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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 No.: IT-05-88-AR73.5

Date: 24 September 2008

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **24 September 2008**

PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC

DECISION ON VUJADIN POPOVIĆ'S INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE PROSECUTION'S MOTION TO REOPEN ITS CASE-IN-CHIEF

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Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Appeals Chamber" and "International Tribunal", respectively) is seized of "Vujadin Popović's Interlocutory Appeal Against the Decision on the Motion to Reopen the Prosecution Case" filed on 3 June 2008 ("Appeal") by Vujadin Popović ("Appellant") against the "Decision on Motion to Reopen the Prosecution Case" issued on 9 May 2008 ("Impugned Decision") by Trial Chamber II ("Trial Chamber"). The Prosecution responded on 13 June 2008.[1] The Appellant replied on 20 June 2008.[2] In the Reply, the Appellant requested leave to exceed the word limit by 289 words.[3]

I. PROCEDURAL HISTORY

2. On 7 April 2008, the Prosecution filed its confidential "Motion to Reopen the Prosecution Case", seeking to present new evidence related to the presence and direct involvement of the Appellant in the execution and burial of over 30 Muslim men in a mass grave at Bišina in July 1995.[4] This proposed additional evidence included the *viva voce* and Rule 92 *ter* testimonies of three additional witnesses and the submission of ten related exhibits.[5] Following the rendering of the Impugned Decision, which granted the Motion to Reopen, the Appellant filed a request for certification to appeal the Impugned Decision pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules").[6] The Trial Chamber granted certification to appeal on 27 May 2008.[7]

II. STANDARD OF REVIEW

3. It is well established in the jurisprudence of the Tribunal that Trial Chambers exercise discretion in relation to trial management.[8] The Trial Chamber's decision to allow the reopening of

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[1] Prosecution Response to Vujadin Popović's Interlocutory Appeal Against the Decision to Reopen the Prosecution Case, 13 June 2008 ("Response").
[2] Reply to the Prosecution Response to Vujadin Popović's Interlocutory Appeal Against the Decision on the Motion to Reopen the Prosecution Case, 20 June 2008 ("Reply").
[3] Reply, p. 1. The Appeals Chamber, exceptionally and in the interests of justice, grants the Appellant leave to exceed the word limit in his Reply.
[4] *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Motion to Reopen the Prosecution Case, 7 April 2008 ("Motion to Reopen"), para. 1.
[5] Motion to Reopen, para. 2.
[6] *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Vujadin Popović's Request for Certification to Appeal the Trial Chamber's Decision on the Motion to Reopen the Prosecution Case, 16 May 2008.
[7] *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Popović's Motion for Certification of Decision on the Motion to Reopen the Prosecution Case, 27 May 2008.
[8] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendant's Appeal against "*Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*", 1 July 2008 ("*Prlić* Decision on Allocation of Time for Defence Case-in-Chief"), para. 15; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination By Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae*

the Prosecution's case-in-chief was a discretionary decision to which the Appeals Chamber accords deference. Such deference is based on the recognition by the Appeals Chamber of "the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case".[9] The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber has abused its discretionary power by committing a discernible error.[10] The Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".[11] The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[12]

III. DISCUSSION

4. The Appellant argues in his Appeal that the Trial Chamber committed five discernible errors in granting the Motion to Reopen and requests the Appeals Chamber to reverse the Impugned Decision on these grounds. Specifically, he contends that the Trial Chamber erred in: 1) the standard applicable;[13] 2) finding that despite the exercise of reasonable diligence the Prosecution could not have identified the evidence during the presentation of its case-in-chief;[14] 3) finding that sufficient notice had been given to the Appellant;[15] 4) considering that the reopening of the Prosecution case would not cause any undue delay or prejudice to the Appellant;[16] and 5) failing to provide sufficient reasons for its decision.[17]

Brief, 4 July 2006 ("*Prlić* Decision on Cross-Examination"), p. 3; *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("Decision on Radivoje Miletić's Interlocutory Appeal"), para. 4; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 ("*Milošević* Decision on the Assignment of Defence Counsel"), para. 9; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002, para. 14.

