on the Scorpions videotape and participated in the removal of their bodies. The sixth witness is TA-377, the former commander of a VJ T55 tank platoon based in Urosevac/Ferizaj Kosovo. TA-377 has told members of the Prosecution that on 15 January 1999, his tank platoon took up a position on a hill overlooking the village of Račak, firing at the village.[21]

18. Witness statements for five of the six proposed witnesses are included as proposed items of evidence in the Application. For proposed witness TA-377, however, the only item of evidence offered by the Prosecution is the redacted notes of the investigator who interviewed TA-377, labelled in the Application as item 90. Moreover, the Application indicates that the Prosecution has not obtained TA-377's agreement to testify in this case.[22] In the view of the Chamber, item 90 is not an acceptable alternative to a formal witness statement, and is not susceptible to admission as evidence; furthermore, TA-377 cannot be treated as a possible witness in the

[19] Application, para. 4 (six witnesses and 49 documents); Addendum, paras. 1–3 (seeking the inclusion of one additional document).

[20] Application, para. 25.

[21] Application, para. 26 (footnotes omitted).

[22] *See* Application, p. 7 n.28 ("The Prosecution is presently trying to re-establish contact with TA-377 in order to obtain his testimony."); item 90, dated 30 November 2004, p. 4 ("At this time, [redacted] is unwilling to testify before the Tribunal or a Military Court in relation to these matters.').

context of an application to re-open in the absence of an express agreement to testify. For these reasons, the Chamber cannot apply the test for re-opening to this document and this proposed witness, and the Application is denied with regard to item 90 and proposed witness TA-377.

19. The documentary evidence can be sorted into the afore-mentioned five categories identified by the Prosecution as follows. The sole document in the first category,[23] that of an alleged plan to ethnically cleanse Bosnia of its Muslim population, is part of a document collection obtained as part of the VRS Drina Corps Archive. The second category, that of alleged VJ involvement in the war in Bosnia, contains the remaining items from this document collection, as well as two citizenship certificates, an identity card, a certificate of promotion, a cable, and a document listing officers in the VRS and VJ.[24] The third category, that of alleged MUP Serbia involvement in the war in Bosnia, includes three reports relating to MUP Serbia support to forces of the Autonomous Prosecution of Western Bosnia and Herzegovina (APWB) in the Bihać pocket, and two documents relating to the presence of Serbian MUP personnel in Trnovo.[25] This category also includes the full length video recording of the Scorpions unit from which excerpts were played in court on 1 June 2005[26] and several related documents, including ten documents in a collection of forensic evidence related to the killings depicted in that video, four documents from a document collection relating to a domestic war crimes prosecution, and four items of evidence relating to the identification of victims depicted in the video by their relatives.[27] The fourth category is limited to the VJ personnel files of high-ranking military officials.[28] Item 90, with regard to which the Chamber has already denied the Application,[29] was the only document contained in the fifth category.

IV. Whether the Proposed Items are Newly Obtained

20. The primary and logically first issue to be decided is whether the proposed evidence was newly obtained, and therefore susceptible to being the basis for a successful application to re-open. As noted above, under the *Čelebići* test for re-opening, "the primary consideration in determining an application for reopening a case to allow for the admission of *fresh evidence* is the question

[23] Referred to in the Application as item 1.

[24] Referred to in the Application as items 4, 16, 17, 18, 19, 23, 6, 15, 13, 16, 21, and 27, respectively. B-235's witness statement is also part of this category, labelled item 26.

[25] Referred to in the Application as items 30, 31, 32, 35, and 42, respectively.

[26] Referred to in the Application as item 37.

[27] Referred to in the Application as items 46, 47, 48, 49, 50, 51, 52, 57, 58, 68, 54, 56, 59, 60, 61, 62, 63, and 67 respectively. This category also includes the unnumbered document identified in the Addendum that is a statement by Slobodan Medić about the Scorpions unit; three witness statements by B-345 (items 64, 65, and 66); a statement by Slobodan Stojković (item 75); a witness statement by TA-378 (item 76); and four statements by Goran Stoparić (items 69, 71, 73, 74), supplemented by a related statement by a Prosecution investigator (item 70).

