



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-95-5/18-T

Date: 20 March 2014

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 20 March 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO RE-OPEN ITS CASE AND
PROSECUTION MOTION FOR PROTECTIVE MEASURES FOR WITNESS KDZ614**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 seised of the “Prosecution Motion to Re-Open its Case with Public Appendix A and Confidential Appendix B” filed on 4 March 2014 (“Re-opening Motion”) and the “Prosecution’s Motion for Protective Measures for Witness KDZ614” filed on 4 March 2014 (“Protective Measures Motion”), and hereby issues its decision thereon.

I. Background and Submissions

A. Re-opening Motion

1. In its Re-opening Motion, the Office of the Prosecutor (“Prosecution”) seeks to re-open its case-in-chief to introduce previously unavailable evidence regarding the Tomašica mass grave in the Prijedor municipality, Bosnia and Herzegovina (“Proposed Evidence” and “BiH”, respectively) pursuant to Rules 73, 85, and 89 of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ As the exhumation process is still ongoing, it requests to present the evidence which is currently available as quickly as possible and to present additional evidence as soon as it becomes available² or, in the alternative, to present the totality of the evidence altogether when the additional evidence becomes available.³

2. By way of background, the Prosecution submits that it first received information that bodies had been buried in the area of Tomašica in 2001, and that a Tribunal forensic archaeologist conducted unsuccessful excavations of the site in 2002.⁴ In 2004 and 2006, the BiH Missing Persons Institute (“MPI”) conducted excavations of the site which exhumed some bodies and isolated body parts but gave no indication as to the actual number of bodies contained in the grave.⁵

3. In September 2013, after the Prosecution had closed its case, the MPI received additional information on the basis of which it began a new excavation which found the grave structures.⁶ The excavation and analysis of forensic remains is ongoing.⁷ The Prosecution asserts that it can currently present the testimony of three witnesses, two pursuant to Rule 92 *ter*, and one pursuant to Rule 94 *bis*, as well as an International Commission for Missing Persons (“ICMP”) preliminary

¹ Re-opening Motion, para. 1.

² Re-opening Motion, paras. 1–3.

³ Re-opening Motion, para. 3.

⁴ Re-opening Motion, para. 13.

⁵ Re-opening Motion, para. 16.

⁶ Re-opening Motion, paras. 2, 12, 17.

⁷ Re-opening Motion, paras. 2, 17.

report on the excavations.⁸ Additionally, the Prosecution anticipates the archaeology, pathology, and identification reports to become available by early April 2014, and that it will be able to present these reports and the testimony of three forensic experts at that time.⁹

4. The Prosecution submits that the Proposed Evidence is highly probative and directly relevant to the alleged joint criminal enterprise to remove the Bosnian Muslims and Bosnian Croats from certain territories of BiH by means which included murder and extermination, and as such is relevant to Counts 3 and 4 to 6 of the Indictment.¹⁰ It further asserts that the number of bodies discovered reflects the planned, systematic, and large scale nature of killings in Prijedor while the size of the gravesite bears on the number of persons expected to be killed at the time, and as such is relevant to Count 1 of the Indictment.¹¹

5. The Prosecution asserts that the currently available evidence can be presented in one day soon after the close of the Defence case and, as such, would only cause a minimal delay in the proceedings.¹² It also anticipates that the remaining evidence can be introduced as soon as it is produced, which it expects to be in the month of April, and that it would need an additional day at that time to present it.¹³

6. On 14 March 2014, the Accused filed a public redacted version of his “Motion for Extension of Time to Respond to Motion to Re-open Prosecution Case and 89th Disclosure Violation Motion”,¹⁴ where he simultaneously sought an extension to respond to the Re-opening Motion (“Motion for Extension”), an order for the disclosure of certain items relevant to the issue of whether the Prosecution should be allowed to re-open its case, and a finding that the Prosecution violated its disclosure obligations (“89th Disclosure Violation Motion”).¹⁵ On the same day, the Chamber denied the Accused’s Motion for Extension, ordered him to respond by 18 March 2014,

⁸ Re-opening Motion, paras. 2, 8–9.

⁹ Re-opening Motion, paras. 2, 10.

¹⁰ Re-opening Motion, para. 4.

¹¹ Re-opening Motion, para. 4.