[9] Decision on Radivoje Miletić's Interlocutory Appeal, para. 4; *Milošević* Decision on the Assignment of Defence Counsel, para. 9.

[10] *Prlić* Decision on Cross-Examination, p. 3, *citing Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4: "Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision", *see also ibid.*, paras 5-6; *see* also *Milošević* Decision on the Assignment of Defence Counsel, para. 10.

[11] *Prlić* Decision on Allocation of Time for Defence Case-in-Chief, para. 15; Decision on Radivoje Miletić's Interlocutory Appeal, para. 6.

[12] *Prlić* Decision on Allocation of Time for Defence Case-in-Chief, para. 15.

[13] Appeal, paras 28-31.

[14] Appeal, paras 32-52.

[15] Appeal, paras 63-71.

[16] Appeal, paras 72-78.

[17] Appeal, paras 56-62.

A. Applicable Standard

5. The Appellant submits that the Trial Chamber erred when it found that the evidence proposed in the Motion to Reopen constituted fresh evidence.[18] According to the Appellant, one should draw a distinction between evidence that the Prosecution did not possess before the close of its case-in-chief, and evidence already in its possession, which the Prosecution claimed became relevant only after the fresh evidence had come into its possession.[19] The Appellant argues that neither type of evidence constitutes "fresh evidence". He argues that the evidence not in the possession of the Prosecution during its case-in-chief could have been discovered in a timely fashion if the Prosecution had acted with reasonable diligence.[20] With respect to evidence in its possession, the Appellant argues that the *Milošević* Decision establishes that such evidence can never constitute fresh evidence and that, in any event, the relevance of this evidence could have been understood by a reasonably diligent Prosecutor before the close of the case-in-chief.[21] Accordingly, the Appellant claims that the Trial Chamber erred in finding that the Prosecution acted with reasonable diligence and that the Impugned Decision effectively allowed a negligent party to fill gaps in its case by introducing evidence which it previously deemed superfluous or that it simply overlooked.[22]

6. The Appellant also claims that the Trial Chamber erred in "applying an excessively low standard of reasonable diligence, which is contrary to the Tribunal's case law and with the practice of the main common law systems".[23] Specifically, he argues that the Trial Chamber failed to apply the guidelines for establishing reasonable diligence outlined in the *Hadžihasanović* Decision[24] and regarded as useful factors in the *Milošević* Decision.[25] He also emphasizes that a motion to reopen should only be granted in "exceptional circumstances where the justice of the case so demands", [26] and that the Trial Chamber erred in concluding that applying a higher standard of reasonable diligence would unreasonably require "virtual investigative perfection".[27] As persuasive precedent,

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[18] Appeal, Ground 1, para. 28.
[19] Appeal, para. 28.
[20] Appeal, paras 14-16, 29, *citing Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 283.
[21] Appeal, para. 28; *see also* paras 17-18, *referring to 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 ("*Milošević* Decision").
[22] Appeal, para. 52.
[23] Appeal, para. 49.
[24] Appeal, paras 20, 50, *citing Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Decision on the Prosecution's Application to Re-Open its Case, 1 June 2005 ("*Hadžihasanović* Decision"), paras 39-42; Reply, para. 3.
[25] Appeal, para. 20, fn. 46, *citing Milošević* Decision, para. 11, fn. 10.
[26] Appeal, para. 52, *citing Čelebići* Appeal Judgement, para. 288; *Hadžihasanović* Decision, para. 47; *Milošević* Decision, para. 37.
[27] Appeal, para. 46.

the Appellant contends that the standard adopted by the Trial Chamber is considerably lower than the standard applied by British, Australian and Canadian courts.[28]