[28] Referred to in the Application as items 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, and 89.

of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application."[30] Both the Prosecution's Notice of July 2004 and the introduction to the Application, however, concede that some of the material was obtained before the close of the Prosecution's case in chief,[31] a situation which would generally preclude re-opening.[32] The Prosecution nonetheless argues that "the exclusion of some of the material could lead to a miscarriage of justice" and urges the Chamber to adopt some version of the standard for admitting evidence on appeal.[33] The Prosecution reprises this argument in its Reply, when it notes that "[t]he Trial Chamber's discretion to admit evidence under the test set out by the *Čelebići* Appeals Chamber falls within a wider discretion to admit evidence under Rule 89 (B), (C) and (D)."[34] Ignoring both the language in the *Čelebići* Appeals Judgement and the manner in which Chambers have applied the narrow test for re-opening, the Prosecution again urges the Chamber to adopt a 'miscarriage of justice' standard, ostensibly based on its "wider discretion":

> Within that wider discretion, the Trial Chamber could admit evidence which, with reasonable diligence, *could have been* discovered and/or presented during a party's case in chief. Logically, a higher standard for admissibility should be set, namely exclusion of the evidence would lead to a miscarriage of justice.[35]

21. Although the Prosecution is correct in the sense that there are some circumstances in which Trial Chambers may admit evidence that could have been presented during a party's case in chief, its assertion is incorrect in the context of a party's application to re-open its case. Under the *Čelebići* test, satisfaction of the reasonable diligence standard is a necessary—but not on its own sufficient—step for a successful re-opening application.[36] As such, it may not be replaced by the "residual discretion" that the Prosecution mistakenly asserts as a standard directly applicable to its Application.[37]

22. The Prosecution's attempt to confuse the applicable legal standards is inconsistent with both the jurisprudence and practice of the Tribunal. No other Trial Chamber has accepted a "miscarriage of justice" standard as a replacement for, or an alternative to, the well-established "reasonable

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[29] *See supra* para. 18.

[30] *Čelebići* Appeal Judgement, *supra* note 5, para. 283 (emphasis added).

[31] Notice, paras. 3, 6; Application, para. 5.

[32] On inappropriateness of old evidence for re-opening, *see supra* paras. 10, 11, 14.

[33] Application, para. 5 (citing, *inter alia*, *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003 ("*Krstić* Appeal Additional Evidence Decision"), p. 4).

[34] Reply, para. 18 (also citing *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), para. 223, upholding the Trial Chamber's decision to admit a new witness' testimony, "unavailable to [the Prosecution] until late in the trial", both as rebuttal evidence and 'fresh' evidence).

[35] *Ibid.* (emphasis added).

[36] *See supra* para. 12; *see also Kordić and Čerkez* Appeal Judgement, para. 222.

[37] *See* Reply, para. 20.

diligence" standard for re-opening a case at trial, and the Trial Chamber notes that the Appeals Chamber specifically endorsed the latter standard for use at the trial level at the same time that it was developing its own jurisprudence on the applicable standard on appeal.[38] Moreover, although analysis of the probative value of the proposed evidence is a factor in the test for re-opening, it is clearly distinguishable from the certainty that the evidence in question "would have" an effect on the verdict—the standard applicable on appeal[39]—because a probative value analysis neither invites nor requires an opinion on the ultimate question of an accused's responsibility for the crimes charged. Finally, in the test for re-opening, reasonable diligence is a threshold inquiry: if a party cannot establish that the evidence could not have been obtained and presented during its case in chief, the application fails, and the Trial Chamber need not consider the probative value of the evidence.[40]