¹² Re-opening Motion, para. 5.

¹³ Re-opening Motion, para. 5.

¹⁴ The Chamber notes that the Accused filed the Motion for Extension publicly on 13 March 2014 but that on 14 March 2014, he requested the Registry to reclassify it as confidential and filed a public redacted version thereto, *see* Request to Reclassify Motion for Extension of Time to Respond to Motion to Re-open Prosecution Case and 89th Disclosure Violation Motion, confidential, 14 March 2014; Prosecution Response to Karadžić Request to Reclassify Motion for Extension of Time to Respond to Motion to Re-open Prosecution Case and 89th Disclosure Violation Motion, confidential, 17 March 2014.

¹⁵ Motion for Extension, para. 1.

and stayed its decision on the 89th Disclosure Violation Motion pending receipt of the Prosecution's response thereto.¹⁶

7. The Accused filed his "Response to Prosecution's Motion to Re-open its Case" on 18 March 2014 ("Response to Re-opening Motion"), requesting that the Re-opening Motion be denied without prejudice.¹⁷ The Accused notes the importance of the Proposed Evidence but submits that the Prosecution is unable at this stage of the investigation to establish a link between the Proposed Evidence and his alleged criminal responsibility.¹⁸ Furthermore, he asserts that incomplete disclosure renders unclear whether the information the Prosecution had during its case could have, with reasonable diligence, led to the discovery of Proposed Evidence before the end of its case-in-chief.¹⁹ Therefore, the Accused asks that the Re-opening Motion be denied without prejudice pending completion of the Prosecution's investigation and satisfaction of its disclosure obligations.²⁰

B. Protective Measures Motion

8. In its Protective Measures Motion, the Prosecution seeks protective measures, pursuant to Rule 75, in the form of a pseudonym as well as image and voice distortion for witness KDZ614, whom the Prosecution wishes to call on the Proposed Evidence.²¹ In support of its Protective Measures Motion, the Prosecution attaches, in a confidential Appendix, a declaration from one of its investigators wherein the reasons for witness KDZ614's request are further explained.

II. Applicable Law

A. Re-opening Motion

9. The Rules do not specifically address whether a party may reopen its case-in-chief in order to introduce additional evidence. Past jurisprudence has held that a party may seek leave to re-open its case to present "fresh" evidence, that is, evidence that could not be obtained by the moving party by the conclusion of its case-in-chief despite exercising all reasonable diligence to do so.²²

¹⁶ Decision on Accused Motion to Extend Time to File Response, 14 March 2014.

¹⁷ Response to Re-opening Motion, para. 1.

¹⁸ Response to Re-opening Motion, paras. 2–3. The Chamber notes that there are two paragraphs numbered '3' in the Response to Re-opening Motion, and the number '3' in this citation refers to the first of these paragraphs.

¹⁹ Response to Re-opening Motion, paras. 3–5. The Chamber notes the number '3' in this citation refers to the second of the two paragraphs numbered '3'.

²⁰ Response to Re-opening Motion, para. 6.

²¹ Protective Measures Motion, para. 1.

²² *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, Pandurević*, Case No. IT-05-88-T, Decision on Motion to Reopen the Prosecution Case, 9 May 2008 ("*Popović* Re-opening Decision"), para. 23; *Prosecutor v.*

10. The Chamber notes 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”.²³ Additionally, the burden of demonstrating that reasonable diligence could not have led to the discovery of the evidence at an earlier stage “rests squarely” on the moving party.²⁴

11. Furthermore, the Chamber has the discretion, pursuant to Rule 89(D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.²⁵ The following factors are relevant to the exercise of the Chamber’s discretion: (i) the advanced stage of the trial; (ii) the delay likely to be caused by the proposed re-opening and the suitability of an adjournment in the overall context of the trial; as well as (iii) the probative value of the evidence to be presented.²⁶

B. Protective Measures Motion

12. Article 20(1) of the Tribunal’s Statute (“Statute”) requires that proceedings be conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Article 21(2) entitles the accused to a fair and public hearing, subject to Article 22, which requires the Tribunal to provide in its Rules for the protection of victims and witnesses, including the conduct of *in camera* proceedings and the protection of identity. As has clearly been established in previous Tribunal cases, these Articles reflect the duty of the Trial Chamber to

Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, Pandurević, Case No. IT-05-88-T, Further Decision on Prosecution’s Motion to Admit Evidence in Rebuttal and Reopen its Case, 27 March 2009 (“*Popović* Further Decision”), para. 98; *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, Pandurević*, Case No. IT-05-88-T, Decision on Prosecution Second Motion to Reopen its Case and/or Admit Evidence in Rebuttal, 8 May 2009 (“*Popović* Second Re-opening Decision”), para. 67; *Prosecutor v. Delalić, Mučić, Delić and Landžo*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”), para. 279–282; *Prosecutor v. Delalić, Mučić, 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. 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, with Confidential Annex, 13 December 2005 (“*Milošević* Decision”), paras. 14–15.

²³ *Čelebići* Appeal Judgement, para. 283; *Popović* Re-opening Decision, para. 24; *Popović* Further Decision, para. 99.

²⁴ *Popović* Re-opening Decision, para. 24; *Popović* Further Decision, para. 99; *Čelebići* Trial Decision, para. 26; *Prosecutor v. Blagojević and Jokić*, Case No. IT-20-60-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 Reopen its Case for a Limited Purpose, 13 September 2004 (“*Blagojević* Trial Decision”), para. 9.

²⁵ *Popović* Re-opening Decision, para. 24; *Popović* Further Decision, para. 100; *Popović* Second Re-opening Decision, para. 68; *Čelebići* Appeal Judgement, para. 283.

²⁶ *Popović* Re-opening Decision, para. 25; *Popović* Further Decision, para. 100; *Popović* Second Re-opening Decision, para. 68; *Blagojević* Trial Decision, paras. 10–11; *Čelebići* Appeal Judgement, paras. 280 (referencing *Čelebići* Trial Decision, para. 27), 290; *see also Milošević* Decision, paras. 14–15.

balance the right of the accused to a fair trial, the rights of victims and witnesses to protection, and the right of the public to have access to information.²⁷

13. Rule 75(A) of the Rules permits a Trial Chamber to “order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused”. Under Rule 75(B) of the Rules, these may include measures to prevent disclosure to the public and the media of identifying information about witnesses or victims, including voice and image distortion and the assignment of a pseudonym.

14. The Chamber recalls that the party requesting protective measures must demonstrate the existence of an objectively grounded risk to the security or welfare of the witness or the witness’s family, should it become publicly known that he or she testified before the Tribunal.²⁸

III. Discussion

15. The Chamber will first examine whether the Proposed Evidence constitutes “fresh” evidence. The Prosecution submits that it first learned of the Tomašica grave site in 2001.²⁹ Excavations of the site in 2002, 2004, and 2006³⁰ recovered numerous body parts and identified approximately 56 individuals.³¹ However, the Prosecution did not identify Tomašica as a mass grave until September 2013, after its case-in-chief had closed, when the current excavation by MPI began and recovered approximately 275 complete and 118 incomplete bodies.³² The Chamber notes that while the Prosecution possessed some information during its case-in-chief which supported the existence of a mass grave in the Tomašica area, previous discovery efforts were largely thwarted by factors outside of its control, including waste dumping at the site which “drastically altered the landscape” and deepened the level at which the remains were found.³³ In light of the information before it, the Chamber is satisfied that the Prosecution has met its burden of demonstrating that it acted with reasonable diligence in attempting to obtain the Proposed

²⁷ See Decision on Motion for and Notifications of Protective Measures, 26 May 2009, para. 11, citing *Prosecution v. Tadić*, Case No. IT-94-1-T, Decision on Prosecution’s Motion Requesting Protective Measures for Witness I, 14 November 1995, para. 11; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness R, 31 July 1996, p. 4; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 7.

²⁸ See Decision on Prosecution’s Motion for Protective Measures for Witness KDZ487, 24 November 2009, para. 13, citing *Prosecution v. Martić*, Case No. IT-95-11-T, Decision on Defence Motion for Protective Measures for Witnesses MM-096, MM-116 and MM-90, 18 August 2006, pp. 2–3; *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution’s Additional Motion for Protective Measures of Sensitive Witnesses, 25 October 2005, para. 5.

²⁹ Re-opening Motion, para. 13.

³⁰ Re-opening Motion, paras. 13, 16.