7. The Prosecution responds that the Trial Chamber acted within its discretion when it found that the evidence in the Prosecution's possession before the end of its case qualified as fresh evidence, because that evidence only became significant after the discovery of the newly obtained evidence of the Bišina mass grave.[29] It also contends that contrary to the arguments of the Appellant, the Trial Chamber did not err when it declined to adopt the "*Milošević per se* rule" given that the Appeals Chamber has not affirmed this narrow construction of what constitutes fresh evidence.[30]

8. The Prosecution further responds that the standard applied in the Impugned Decision is consistent with the jurisprudence of the Tribunal and that the Trial Chamber correctly determined that reasonable diligence must consider the "realities facing the parties" and not impose an unreasonable burden on the parties by requiring "investigative perfection".[31] The Prosecution submits that the *Hadžihasanović* Decision guidelines have not been followed by any Trial Chamber or affirmed by the Appeals Chamber.[32] Additionally, the Prosecution emphasizes that the Trial Chamber is not bound by the jurisprudence of domestic jurisdictions.[33]

9. The Appellant replies that the *Hadžihasanović* Decision and the *Milošević* Decision constitute the most current precedent of the International Tribunal, other than the Impugned Decision itself, relating to the reopening of a party's case.[34] He contends that according to the International Tribunal's case law, a "decision on re-opening requires a two-step test: a Trial Chamber must first assess the exercise of reasonable diligence; then, *only if* it finds that reasonable diligence was exercised, will it evaluate the consequences a re-opening would have on the defence".[35] The Appellant finally suggests that the Prosecution is attempting to fill a gap in its case by proposing evidence regarding the Appellant's involvement in the executions to corroborate a portion of its case, which the Prosecution fears it might not have established beyond reasonable doubt.[36]

Analysis

[28] Appeal, paras 22-25, 52, fn. 124.
[29] Response, para. 3.
[30] Response, para. 13, fn. 27 *citing Čelebići* Appeal Judgement, para. 282.
[31] Response, para. 4.
[32] Response, paras 6-7.
[33] Response, para. 8 ; *see also* paras 9-12.
[34] Reply, para. 2.
[35] Reply, para. 4, *citing Čelebići* Appeal Judgement, para. 287; *Hadžihasanović* Decision, para. 36.
[36] Reply, para. 11.

10. The Appeals Chamber is not persuaded that the Trial Chamber incorrectly characterised the evidence the Prosecution relied upon as justifying a re-opening of its case as fresh evidence. In making this determination, the Trial Chamber explicitly relied on the *Čelebići* Appeal Judgement holding that the primary consideration in allowing the admission of fresh evidence is whether the evidence could, with reasonable diligence, have been identified and presented in the case-in-chief of the party making the application.[37] In applying this test, and given that such assessment is to be carried out on a case-by-case basis, there was no obligation upon the Trial Chamber to follow precedents of earlier Trial Chambers regarding what type of evidence could constitute fresh evidence and what criteria had to be met for a finding of exercise of reasonable diligence on the part of the Prosecution.[38] The Appellant therefore fails to demonstrate that the Trial Chamber erred by not following the earlier decisions of other Trial Chambers.

11. The Appeals Chamber also rejects the Appellant's argument that the Trial Chamber erred in holding that the category of fresh evidence could include evidence in a party's possession, which becomes significant only in the light of other fresh evidence.[39] In this respect, the Appeals Chamber notes that the Appellant's argument relies upon the non-binding holding in the *Milošević* Decision that the notion of fresh evidence excludes by definition any evidence which was already in the possession of the moving party during its case-in-chief.[40] The Appeals Chamber observes that in the present case, the evidence in the Prosecution's possession during its case-in-chief included the following documents: two Drina Corps vehicle logs evidencing a trip to Bišina by the Appellant on 23 July 1995;[41] one intercept from 24 July 1995 referring to the whereabouts of an individual named Himzo Mujić;[42] two aerial images of the area encompassing the Bišina grave;[43] and two reports dated 20 July 1995 regarding the transfer of two Muslim prisoners from Serbia to Republika Srpska and from Republika Srpska to the Bratunac Brigade.[44] In determining that this evidence could constitute fresh evidence for the purpose of re-opening the Prosecution case, the Trial Chamber found that the significance of these documents, which were already in the possession of the Prosecution, "could not have been reasonably understood" without the newly found evidence of