23. The Trial Chamber therefore holds that any proposed item of evidence that was in the Prosecution's possession before the end of its case in chief, and which was therefore not newly obtained, cannot constitute a basis for re-opening. This conclusion applies not only to items that were not identified or presented because of some inadvertence or administrative oversight on the part of the Prosecution, but also to those items for which the Chamber specifically denied admission during the Prosecution's case in chief. As a matter of law, despite the argument of the Prosecution to the contrary,[41] it is irrelevant that the reason this latter category of evidence was not presented could be viewed as being beyond the control of the Prosecution. Application of the reasonable diligence standard—indeed, the entire exercise of re-opening a party's case—is reserved for 'fresh' evidence, which by definition excludes any evidence already in the possession of the moving party during its case in chief. Such evidence is inappropriate as a basis for re-opening. Accordingly, the Application is denied with regard to the following items and witnesses: items 26, 31, 32, 69, 70, 71, 73, 74, and the unnumbered document discussed in the Addendum; and proposed witnesses B-235 and Goran Stoparić. In addition, as discussed below, much of item 64 is not appropriate for re-opening because it is not actually newly discovered evidence.[42] A detailed discussion of the Chamber's decision with regard to these items, as well as those discussed below in the context of the two stages of the test for re-opening, is set forth in the Confidential Annex to this Decision.

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[38] *Compare supra* note 5 (*Čelebići* Appeal Judgement issued in February 2001) *with* Application, para. 5 n.13 (citing Appeals Chamber decisions from February and April 2001).

[39] *See Krstić* Appeal Additional Evidence Decision, *supra* note 33, p. 4 (emphasis in original).

[40] *See Čelebići* Appeal Judgement, *supra* note 5, para. 287 (holding that "the Trial Chamber's finding that reasonable diligence had not been exercised was a sufficient basis on which to dispose of the application").

[41] Reply, para. 16.

[42] *See infra*, para. 27.

V. The Reasonable Diligence Stage of the Re-Opening Analysis

24. The next issue to be determined is whether the reasonable diligence standard has been met for the remaining prospective exhibits and witnesses. Only if it has, do probative value and the fairness of the trial fall to be considered. The Tribunal's case law makes clear that the burden of proving that reasonable diligence was exercised is placed upon the party seeking to re-open its case.[43] As the moving party, the Prosecution had two opportunities—the initial Application and the Reply—to provide information on its efforts to identify, locate, and obtain the items in question.[44] In this regard, the Chamber notes that in responding to objections raised by Assigned Counsel, the Prosecution used its Reply to supplement its submissions on its efforts to obtain some of the proposed items of evidence.[45]

25. For several documents in the Application, the Prosecution reports no attempt to identify, locate, or obtain them until well after the start of its case on the relevant indictment, or close to the end of its case in chief. While the Chamber is cognisant of the difficulties that parties before the Tribunal face in investigating and preparing cases of such scope and complexity, it considers that a party seeking evidence intended for use in its case in chief should not wait until several months after the commencement of its case to begin the process of obtaining it. Such a delay, particularly if the party in question anticipates difficulty in securing the evidence,[46] is inconsistent with the exercise of reasonable diligence.[47] The Application is therefore denied with regard to items 30, 79, 80, 81, 83, 84, 88, and 89. The Chamber notes that the Prosecution's submissions, though elliptical, indicate that it is possible that items 54, 56, 59, and 60 were not part of a document collection that was in the possession of the Prosecution before the end of its case in chief.[48] Even if these documents were not in the hands of the Prosecution before 25 February 2004, however, it is clear that the category of documents to which they belong was not requested until December 2003. For the reasons set forth thus far in this paragraph, therefore,

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[43] *Čelebići* Trial Decision, *supra* note 5, para. 26; *Čelebići* Appeal Judgement, *supra* note 5, para. 279; *Blagojević and Jokić* Trial Decision, *supra* note 5, para. 9; *Hadžihasanović and Kubura* Trial Decision, *supra* note 10, para. 36.