³¹ 65 *ter* number 26081, paras. 5–9; Re-opening Motion, paras. 13, 16.

³² 65 *ter* number 26081, paras. 12, 14; Re-opening Motion, paras. 16–17; 65 *ter* number 26083, para. 33.

³³ 65 *ter* number 26062, p. 6; Re-opening Motion, paras. 14–15.

Evidence, which only materialised after the close of its case-in-chief and therefore that the Proposed Evidence is fresh.

16. Having determined that the Proposed Evidence meets the threshold requirement of freshness, the Chamber must determine whether the probative value of the Proposed Evidence is substantially outweighed by the need to ensure a fair trial. The Chamber has considered the Prosecution's argument that the Proposed Evidence is probative in relation to the Accused's alleged responsibility for Counts 1, 3, and 4 to 6 of the Third Amended Indictment with regard to the Prijedor municipality, in particular to demonstrate "the Bosnian Serb authorities' planning and intentions related to attacks on villages in Prijedor municipality and the operation of the camps",³⁴ as well as the Accused's submission that its probative value remains uncertain.³⁵ At this stage, the Prosecution possesses only some of the Proposed Evidence.³⁶ The Chamber is therefore of the view that any probative value attributed to the entirety of the Proposed Evidence by the Prosecution is therefore speculative at best.

17. Turning now to whether the Re-opening Motion raises any fair trial concerns, the Chamber first observes that "any Prosecution motion to re-open its case will—by definition—arise at an advanced stage of the proceedings and will involve late introduction of evidence to the prejudice of the accused".³⁷ What must therefore be considered is whether the circumstances are such that the overall fairness of the trial is negatively affected.³⁸ The Prosecution is attempting to introduce the Proposed Evidence as the presentation of the Accused's defence case is in its very final phase. In contrast to cases where re-opening was sought either before or during the defence's case-in-chief, it cannot be said that the Re-opening Motion is an "early" application.³⁹ The Accused has already requested, should the Re-opening Motion be granted, "a deadline for disclosure of all Rule 66(A)(ii) material and that the re-opening case not commence until at least 30 days after the disclosure has been completed".⁴⁰ It is to be further expected that re-opening the case at this time will trigger a request from the Accused to present evidence in rejoinder and additional time for his preparations thereto. This is likely to result in more than "a minimal amount of additional time to the trial".⁴¹ This is even more so as the Prosecution has acknowledged that not all the Proposed

³⁴ Re-opening Motion, paras. 21–22.

³⁵ Response to Re-opening Motion, para. 3. The Chambers notes this citation refers to the first of the two paragraphs numbered '3'.

³⁶ Re-opening Motion, para. 8, confidential Annex B.

³⁷ *Popović* Re-opening Decision, para. 35.

³⁸ *Popović* Re-opening Decision, para. 35.

³⁹ *Popović* Re-opening Decision, para. 36. In *Popović*, the Prosecution sought to re-open its case before the various defence teams had begun their case. This "early" application supported re-opening.

⁴⁰ Response to Re-opening Motion, fn. 6.

⁴¹ Re-opening Motion, para. 24.

Evidence is available at this stage and that exhumations and forensic analysis are still ongoing.⁴² It anticipates being in possession of all of the Proposed Evidence by early April 2014, yet does not provide any evidence to support this assertion.⁴³

18. The Chamber is therefore of the view that granting the Re-opening Motion is not in the interests of justice given the very late stage of the trial, the delay it would cause to the overall completion of the proceedings, and the speculative probative value of the Proposed Evidence. Accordingly, the Chamber will deny the Re-opening Motion.

19. In light of the Chamber's decision on the Re-opening Motion, the Protective Measures Motion shall therefore be dismissed as moot.

IV. Disposition

20. Accordingly, the Chamber, pursuant to Rules 54 and 85 of the Rules, hereby:

- (a) **DENIES** the Re-Opening Motion, and
- (b) **DISMISSES** the Protective Measures Motion as moot.

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



Judge O-Gon Kwon
Presiding

Dated this twentieth day of March 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴² Re-opening Motion, paras. 2, 17.

⁴³ Re-opening Motion, paras. 2, 10; 65 *ter* number 26081 para. 23 (expecting that approximately 220 bodies remain in the grave and noting that numerous other persons are still missing).