IT-05-88-T
D18833-D18821
09 MAY 2008

18833
PK

**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-T

Date: 9 May 2008

Original: English

**IN TRIAL CHAMBER II**

**Before:** **Judge Carmel Agius, Presiding**
**Judge O-Gon Kwon**
**Judge Kimberly Prost**
**Judge Ole Bjørn Støle – Reserve Judge**

**Registrar:** **Mr. Hans Holthuis**

**Decision of:** **9 May 2008**

**PROSECUTOR**

**v.**

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

**PUBLIC**

# DECISION ON MOTION TO REOPEN THE PROSECUTION CASE

**Office of the Prosecutor**
Mr. Peter McCloskey

**Counsel for the Accused**
Mr. Zoran Živanović and Ms. Mira Tapušković for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
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

**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 "Motion to Reopen the Prosecution Case, With Two Appendices", filed confidentially on 7 April 2008 ("Motion"), and hereby renders its decision thereon.

## I. PROCEDURAL BACKGROUND

1. On 7 February 2008, the Prosecution brought its case in chief to a close.[1] On 7 April 2008, the Prosecution filed the Motion, in which it seeks to re-open its case for the purpose of presenting the evidence of three witnesses. The Prosecution also requested the issuance of an order that the contents of the interviews and identities of two of the witnesses not be disclosed to any third party without the Trial Chamber's permission, pending a decision on the Motion.[2] On 8 April 2008, the Trial Chamber issued an "Order on the Motion to Reopen the Prosecution Case" ("Order"), in which it ordered that "[t]he contents of the interviews and the identities of the witnesses [...] shall not be disclosed in whole or in part to any third party without first obtaining the Trial Chamber's permission to do so, pending the outcome of the Prosecution Motion".[3]

2. On 10 April 2008, Popović filed "Vujadin Popović's Request for Permission to Disclose the Interview to Potential Defence Witnesses During the Investigation and for Clarification of the 'Order on the Motion to Reopen the Prosecution Case'", in which he requested permission to reveal the information contained in the interviews of the two proposed protected witnesses to potential Defence witnesses—without revealing the proposed witnesses' identities—in order to investigate the proposed witnesses.[4] On 11 April 2008, the Prosecution confidentially filed a "Consolidated Response to Accused Popović's Requests for Extension of Time and for Permission to Disclose Interviews and Clarification", in which the Prosecution did not object to Popović's request to disclose the substance of the proposed witnesses' interviews so long as the proposed witnesses were not identified as potential Prosecution witnesses. On 15 April 2008, the Trial Chamber issued a "Decision on Popović's Request for Permission to Disclose the Content of Interviews of Two Protected Witnesses and for Clarification of 'Order on the Motion to Reopen the Prosecution Case'" ("Decision of 15 April 2008"), in which it granted Popović's request but ordered him not to disclose to the public that the witnesses may be potential Prosecution witnesses in this case or to disclose the content of the witnesses statements or ask questions about the witnesses, their

[1] T. 21222 (7 February 2008).
[2] Motion, para. 42.
[3] Order, pp. 1–2.
[4] Request, para. 12.

whereabouts or their role in the events at issue except as "directly and specifically necessary for the preparation and presentation of [his] defence".[5]

3. On 21 April 2008, Popović confidentially filed "The Accused Vujadin Popović's Response to the Motion to Reopen the Prosecution Case and Request for Leave to Exceed the Word Limit" ("Response"). On 28 April 2008, the Prosecution confidentially filed a "Prosecution Reply to 'the Accused Vujadin Popović's Response to the Motion to Reopen the Prosecution Case and Request for Leave to Exceed the Word Limit'" ("Reply").

4. The Trial Chamber notes that on 22 April 2008, Nikolić confidentially filed a "Notice on Behalf of Drago Nikolić Joining Vujadin Popović's Response to the Prosecution's Motion to Reopen its Case" ("Nikolić Joinder Notice"), in which Nikolić purports to "join[] and adopt[] all the arguments set out [in the Response]".[6] Nowhere, however, does Nikolić explain why he filed this notice in disregard of the Order, under the terms of which any Defence responses to the Motion were to be filed no later than 15 April 2008.[7] Nor does Nikolić request leave to file the untimely response. Accordingly, the Trial Chamber will not further consider the Nikolić Joinder Notice.