[37] Impugned Decision, paras 24, 27, *citing Čelebići* Appeal Judgement, para. 283.
[38] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 114.
[39] Impugned Decision, para. 28.
[40] *Milošević* Decision, para. 23.
[41] Impugned Decision, para. 9; Motion to Reopen, para. 7 (i)-(ii). The Prosecution indicates that these logs were disclosed to the Defence on 26 July 2007.
[42] Impugned Decision, para. 9; Motion to Reopen, para. 7 (iii). The Appeals Chamber notes that this intercept was on the Prosecution's 65 *ter* Witness List but its admission was not sought by the Prosecution. The Prosecution also indicates that the intercept is related to another intercept of 24 July 1995 at 12:50 hours which was admitted into evidence as PO1324 on 7 December 2007, and refers once again to Himzo Mujić and to the fact that the Appellant should be contacted because he is the only one to know about the whereabouts of that individual, *Ibid.*
[43] Impugned Decision, para. 9; Motion to Reopen, para. 7(iv)-(v). These photographs were taken on 20 April and 27 July 1995 and disclosed to the Defence on 17 March 2008.
[44] Impugned Decision, para. 9; Motion to Reopen, para. 7 (ix)-(x).

the mass grave in the Bišina area.[45] The Appeals Chamber is not persuaded that the Trial Chamber erred in making such a determination and is satisfied that, under the circumstances, the Trial Chamber's finding constituted a reasonable exercise of its discretion. The Appeals Chamber will now turn to the question of whether, in this instance, the Trial Chamber reasonably found that the Prosecution acted with reasonable diligence in identifying and presenting the newly obtained evidence.

B. Whether the Prosecution Acted with Reasonable Diligence

12. The Appellant submits that the Trial Chamber erred in fact in finding that the Prosecution could not have identified the relevance of the proposed evidence before the close of its case-in-chief.[46] Specifically, the Appellant argues that the Impugned Decision fails to provide any valid reason as to why the Prosecution exercised reasonable diligence in beginning its investigation at such a late date when it had access to the information and the resources to do so earlier.[47] The Appellant further claims that the Trial Chamber fails to explain why requiring the Prosecution to at least monitor the exhumations and the discovery of mass graves in Bosnia and Herzegovina would have constituted an unreasonable burden.[48]

13. The Appellant contends that the Prosecution failed to meet the standard of reasonable diligence because its investigation was "unfocused and disregarded important investigative leads"[49] and because the Prosecution knew where to get information on ongoing exhumations and could have easily and readily obtained it.[50] The Appellant further claims that the Prosecution failed to keep continuous contact with the authorities responsible for exhumations and investigating the discovery of new graves.[51] The Appellant notes that the Prosecution waited until March 2007 to request information from the Bosnian authorities and that after the first field trip to visit the Bišina mass grave in October 2007, no specific investigative steps were taken until February 2008.[52]

14. The Appellant also cites regional news articles published between 30 May 2006 and 10 June 2006 describing the discovery and exhumation of a primary mass grave from July 1995 that was located near the Drina Corps barracks at Bišina.[53] The Appellant avers that these articles were based on highly reliable sources, given that they were based on information provided by the Department

[45] Impugned Decision, para. 29; *see also* Motion to Reopen, para. 7 (viii), (x), where the Prosecution indicates that the remains of Himzo Mujić and of the two Muslim prisoners were found in the Bišina grave.
[46] Appeal, para. 48.
[47] Appeal, paras 45-46, 56.
[48] Appeal, paras 46, 56.
[49] Appeal, para. 53.
[50] Appeal, para. 47.
[51] Appeal, paras 38, 47.
[52] Appeal, paras 44-45, 47, 51; *see also* Reply, para. 14, 17, 19-20.