[44] *See* Notice, para. 6 (Prosecution noting that it is "alert to" the Tribunal's jurisprudence on re-opening a case). The Chamber therefore considers that the Prosecution is well aware of the factors that guide a Trial Chamber's consideration of such an application.

[45] *See* Reply, Annex A; *ibid.*, Annex B, paras. 1, 2, 4–9, 10–15, 16; Reply Addendum.

[46] *See* Application, para. 12 ("Until recently, however, Serbia and Montenegro ... was not fulfilling its obligations pursuant to Article 29 of the Statute. The lack of co-operation persisted throughout the Prosecution case."). *See also* Reply, para. 10:

> Despite the fact that States are obliged to cooperate with the Tribunal in the investigation and prosecution of accused pursuant to Article 29 of ICTY Statute, such co-operation has been lacking in the case of Serbia and Montenegro and Republika Srpska. In reality, the exercise of obtaining relevant documentation from the Serbia and Montenegro's archives has been akin to the most fiercely contested adversarial application for disclosure to compel compliance with the obligation to "cooperate."

[47] *See Hadžihasanović and Kubura* Trial Decision, *supra* note 10, para. 37 (citing *Čelebići* Appeal Judgement, *supra* note 5, paras. 285–286).

[48] *See* Reply Addendum, para. 2.

the Application is denied with regard to those items regardless of the date on which they were actually received by the Prosecution.

26. It is even clearer that the reasonable diligence standard is not satisfied where no attempt to locate or obtain the evidence in question was made until after the close of the party's case, and no explanation for such delay is provided. Accordingly, the Application is denied with regard to items 15, 78, 82, 85, 86, and 87.

27. In contrast to those situations, however, where the party seeking re-opening was ignorant of the very existence of a proposed item of evidence until well into its case or after the close of its case, as long as such ignorance is reasonable under the circumstances, the party's delay in commencing its efforts to obtain the evidence should not necessarily lead to the conclusion that it was not reasonably diligent. Similarly, in the unique circumstance where the proposed item of evidence is in the exclusive possession of an at-large accused, the Prosecution's failure to make a separate or independent effort to secure the item does not mean that it was not reasonably diligent, particularly in light of its continued efforts to ensure that the accused is taken into custody. For these reasons, the Chamber is satisfied that items 13, 21, 37, 46, 47, 48, 49, 50, 51, 52, 57, 58, 61, 62, 63, 65, 66, 67, 68, 76, and 77, and proposed witnesses B-345 and TA-378 could not, with reasonable diligence, have been identified and presented during the Prosecution's case in chief. With regard to item 64, the Chamber considers that only part of this witness statement is potential evidence that could not have been presented in the Prosecution's case in chief. To the extent that the contents of this statement cover the same topics and present the same information as the first statement of Goran Stoparić, that proposed evidence is not newly discovered, and is inappropriate for re-opening. The second stage of the test for re-opening will therefore be applied only to the information in this statement that is actually newly obtained evidence.[49] With regard to item 27, however, the Chamber concludes that the Prosecution's professed ignorance of its existence was not reasonable under the circumstances, because the category within which the evidence falls by virtue of its source, its content, and its location is such that a reasonably diligent party would have discovered the item in time to present it during its case in chief. The Application is therefore denied with regard to this item.

28. In relation to a number of items, the Prosecution provides no information at all about its efforts to identify, locate, or obtain the proposed evidence, other than the date on which the item was eventually received. In the absence of such information, particularly the date on which the Prosecution first learned of the item's existence or first requested its provision, the Chamber is unable to evaluate whether the Prosecution exercised reasonable diligence. Since the onus of

demonstrating that this first stage of the re-opening test has been satisfied rests firmly on the moving party, where that party fails to provide sufficient information to permit a thorough evaluation of its application, the Chamber can only conclude that it has not discharged its burden. For these reasons, the Chamber denies the Prosecution's request to re-open its case with regard to items 35, 42, and 75, and proposed witness Slobodan Stojković.