## II. SUBMISSIONS OF THE PARTIES

### A. Motion

5. The Prosecution seeks to reopen its case for the purpose of presenting the "*viva voce* and Rule 92*ter* testimony of three witnesses", together with "ten short related documents."[8] Specifically, the Prosecution asserts that it "has obtained new evidence relating to a mass execution in an area known as Bišina, in which Popović was directly involved".[9] The Prosecution asserts that this evidence supports its theory that Popović was a core member of the joint criminal enterprise alleged in the Indictment, is relevant to Popović's criminal intent, and helps establish a consistent pattern of conduct relevant to the charged crimes.[10]

6. The Prosecution describes the three proposed witnesses and their expected evidence. One of the proposed witnesses would testify that on 23 July 1995, he observed Popović at an area known as

[5] Decision of 15 April 2008, p. 2.
[6] Nikolić Joinder Notice, para. 2.
[7] Order, p. 2. Popović sought, and was granted, an extension of time to file his response no later than 21 April 2008. Decision on Popović's Request for an Extension of Time to File a Response to the Motion to Reopen the Prosecution Case, filed on 11 April 2008, p. 1.
[8] Motion, paras. 1–2.
[9] *Ibid.*, para. 6.
[10] *Ibid.*, paras. 32–35.
[12] *Ibid.*, para. 6(i).

Bišina, where prisoners that the witness had driven to that point were executed by members of the 10th Sabotage Division.[12] The Prosecution further submits that the witness "would testify that Popović was present throughout the executions and that [the witness] specifically recalls Popović issuing orders regarding the burial".[13]

7. The second proposed witness would testify that on 23 July 1995, some soldiers were taken to the vicinity of the military barracks in Bišina.[14] The witness would further testify that while he did not know what the soldiers were doing, he assumed it was "bad".[15]

8. The third proposed witness would testify regarding two intercepts from 24 July 1995, which would establish Popović's knowledge of the whereabouts of Himzo Mujić—whose remains were allegedly found in the mass grave at Bišina.[17]

9. The documentary evidence that the Prosecution seeks to admit is the following: two vehicle logs;[19] an intercept dated 24 July 1995 at 11:32 a.m., recording a conversation between a person identified as "Kane" and an unidentified correspondent, regarding the whereabouts of Himzo Mujić and referencing the name "Popović";[20] aerial images of the area encompassing the Bišina mass grave taken on 20 April 1995 and 27 July 1995,[21] as well as an exhumation report of the grave, dated 6 June 2006;[22] an autopsy report for victim BIŠ 01 ŠEK 038 B, dated 19 June 2006,[23] and an identity determination record identifying this victim as Himzo Mujić, dated 22 February 2007;[24] and two reports dated 20 July 1995 regarding prisoner transfers, one from Serbia to the Republika Srpska and one from Republika Srpska Border Control to the Bratunac Brigade.[25]

10. The Prosecution asserts that it had no reason to know of the mass grave at Bišina, and did not discover its relevance until 25 October 2007. On that day, Prosecution investigator Dušan Janc was shown the grave by the Federation of Bosnia and Herzegovina Federal Commission for Missing Persons, while on a mission to Bosnia for the purpose of receiving such information.[26] The

---

[13] *Ibid.*
[14] *Ibid.*, para. 6(ii).
[15] *Ibid.*
[17] *Ibid.*, para. 6(iii).
[19] *Ibid.*, paras. 7(i), 7(ii).
[20] *Ibid.*, para. 7(iii).
[21] *Ibid.*, paras. 7(iv), 7(v).
[22] *Ibid.*, para. 7(vi).
[23] *Ibid.*, para. 7(vii).
[24] *Ibid.*, para. 7(viii).
[25] *Ibid.*, para. 7(ix), 7(x).
[26] *Ibid.*, para. 14.

Prosecution sent requests for assistance to the governments of Bosnia and Herzegovina and the United States in early November 2007, and followed up in December 2007 and January 2008.[27] In February 2008, while Janc was awaiting responses to the requests for assistance, he conducted a database search using names of 33 identified Bišina victims.[28] The search resulted in the name of one of the identified victims being located in two intercepts from 24 July 1995, which led Janc to the conclusion that Drina Corps personnel may have been involved.[29] A more thorough assessment of evidence ensued, leading to the discovery of, *inter alia*, the vehicle logs.[30]

### B. Response

11. Popović submits that the re-opening of a case is a measure for "exceptional circumstances where the justice of the case so demands".[31] He further submits that, in this instance, "the proposed evidence does not fall into the category of 'fresh' evidence as created and developed by the [Tribunal's] case law", and urges the Trial Chamber to deny the Motion on this basis.[32] Alternatively, Popović urges the Trial Chamber to use its discretion to deny the motion.