of the Federal Commission for Tracking Missing Persons from Tuzla, the Cantonal Prosecutor and the Chief of the Tuzla's Information Department.[54] The Appellant submits that since these news reports implicated the Drina Corps during the timeframe of the Indictment, the Prosecution should have investigated any potential link to the Appellant given that he is identified in the Indictment as the Chief of Security for the Drina Corps and allegedly responsible for the handling of all the Bosnian Muslim prisoners in the Drina Corps' zone of responsibility, where Bišina is located.[55]

15. The Appellant further claims that the Prosecution would have been negligent to ignore the information about the grave at Bišina based only on the small size of the grave, given that other execution sites mentioned in the Indictment involve even fewer victims. [56] The Appellant finally contends that a simple keyword search of the Drina Corps' archive in the Electronic Disclosure System would have brought up the vehicle logs the Prosecution intends to introduce as exhibits, which were in the Prosecution's possession since December 2004.[57]

16. The Prosecution responds that the Trial Chamber was correct in finding that the Prosecution could not have reasonably understood in 2006 that the direct involvement and direction of the Appellant in the executions would emerge from the exhumation of the graves[58] and claims that "[t]he reports of a primary grave in the Drina Corps zone of responsibility do not give rise, in and of themselves, to the inference that the Appellant was present and directing the executions and burials".[59]

17. First, the Prosecution contends that it had in place a reasonable and effective system for confirming the connection, if any, of new exhumed graves to the case.[60] Second, the Prosecution asserts that the investigation was timely and that contrary to the Appellant's contention, the investigation actually began in earnest in October 2007 following the visit to the newly exhumed Srebrenica-related graves by Investigator Janc, who then pursued his investigation to uncover additional information regarding the executions and burials that occurred at Bišina.[61] The Prosecution thus claims that it diligently continued its investigative work "as the potential relevance of the Bišina grave emerged", culminating in a discovery which appeared as a result of the

[53] Appeal, paras 33-34, 44.
[54] Appeal, para. 37. The Appellant further contends that, in any event, if the Prosecution had any doubts about the reliability of the information, it could have sought confirmation by contacting the responsible Bosnian authorities, *Ibid.*
[55] Appeal, paras 35, 44; *see also* Reply, para. 15.
[56] Appeal, paras 39-40.
[57] Appeal, paras 41-42.
[58] Response, para. 14.
[59] Response, para. 17.
[60] Response, para. 15. The Prosecution adds that given that it was the very same authorities cited as the sources of the information reported in the 2006 articles which had carried out the first stage of the procedure just described, the Trial Chamber could find that the Prosecution had been reasonably diligent in following existing procedures, which rely on scientific methods to establish links to the case, Response, para. 16.

exhumation of 39 bodies at Bišina.[62] The Prosecution finally contends that a simple search of its document database would not have yielded the vehicle logs connecting the Appellant to the events at Bišina since the word Bišina was handwritten and therefore would not have been detected by the search engine.[63]

18. The Appellant replies that the late materialization of the link between his involvement and the events at Bišina alone is sufficient evidence that the Prosecution's procedures to connect the newly exhumed Srebrenica graves to the case were ineffective[64] and led the Prosecution to ignore multiple sources which would have enabled it to link Bišina to his case.[65]

Analysis

19. The issue to be determined by the Trial Chamber was whether despite the exercise of due diligence in its investigation, the Prosecution would have failed to discover the evidence prior to the close of its case. While it is true that with the benefit of hindsight, the 2006 articles published in the local press could have provided a lead to the Prosecution, the Appeals Chamber considers that this does not suffice to demonstrate that the Impugned Decision was in error. The Appeals Chamber notes in this regard that the Prosecution explained at great length the investigative steps taken from the time that it received information regarding the Bišina mass grave and its efforts to obtain and identify the proposed evidence.[66] It is also clear that the relevance of the mass grave was not immediately apparent and only emerged following the identification of the victims' remains, which was not confirmed to the Prosecution until February 2008, and enabled it to link the mass grave with evidence regarding the Appellant's presence and involvement in that area.[67] The Appeals Chamber is thus satisfied that it was within the discretion of the Trial Chamber to find that the Prosecution had established that, despite the exercise of due diligence, it could not have discovered the new evidence during its case-in-chief or have discovered the relevance of evidence already in its possession regarding the Appellant's presence in the area of the Bišina mass grave.[68] Accordingly, the Appeals Chamber dismisses this ground of appeal.