29. The last set of items consists of the documents that were obtained by the Prosecution as part of the VRS Drina Corps archive. In essence, the Prosecution's argument that it had exercised due diligence with regard to these documents hinges upon the fact that it was dealing with recalcitrant government authorities, whose lack of co-operation during the case in chief hindered its ability to obtain documents.[50] As the Prosecution itself points out, however, it has made extensive use of Rule 54 *bis* to compel the production of relevant information for this trial, and has also used requests for assistance both before and during the course of its case in chief.[51] It does not appear, however, that any of these documents was ever the subject of Rule 54 *bis* litigation, and the Prosecution fails to explain why it did not resort to this procedural mechanism when confronted with a continued lack of co-operation. The Application is therefore denied with respect to items 1, 4, 16, 17, 18, 19, and 23, because the Prosecution has not met its burden of demonstrating that the reasonable diligence standard has been satisfied.

30. Similarly, for item 6, the Reply explains that the Prosecution made repeated Requests for Assistance for this item, but makes no mention of any attempt to compel production of the document through Rule 54 *bis* litigation. The Chamber notes the considerable gap between the two earliest requests for item 6 and the remaining requests that eventually led to the document's provision to the Prosecution, and the lack of any explanation for the Prosecution's apparent resignation to the authorities' refusal to provide the document. If the reason for this gap was the Prosecution's belief that such requests were futile because the authorities concerned would not answer them, it should have included this document among the material for which it sought compelled production under Rule 54 *bis*, or at very least explained in the Application why it made no resort to this mechanism.[52] Although the Chamber recognises that Rule 54 *bis* should

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[49] *See* Confidential Annex, para. 28.

[50] Application, para. 12 (presenting this general argument with regard to the Application as a whole, and documents held by Serbia and Montenegro in particular). *See also* Reply, para. 5 (referring to both Republika Srpska and Serbia and Montenegro):

> To exclude the material recently obtained simply on the basis of the fact that it was obtained after the end of the Prosecution case would reward those forces that prevented the Trial Chamber from receiving evidence that should have been provided much earlier. Excluding this material at this stage would send the wrong message to those forces hindering the completion of the mandate of the Tribunal.

[51] *See* Application, para. 11.

[52] Unlike the items from the Drina Corps Archive, moreover, the Prosecution does not report a blanket denial of the existence of this item from the relevant authorities, and it is clear that the Prosecution was itself convinced that the item existed, because it lists five separate requests for its rendition.

not be the first or only method relied upon by parties seeking evidence from states, it nevertheless concludes that, in the circumstances of this case, the Prosecution's failure to take advantage of all the means available to it to obtain evidence, especially when confronted with what it viewed as the consistently obstructive behaviour of the authorities in question, cannot be considered the exercise of reasonable diligence.[53] Accordingly, the Chamber denies the Application with regard to item 6.

31. After considering the Prosecution's submissions in relation to the first stage of the re-opening test, the Chamber therefore concludes that the reasonable diligence standard has been satisfied for only 21 documents and one proposed witness: items 13, 21, 37, 46, 47, 48, 49, 50, 51, 52, 57, 58, 61, 62, 63, 65, 66, 67, 68, and 77, part of item 64, and proposed witness B-345.[54]

32. The Chamber need not, however, actually subject item 77 to the balancing test in the second stage of the re-opening analysis. When the Prosecution submitted the Application in mid-July 2005, no translations of any of the thirteen extensive personnel files were provided, so the Chamber would not have been able to conduct the analysis of that material's probative value that is required by the second stage of the test for re-opening. Since that date, however, portions of several of the personnel files, along with the corresponding translations of the excerpts, have been tendered and admitted as Prosecution exhibits used in the cross-examination of a Defence witness.[55] Since item 77 is among the limited group of personnel files from which translated excerpts have already been admitted, the Prosecution's request to have it admitted as the basis for a re-opened case in chief is denied as moot.[56]