12. Popović divides the Prosecution's proposed evidence into two groups, the first consisting of the proposed witness testimonies and three documents obtained after the close of the Prosecution's case, and the second consisting of the remaining seven documents, which the Prosecution had in its possession during its case in chief.[33]

13. Regarding the first category—consisting of newly-obtained evidence—Popović argues that the Prosecution did not exercise the required reasonable diligence and that the evidence should be excluded for that reason.[34] Citing "wide" media reporting in May and June 2006 of the discovery of a mass grave at Bišina,[35] Popović asserts that information contained in these reports should have put the Prosecution on notice of the link between the Drina Corps and the gravesite.[36] He emphasises that this is particularly true in light of the Prosecution's possession of, *inter alia*, Drina Corps vehicle logs.[37] Additionally, Popović submits that the Prosecution failed to exercise reasonable

---

[27] *Ibid.*, paras. 15–16.
[28] *Ibid.*, para. 18.
[29] *Ibid.*, para. 19.
[30] *Ibid.*
[31] Response, para. 6 (citing *Prosecutor v. Slobodan 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* Trial Decision of 13 December 2005"], para. 37).
[32] Response, p. 1.
[33] *Ibid.*, para. 18.
[34] *Ibid.*, paras. 18, 28, 29.
[35] *Ibid.*, paras. 21–23.
[36] *Ibid.*, para. 28.
[37] *Ibid.*, para. 25.

diligence when it chose to forward information regarding the Bišina grave to an investigator who was no longer employed by the Prosecution, rather than to one who was still actively engaged in the exhumations, and that "the Prosecution's diligence needs to be evaluated [...] in light of this choice".[38]

14. Regarding the seven documents in the Prosecution's possession prior to the close of its case-in-chief, Popović asserts that they categorically cannot constitute "fresh evidence" as they were indisputably in the Prosecution's possession prior to the close of its case-in-chief.[39] Popović further asserts that even if the Trial Chamber does characterise the documents as fresh evidence, they should still be excluded based on the Prosecution's lack of reasonable diligence. Popović asserts that "the Prosecution using reasonable diligence could and should have realized the relevance of the documents well before the end of its case-in-chief".[40] Thus, should the Trial Chamber accept that the Prosecution's evidence is admissible, Popović submits that the Trial Chamber should nonetheless use its discretion to exclude the evidence.[41]

15. In urging the Trial Chamber to deny the Motion in the exercise of its discretion, Popović argues that the Motion was filed after the filing of his Military Expert Report, and after the completion of his "65 *ter* list", and that the late stage of the proceedings mitigates against admission of the evidence.[42] Additionally, Popović asserts that to answer this new evidence would require him to undertake an entirely new investigation, which would encompass interviews of over four hundred potential new witnesses, "thorough archive searches", and new assignments to his experts.[43] Popović submits such a delay would amount to no less than six months, which would accordingly violate his rights to a fair and expeditious trial without undue delay.[44]

16. Popović also submits that permitting the re-opening of the Prosecution's case would prejudice the rights of the other Accused in two ways—first, because the evidence relates to a joint criminal enterprise the other Accused would be affected by its admission, and second, the delay caused by the evidence would also impact the rights of the other Accused to a fair and expeditious trial free from undue delay.[45]

---

[38] *Ibid.*, para. 29.

[39] *Ibid.*, para. 32–33 (citing *Milošević* Trial Decision of 13 December 2005, para. 23; *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement), para. 276).

[40] Response, para. 34.

[41] *Ibid.*, para. 37.

[42] *Ibid.*, paras. 40–42.

[43] *Ibid.*, para. 46.

[44] *Ibid.*, paras. 47–48.

[45] *Ibid.*, paras. 58–60.

17. Finally, Popović argues that the probative value of the evidence does not justify reopening the Prosecution's case, particularly in light of the Prosecution's failure to include this evidence in the Indictment or in its Pre-trial Brief, or to put Popović on notice of the evidence in any way.[46] Popović also refers to the Trial Chamber's oral decision of 25 January 2008 that excluded relevant evidence for fear of prejudice to the Defence resulting from "lack of time to investigate and prepare for the cross-examination of this witness."[47] For all these reasons, Popović submits, the Trial Chamber should exercise its discretion and deny the Motion.