[61] Response, paras 19-20.
[62] Response, para. 20.
[63] Response, para. 18.
[64] Reply, para. 13.
[65] Reply, paras 15-16.
[66] Motion to Reopen, paras 8-20.
[67] Impugned Decision, para. 10, Motion to Reopen, para. 20.
[68] Impugned Decision, para. 31.

C. Whether Sufficient Notice Was Given to the Appellant

20. The Appellant submits that the Trial Chamber erred in finding that the introduction of the proposed evidence would not *per se* amount to a fair trial concern and violate the Appellant's right to have adequate time to prepare his defence.[69] The Appellant claims that "even though the evidence relates also to a pattern of conduct or intent already charged in the Indictment, it primarily relates to events which the Appellant never suspected he could be called upon to answer".[70] The Appellant emphasizes that his right to be informed of the charges against him and to have adequate time to prepare his defence would not have been at risk if the evidence sought to be introduced had been related to one of the mass executions already pleaded in the Indictment.[71]

21. The Appellant argues that, according to the International Tribunal's jurisprudence, information regarding the time and place of events, the identity of victims, and the means by which the acts were committed are "material facts" that must be specifically included in an indictment,[72] and that the Bišina events are material facts which are not mentioned in the Indictment.[73] The Appellant refers in this respect to the *Bizimungu* Trial Chamber Decision, upheld by the Appeals Chamber, which denied the Prosecution's Request to amend the indictment because the new evidence would necessitate that the accused be given adequate time to prepare his defence and therefore, a postponement of the commencement of trial.[74] He argues that in the present case, the Prosecution opted for the reopening of its case-in-chief because the advanced stage of the proceedings would have weighed against the granting of an amendment to the Indictment.[75]

22. The Prosecution responds that since the Appellant concedes that the proposed evidence would simply clarify a pattern of conduct or intent already alleged in the Indictment, the specific details of the events at Bišina do not constitute material facts that must be included in the Indictment.[76] The Prosecution adds that the *Bizimungu* Appeals Decision specifically relied on the

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[69] Appeal, para. 63.
[70] Appeal, para. 67; *see also* para. 71.
[71] Appeal, para. 70.
[72] Appeal, paras 64-65, *citing Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement"), para. 153; *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice Charges), 4 April 1997, para. 15; *Prosecutor v. Kupreškić*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement") , para. 88; *Prosecutor v. Blagojević*, 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, para. 54.
[73] Appeal, para. 66.
[74] Appeal, para. 68 *citing The Prosecutor v. Bizimungu, et al.*, Case No. ICTR-99-50-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003 ("*Bizimungu* Decision"), paras 32-35; *The Prosecutor v. Bizimungu, et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment ("*Bizimungu* Appeals Decision"), 12 February 2004, para. 18.
[75] Appeal, para. 69.
[76] Response, para. 28.

Trial Chamber's reasoning that the particular allegations not included in the indictment in that case would have expanded the scope of liability and not simply clarified the charges against the accused.[77] The Prosecution also cites the *Šešelj* Decision as precedent that evidence of crimes not mentioned in the indictment may be introduced to establish a consistent pattern of conduct if the accused is given sufficient notice.[78] It also insists that the Impugned Decision found that the motion was an early application, and that, therefore, adequate notice had been provided and any prejudice caused to the Appellant had been cured by the arrangements set forth in paragraph 38 of the Impugned Decision.[79]