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[53] On this point, the case law of the Appeals Chamber provides a useful analogy. Although the test applied at the appellate level for the admission of evidence that was available at trial is inapplicable to proceedings before Trial Chambers, *see supra* paras. 20–22, the Appeals Chamber applies a different test to evidence that was *unavailable* at trial. Evidence is "unavailable", for the purposes of this test, if it could not have been discovered through the due diligence of the party now moving for admission. *Cf. Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence Before the Appeals Chamber, para. 13 (holding, in the context of the test for admitting additional evidence on appeal, which requires the moving party to demonstrate, *inter alia*, that the evidence in question was not "discoverable through the exercise of due diligence" at trial, that "[t]he applicant's duty to act with reasonable diligence includes making appropriate use of all mechanisms of ... compulsion available under the Statute and the Rules of the International Tribunal to bring evidence ... before the Trial Chamber") (internal quotation marks and footnote omitted). *See also ibid.* (holding that "Counsel must therefore bring any difficulties in relation to obtaining the evidence ... to the attention of the Trial Chamber"). *Accord Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Appellant Vidoje Blagojević's Motion for Additional Evidence Pursuant to Rule 115, 21 July 2005, para. 7; *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, para. 11.

[54] *See supra* para. 27.

[55] *Milošević*, Transcript of Hearing, T. 44826 (private session) (29 September 2005).

[56] The Chamber also notes that an excerpt from the full document that is item 77 was already admitted pursuant to a written decision of 16 June 2004.

VI. The Balancing Test Stage of the Re-Opening Analysis

33. The Trial Chamber must now exercise its general discretion under Rule 89(D) to grant or deny the Application with respect to the remaining items for which the Prosecution demonstrated that the reasonable diligence standard has been satisfied: items 13, 21, 37, 46, 47, 48, 49, 50, 51, 52, 57, 58, 61, 62, 63, 65, 66, 67, and 68, part of item 64, and proposed witness B-345. In exercising that discretion, which requires weighing the probative value of the evidence against the need to ensure a fair trial, the Trial Chamber is mindful that "it is only in exceptional circumstances where the justice of the case so demands" that a party should be permitted to re-open its case to present new evidence.[57]

A. Potential Detrimental Effect of Admission on Fairness of Trial

34. As Assigned Counsel note in their Response, "[t]he Prosecution's application to re-open was filed on 18 July 2005, more than half-way through the Accused's presentation of his case."[58] Assigned Counsel argue that granting the Application would breach the Accused's fundamental fair trial rights in at least two respects. First, admitting a large amount of Prosecution evidence at an advanced stage of the trial would prejudice the Accused in the presentation of his case, because, "had the proposed documents and witness testimony been admitted prior to the start of the defence case, the Accused would have used his allotment of time differently".[59] Second, Assigned Counsel contend that the Prosecution's submissions, and its estimate of how much additional time would be required to deal with the evidence if it were admitted, are "disingenuous and fail[] to take into account the fair trial rights of the Accused."[60] In their submission, delay would be caused not only by the fact that many more witnesses would be necessary to provide a sufficient basis for the admission of the items that are the subject of the Application,[61] but also by the requirements of Article 21(4)(b) of the Statute, pursuant to which "the re-opening of the Prosecution's case would inevitably necessitate an adjournment of the proceedings in order to allow the Accused time to investigate and prepare his case in relation to the new evidence presented."[62] Contrary to the Prosecution's estimate of six days,[63] Assigned Counsel submit that

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[57] *Čelebići* Trial Decision, *supra* note 5, para. 27.

[58] Response, para. 38. *See also Milošević*, Memorandum entitled "Use of Time During Defence Case; Period Ending 20 July 2005", 21 July 2005 (noting that as of the conclusion of court on 20 July 2005, approximately 53 percent of the time allotted to the Accused for his case in chief had elapsed).

[59] Response, para. 39.

[60] *Ibid.*, para. 40.