### C. Reply

18. In its Reply, the Prosecution submits that Popović mischaracterises the evidence at issue, that the evidence does constitute fresh evidence, and that the factors the Trial Chamber must consider in exercising its discretion militate in favour of granting the Motion.

19. The Prosecution submits that considering the meagre amount of reported information regarding the Bišina grave as well as its "speculative" nature, it could not reasonably have diverted its limited resources to investigate the new gravesite, particularly as the significance of this evidence to "the direct involvement and direction of one of the Accused in an execution and burial" could not have been anticipated.[48] The Prosecution asserts that it acted immediately following the exhumation "to determine with certainty the relationship, if any, of the Bišina mass grave to the events of July 1995 [...] and when the results were obtained by the Prosecution, they were provided immediately to the Prosecution's exhumation expert".[49]

20. The Prosecution argues that the Appeals Chamber has not ruled definitively on the definition of fresh evidence, and asserts that the jurisprudence of the Tribunal supports a reopening of the case even where evidence was in the Prosecution's possession at the close of its case-in-chief.[50]

21. The Prosecution argues that the highly probative value of the evidence justifies its admission and that the evidence would not prejudice any of the Accused. Specifically regarding Popović, the Prosecution asserts that the evidence does not expand the charges but falls within the scope of the allegations laid out in the Indictment.[51] Popović, according to the Prosecution, is therefore already on notice of the charges against him and not prejudiced by the introduction of the evidence at this

[46] *Ibid.*, paras. 52, 57.
[47] T. 20501–20503 (25 January 2008).
[48] Reply, paras. 2–5.
[49] *Ibid.*, para. 4.
[50] *Ibid.*, para. 6.

stage of the trial. The Prosecution also submits that Popović's estimation of the scope of the necessary new investigation is "vastly exaggerate[d]", and that the reopening of its case could be scheduled for a time following the completion of Popović's investigation.[52] As to any potential effect of the evidence on the other Accused, the Prosecution points out their lack of a (timely) response.[53]

22. Finally, the Prosecution submits that the Trial Chamber's oral decision of 25 January 2008 regarding the addition of a new witness to the Prosecution's 65 *ter* Witness List was guided by the concern that the Defence would have insufficient time to prepare for cross-examination. The Prosecution asserts that this concern is less pressing in this instance because the reopening could be scheduled so as to permit thorough defence preparation.[54]

## III. APPLICABLE LAW

23. The Rules do not specifically address whether the Prosecution may reopen its case-in-chief in order to introduce additional evidence. The possibility has been addressed, however, in the jurisprudence of the Tribunal.[55] Permission to reopen a case may be granted only where the request regards "fresh" evidence.[56] Fresh evidence is not simply evidence "that was not in fact in the possession of the Prosecution at the time of the conclusion of its case, but [...] evidence which by the exercise of reasonable diligence could not have been obtained by the Prosecution at that time."[57] Additionally, fresh evidence is distinct from rebuttal evidence.[58]

24. The Appeals Chamber has held 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

---

[51] *Ibid.*, para. 8.

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

[53] *Ibid.*, para. 10. *See also supra*, para. 4.

[54] Reply, para. 12.

[55] *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* Trial Decision"), para. 31.

[56] *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement), para. 279–282; *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Re-open the Prosecution's Case, 19 August 1998 ("*Čelebići* Trial Decision"), para. 26; *see also Milošević* Trial Decision of 13 December 2005, paras. 14–15.

[57] *Čelebići* Trial Decision, para. 26.

[58] Rebuttal evidence is admissible solely to refute evidence adduced by the Defence, and may exclusively address "matters that arise directly and specifically out of defence evidence." *Čelebići* Trial Decision, para. 23. "The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different basis of admissibility applies." *Čelebići* Appeal Judgement, para. 276.

case-in-chief of the party making the application."[59] 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.[60]