23. The Appellant replies that the Prosecution misstates his argument. He does not concede that the events at Bišina relate *only* to a pattern of conduct or intent already alleged in the Indictment.[80] His argument is that the evidence concerns material facts, names and places which have never been charged before.[81] The Appellant also distinguishes the facts of the present case from those underlying the *Šešelj* Decision, emphasizing that the events underlying the proposed evidence in that case had been previously charged in an earlier indictment and the accused had therefore known about them.[82] The Appellant also challenges the qualification of the Motion to Reopen as an early application, since the Prosecution did not notify the Appellant of the new evidence until 7 April 2008 despite discovering it on 22 February 2008 and interviewing the witnesses in March 2008.[83]

Analysis

24. The Appeals Chamber notes that the Trial Chamber made it clear that the Appellant could not be found criminally responsible for the Bišina executions.[84] Rather, the evidence related to these executions was, in accordance with Rule 93 of the Rules, admitted as being relevant and probative of the Appellant's knowledge, intent and consistent pattern of conduct "during the period relevant to the executions which are alleged in the Indictment".[85] The Appeals Chamber further observes that the Trial Chamber noted that a motion to reopen will always arise at an advanced stage of the proceedings and involve late introduction of evidence against the accused[86] and that as the Prosecution had filed its Motion to Reopen only a few weeks after the close of its case and almost

[77] Response, para. 29, *citing Bizimungu* Appeals Decision, paras 18-19.
[78] Response, para. 30, *citing Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.7, Decision on Appeal against the Trial Chamber's Oral Decision of 9 January 2008, 11 March 2008 ("*Šešelj* Decision"), para. 23.
[79] Response, para. 30.
[80] Reply, para. 23.
[81] Reply, para. 24.
[82] Reply, para. 24.
[83] Reply, para. 25.
[84] Impugned Decision, para. 39.
[85] Impugned Decision, para. 39; *see also Šešelj* Decision, para. 23; *Kupreškić* Appeal Judgement, 23 October 2001, para. 321.
[86] Impugned Decision, para. 35.

two months before the opening of the Defence cases,[87] "the introduction of this evidence at this stage cannot *per se* amount to a fair trial concern."[88] The Trial Chamber also found that the Appellant would have sufficient time to carry out investigations into the evidence during the presentation of the cases of his co-Accused and stated that it would ensure that the Appellant would have sufficient time to prepare his defence by allowing any evidence the Appellant would want to present in response to be called later in the proceedings.[89] The Appeals Chamber is not satisfied that the Appellant demonstrated any discernible error on the part of the Trial Chamber in this respect.

D. Undue Delay in the Proceedings

25. The Appellant submits that the Trial Chamber erred in finding that reopening the case would not cause undue delay in the proceedings because no extra adjournment would be necessary.[90] The Appellant argues that he does not have the same resources and capabilities as the Prosecution to conduct investigations during the course of the proceedings as is suggested in the Impugned Decision[91] and that the defence can effectively prepare its case only when the Prosecution has completely finished the presentation of its own case.[92] The Appellant claims that if the Trial Chamber finds the Bišina events probative, fairness would dictate that the trial be adjourned to allow the Appellant time to conduct an investigation and interview the nearly 400 potential witnesses who may be able to rebut the Prosecution's allegations.[93] The Appellant submits, however, that this adjournment would result in an undue delay in the proceedings.[94]

26. The Prosecution responds that the Trial Chamber's proposed trial schedule would allow the Appellant ample time to prepare his defence without causing undue delay.[95] The Prosecution emphasizes that the Trial Chamber has allowed the Appellant time to present additional evidence to respond to the new allegations and to amend his Rule 65 *ter* Witness List in relation to any Bišina witnesses his investigation identifies as well as additional opinion from the Appellant's military expert if needed.[96] The Prosecution also submits that the Appellant will have a minimum of four months to conduct investigations and prepare his response to the new allegations while the co-Accused present their cases-in-chief.[97] The Prosecution further argues that any disparity in resources available to the Prosecution and the Appellant is irrelevant, particularly once the

[87] Impugned Decision, para. 36.
[88] Impugned Decision, para. 39.
[89] Impugned Decision, para. 38.
[90] Appeal. paras 72, 77.
[91] Appeal, paras 73-76.
[92] Appeal, para. 76.
[93] Appeal, paras 77-78.
[94] Appeal, para. 78.
[95] Response, paras 31-33.
[96] Response, para. 32.