[61] *Ibid.*, para. 41 (noting also that "the current witnesses relied upon to produce the proposed exhibits are unable to properly create the conditions for legal admissibility").

[62] *Ibid.*, para. 42. Article 21(4)(b) of the Statute provides, in relevant part: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: ... to have adequate time and facilities for the preparation of his defence".

"[a] delay in the conclusion of the trial proceedings of at least three months is a realistic prospect."[64]

35. The Prosecution's arguments for the balancing test stage of the inquiry are limited to the submissions presented in the original Application; nothing in the Reply directly answers Assigned Counsel's arguments in the Response. With regard to the advanced stage of the trial, the Application concedes that it was at a "relatively advanced stage" even in mid-July 2005, but merely notes that as the Accused had not yet completed the Kosovo portion of his case, "the evidence could be presented before the close of the Kosovo phase of the Defence case and before the Accused presents his first Bosnia-specific witness, thereby preserving his fair trial rights."[65] The Prosecution's submissions with regard to delay and possible prejudice to the Accused are premised on the assumption that the Chamber would have issued a decision on the Application, which was filed on 18 July 2005, in time for the Accused and his legal team to "consider the material contained in this Application over the summer recess and adjust the presentation of his Defence case accordingly."[66] Although conceding that "[t]he Accused and Assigned Counsel should ... be allowed to present their objections to the proposed documents",[67] the Application appears to envision that such objections would have been prepared in time for the Chamber to consider in the course of issuing its decision no later than four days after receiving the Application,[68] or that the Chamber would have issued a decision granting the Application without waiting for the preparation and submission of responses from the Accused or Assigned Counsel.[69] In sum, these arguments misapprehend the significance of the factors applied in the test for re-opening.

36. In light of the factors identified in the jurisprudence on re-opening and the submissions of the parties, the Chamber has weighed the following considerations against the probative value of each item for which the reasonable diligence standard is satisfied: the advanced stage of trial proceedings; the certainty that a delay, of whatever length, would be caused by the admission of the proposed evidence; and the probable extent of such a delay. In particular, the Chamber accepts neither the Prosecution's estimate that only six additional hearing days would be necessary if the Application were granted with respect to all the items therein, nor its submission that no delay or adjournment would be caused by the admission of new documents. In the view

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[63] *See* Application, para. 4.

[64] Response, para. 43.

[65] Application, para. 16; *see also ibid.*, n. 24 (noting the Chamber's power under Rule 85 to control the order of the presentation of evidence).

[66] Application, para. 22. *See also Ibid.*, para. 19.

[67] *Ibid.*, para. 18.

[68] The 2005 summer recess began at the close of business on 22 July 2005.

of the Chamber, significantly longer would be required. With the possible exception of the witness statements for proposed witnesses, the Prosecution identifies no procedural basis for the admission of the numerous documents for which it also seeks re-opening. While the Trial Chamber has admitted documents that were not adduced through witnesses, it is not clear that the documents presented by the Prosecution would be admissible under the principles identified by the Trial Chamber in its earlier decisions,[70] so it is possible that additional witnesses would be needed to authenticate these documents. Moreover, the Accused would need additional time to prepare a defence with regard to the new evidence, and would have the right not only to cross-examine Prosecution witnesses, but also to lead evidence in response to any evidence admitted as part of a re-opened case in chief.

B. Probative Value of Items for Which Reasonable Diligence was Established

37. In its seminal decision on the legal test for re-opening, the *Čelebići* Trial Chamber held:

> 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.[71]

Even though a showing of 'exceptional circumstances' is not a separate burden imposed upon the moving party,[72] the term is a clear description of the context in which an application to re-open would be successful, and is intended to guide Trial Chambers' exercise of their discretion. As such, this general principle is particularly relevant to the evaluation of probative value in the second stage of the re-opening test. Given the concern expressed in the Statute, the Rules, and the jurisprudence of the Tribunal for the Accused's right to a fair and expeditious trial,[73] the Chamber considers that the exceptional measure of re-opening the Prosecution's case in chief for the admission of evidence that is certain to cause delay, at a late stage of a trial that began three and a half years before the Application was submitted, is warranted only where the probative

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[69] *See* Application, paras. 18–19.