25. Even where a failure to discover evidence cannot be attributed to the moving party's lack of reasonable diligence and the subsequently-discovered evidence therefore qualifies as fresh and admissible, the Trial Chamber must exercise its discretion and determine whether the evidence should be admitted.[61] The Appeals Chamber has noted that this discretion should be exercised "by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings" and that these factors fall under the general discretion reflected in Rule 89 (D).[62] Pursuant to Rule 89 (D), a Chamber may exclude relevant evidence where the probative value of the evidence is substantially outweighed by the need to ensure a fair trial. In such a determination, the following factors are relevant: (1) the advanced stage of the trial; (2) the delay likely to be caused by a re-opening of the [. . .] case and the suitability of an adjournment in the overall context of the trial; (3) the effect of bringing evidence against one Accused on the fairness of the trial of another Accused in a multi-defendant case and (4) the probative value of the evidence to be presented.[63]

## IV. DISCUSSION

### A. Fresh Evidence and Reasonable Diligence

26. Popović argues that none of the evidence the Prosecution now seeks to adduce qualifies as fresh and, therefore, the Trial Chamber may not grant the Motion. Popović further asserts that the seven documents in the Prosecution's possession prior to the end of its case are categorically inadmissible, and that the Prosecution failed to exercise reasonable diligence in discovering the remainder of the evidence at issue. The Trial Chamber is not persuaded by either assertion.

---

[59] *Čelebići* Appeal Judgment, para. 283.

[60] *Čelebići* Trial Decision, para. 26; *see also 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* Trial Decision"), para. 9.

[61] *Čelebići* Appeal Judgement, para. 283.

[62] *Ibid.*

[63] *See, e.g., Blagojević* Trial Decision, paras. 10–11; *see also Milošević* Trial Decision of 13 December 2005, para. 13; *Čelebići* Appeal Judgement, paras. 280 (referencing *Čelebići* Trial Decision, para. 27), 290.

1. Documents in the Prosecution's possession prior to the close of its case-in-chief

27. Contrary to Popović's claim, the Tribunal's jurisprudence does not require a finding that the Prosecution's prior possession of seven documents it now seeks to adduce demonstrates a *per se* lack of reasonable diligence. Here, Popović relies upon a decision of the *Slobodan Milošević* Trial Chamber to argue that any documents in the possession of the Prosecution prior to the close of its case-in-chief cannot qualify as fresh evidence. This Trial Chamber does not agree with Popović that the definition of fresh evidence must be so narrowly construed. Indeed, the Appeals Chamber described the "primary consideration" in determining an application for reopening as whether the evidence could have been "*identified* and presented" in the moving party's case-in-chief.[64]

28. The Prosecution asserts that determining reasonableness under the circumstances must "reflect a practical understanding of the realities faced by a party during any investigation".[65] The Trial Chamber agrees. It is certainly possible for evidence in a party's possession to have no relevance in the absence of other evidence linking it to the case. When that linking evidence itself qualifies as fresh evidence, the Trial Chamber finds that it would be unfair to bar the *newly-relevant* evidence simply because it was in the party's prior possession. Accordingly, the Trial Chamber considers that the category of fresh evidence must include evidence in a party's prior possession which becomes significant only in the light of other fresh evidence.

29. Here, the Trial Chamber is persuaded that the Prosecution could not reasonably have understood the significance of the seven documents it now seeks to adduce which were already in its possession prior to the end of its case-in-chief. Rather, the significance of those documents became apparent only after the Prosecution discovered the specific relevance of the Bišina grave. Under the circumstances, these seven documents must qualify as fresh evidence to the same extent as the linking evidence of the Bišina executions which was not in the possession of the Prosecution prior to the close of its case-in-chief.

2. The newly-obtained evidence

30. The remaining evidence the Prosecution seeks to adduce was not in the Prosecution's possession prior the close of its case-in-chief. However, Popović argues that the Prosecution failed to exercise reasonable diligence in the discovery of that evidence. Under the circumstances, the Trial Chamber does not agree.

---

[64] *Čelebići* Appeal Judgement, para. 283 (emphasis supplied).
[65] Motion, para. 29.