Appellant's co-Accused start presenting their case, at which point there will be no need for both counsel to be present in court.[98] The Prosecution also refutes the claim that the Appellant can only prepare its case effectively once the Prosecution has completely finished the presentation of its own case, given that the Rules and practice of the International Tribunal actually enable the Defence to prepare its case before the Prosecution begins its presentation.[99]

Analysis

27. The Appeals Chamber finds that the Trial Chamber acted within its discretionary power in determining that the re-opening of the Prosecution case and the admission of fresh evidence would not require an adjournment of the proceedings and therefore result in undue delay. The Trial Chamber made a careful assessment that the additional time that would be required to allow for the Defence to respond to the evidence would be minimal and considered that the Appellant would have the time to carry out its investigations during the proceedings. It also determined that any possible prejudice to the Appellant could be addressed by calling the Prosecution's evidence and any evidence in response later in the trial proceedings.[100] The Appeals Chamber finds that given its familiarity with the case and its daily management of the trial, it was within the Trial Chamber's discretion to conclude that the reopening of the case would not incur any serious delay and not affect the overall fairness of the trial.[101] The Appellant fails to demonstrate any discernible error in this respect.

E. Right to Be Heard

28. The Appellant submits that the Impugned Decision violates his right to a reasoned decision by failing to indicate why it found that the Prosecution had exercised reasonable diligence or why a different holding would have imposed an unreasonable burden on the parties.[102] In particular, the Appellant contends that the Impugned Decision fails to clearly explain whether the Trial Chamber did not believe that the information was available to the Prosecution or whether, even if it was available, the information would not have been sufficient to identify the evidence on time or both.[103] Consequently, the Appellant contends that the Trial Chamber's failure to provide a reasoned decision prevents him from adequately preparing arguments on appeal, therefore violating

[97] Response, para. 33.
[98] Response, para. 34.
[99] Response, para. 34.
[100] Impugned Decision, para. 38; *see also* in this respect Rule 90(F) of the Rules.
[101] Impugned Decision, paras 35, 38.
[102] Appeal, paras 56, 61.
[103] Appeal, para. 61.

his right to be heard, recognized by the European Court of Human Rights and by the United Nations.[104]

29. The Prosecution responds that although the Trial Chamber must give reasons for its findings on the facts that led to its conclusions, pursuant to the jurisprudence of the International Tribunal and the European Court of Human Rights, the Trial Chamber need not provide a detailed analysis of each factor or provide a detailed answer to every argument.[105] The Prosecution further argues that the Impugned Decision was sufficiently detailed and reasoned to meet this standard and allow the Appellant an adequate opportunity to appeal.[106]

30. The Appellant replies that the Trial Chamber must provide more detailed reasoning[107] and that the *Furundžija* Appeal Judgement actually specifies that the duty to provide a reasoned opinion "may vary according to the nature of the decision".[108] In the present case, according to the Appellant, the Trial Chamber failed to consider or discuss, individually, or collectively, the value of any of the information available to the Prosecution.[109]

Analysis

31. Having considered and upheld the challenged findings in the previous sections of this Decision, the Appeals Chamber is not satisfied that the Appellant demonstrated that the Impugned Decision was insufficiently reasoned and that it therefore undermined the Appellant's substantive right of appeal.

IV. DISPOSITION

32. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal in its entirety.

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

Done this 24th day of September 2008,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding

[Seal of the International Tribunal]

[104] Appeal, paras 57-60, 62.
[105] Response, paras 22-23, 27, *citing Furundžija* Appeal Judgement, para. 69; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para. 24.
[106] Response, paras 24-26.
[107] Reply, para. 21.
[108] Reply, para. 21.
[109] Reply, para. 21.