[70] *See, e.g.*, *Milošević*, Decision on Admission of Documents, issued confidentially on 28 July 2004 (admitting certain items of evidence because they are official documents, provided to the Prosecution in response to a request for assistance, and contain sufficient indicia of reliability).

[71] *Čelebići* Trial Decision, *supra* note 5, para. 27.

[72] Although the Prosecution is correct that "[t]here is no mention by the [*Čelebići*] Appeals Chamber of a *separate and additional requirement* that the circumstances of the case be exceptional", Reply, para. 7 (emphasis added), the Chamber notes that the part of the Assigned Counsel's Response to which that assertion was directed merely notes the now-unremarkable proposition that "once a party has closed its case, the re-opening of a trial is only permitted in exceptional circumstances". Response, para. 19. The Chamber also notes that the *Čelebići* Appeals Chamber quoted with approval the reference of the *Čelebići* Trial Chamber to exceptional circumstances. *Čelebići* Appeal Judgement, *supra* note 5, para. 288 (quoting *Čelebići* Trial Decision, *supra* note 5, para. 27). *See also Hadžihasanović and Kubura* Trial Decision, *supra* note 10, para. 47.

[73] *See* Statute, Arts. 20(1), 21(4)(c); Rules 89(D), 90(F) of the Rules; *Čelebići* Appeal Judgement, *supra* note 5, para. 290.

value of the proposed evidence is particularly high. In the particular circumstances of this case, including the forms of responsibility alleged in the indictments[74] and the extensive evidence relating to underlying offences already adduced during the Prosecution's case in chief, the Trial Chamber is of the opinion that, in order to have sufficient probative value to be accepted as an appropriate basis for re-opening, the evidence proposed should have significant bearing on the individual criminal responsibility of the Accused. In addition, since this assessment of probative value occurs in the context of an application to admit new evidence, proposed evidence that is substantially similar in all important respects to evidence already admitted during the Prosecution's case in chief will not warrant re-opening; the delay occasioned by its admission could not be substantially outweighed by whatever probative value such cumulative evidence could present.

38. For the reasons set forth in detail in the Confidential Annex, the Chamber concludes that none of the items for which reasonable diligence was established has sufficient probative value to warrant admission as the basis of a re-opened case in chief. Although most of the items have some probative value in relation to the underlying offences charged in the indictments, none is of significance for the ultimate legal question of whether the Accused is responsible for the crimes alleged in the indictments. None of the material proposed would add significantly to the existing evidence relating to the Accused's individual criminal responsibility. The Prosecution's request to re-open its case with regard to these items is therefore denied.

[74] All three indictments allege that the Accused is responsible for the crimes alleged therein, not because he physically committed any of them, but rather because he planned, instigated, ordered, or aided and abetted their commission, or participated in a joint criminal enterprise whose purpose was accomplished through the commission of those crimes. *See Milošević*, Second Amended Indictment (Croatia), 26 July 2004, paras. 5–6; *Milošević*, Amended Indictment (Bosnia), 22 November 2002, paras. 5–6; *Milošević*, Second Amended Indictment (Kosovo), 16 October 2001, paras. 16, 18.

VII. Disposition

39. Pursuant to Rules 54 and 126 *bis* of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), the Trial Chamber hereby unanimously ORDERS as follows:

    i. The status of the Notice shall be changed from confidential and *ex parte* to confidential and *inter partes*;

    ii. Assigned Counsel are granted leave to file the oversized Response; and

    iii. The Prosecution is granted leave to file the Reply; and

    iv. The Application is denied.

40. A separate opinion by Judge Kwon is attached to this Decision.

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

Judge Patrick Robinson
Presiding

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

[Seal of the Tribunal]