31. The Trial Chamber is satisfied that the Prosecution has met the applicable burden of proof and demonstrated that reasonable diligence could not have led to the discovery of the evidence at an earlier stage of the trial. Thus, the Trial Chamber finds that the Prosecution exercised reasonable diligence in the discovery of the evidence that it now seeks to adduce regarding Popović's alleged direct physical participation in the executions at Bišina. The Trial Chamber is persuaded that, based on the materials available to it at the relevant times, the Prosecution could not reasonably have understood that "the direct involvement and direction of one of the Accused in an execution and burial [...] would emerge from the exhumation of a relatively small number of bodies in an area previously unknown to the Prosecution."[66] Reasonable diligence must be understood with regard to the realities facing the parties, not measured by what a party with infinite time and limitless investigative resources might have discovered or understood. Here, the Trial Chamber is persuaded that the Prosecution exercised the requisite diligence in discovering this evidence regarding Popović's alleged direct physical participation in the executions at Bišina. Indeed, the Trial Chamber considers that a different holding would impose an unreasonable burden on the parties; one that would require virtual investigative perfection in spite of the circumstances, rather than requiring reasonable diligence under the circumstances.

32. Accordingly, the Trial Chamber finds that all the evidence the Prosecution now seeks to adduce qualifies as fresh and, therefore, is admissible at this stage of the trial.

### B. The Trial Chamber's Discretion

33. Having found that the evidence at issue is admissible, the Trial Chamber must exercise its discretion in deciding whether to grant the Motion. The evidence goes to a fundamental aspect of the Prosecution's case against Popović. It is true that the executions at Bišina do not form part of the specific allegations in the Indictment. Nevertheless, the evidence as to Popović's alleged participation in the event is still relevant and highly probative as to his knowledge, intent and "pattern of conduct" during the relevant time period, particularly in relation to the alleged joint criminal enterprise to murder the able bodied Bosnian Muslim men.

34. In light of the probative value of the proffered evidence, it is necessary to consider the fair trial concerns implicated by the Prosecution's request to reopen its case and introduce the evidence at this stage of the trial.

35. Any Prosecution motion to reopen will—by definition—arise at an advanced stage of the proceedings and will involve late introduction of evidence to the prejudice of the accused. What

[66] Reply, para. 3.

must be considered therefore is whether, in the particular case, the circumstances are such that the overall fairness of the trial is negatively affected. In the Trial Chamber's view, this is not such a case.

36. The Motion was brought a few weeks after the close of the Prosecution's case—almost two months before the scheduled opening of the Defence cases. In contrast to cases where reopening is sought in the middle or near the end of the defence case, it is difficult to envisage how the Motion can be categorised as anything but an "early" application.[67] This factor supports the exercise of discretion in favour of reopening.

37. One central concern is the potential delay arising from the introduction of this evidence, particularly in this case with seven Accused. The Prosecution estimates that, in total, the evidence in direct would add a further 2.75 hours.[68] As for the Defence, while the proposed evidence could have some relevance to the other Accused with alleged involvement in the joint criminal enterprise to murder the Bosnian Muslim men, it is evidence which is primarily of concern to Popović. This is particularly the case since the incident in question is not one which is specified in the Indictment, but is highly probative as to Popović's knowledge, intent and "pattern of conduct" during the relevant time period. In this regard, it is also notable that only Popović responded substantively to the Motion.[69] Any realistic assessment of the possible delay must centre on potential cross-examination and defence evidence that Popović may wish to lead in response.

38. The Prosecution asserts that Popović's estimate of a minimal six-month delay is vastly exaggerated. Regardless of whether Popović's estimate is realistic, there can be no doubt that some additional time will be required to allow for a proper defence response to the evidence. However, the Trial Chamber believes that this would not require a postponement of the trial proceedings and would ultimately involve a relatively limited amount of additional court time. Given that this is a multi-accused trial with the defence cases expected to last for six months at a minimum, there is no need to adjourn the proceedings to give Popović time to carry out investigations into this evidence. As was true during the presentation of the Prosecution's case-in-chief, those investigations can take place as the trial proceeds, if necessary while the other defence cases are being presented. Insofar as the order of presentation of cases is concerned, the Trial Chamber can address any possible prejudice to Popović by allowing the Prosecution's evidence—and any evidence Popović wishes to present in response—to be called, in whole or in part, out of order later in the trial proceedings.

---

[67] *See*, for example, the *Blagojević* Trial Decision, paras. 1–2. In *Blagojević*, the Prosecution request to reopen its case was filed more than a month after both defence cases had concluded.

[68] Motion, para. 2.

[69] *See supra*, para. 4

This is also an instance where amendment to the Defence's Rule 65*ter* Witness List would be justified should Popović identify additional witnesses as a result of his investigation. Similarly, any necessary further comment from Popović's military expert could be easily accommodated. In the Trial Chamber's estimation, granting the Motion need not delay the trial proceedings and any additional time involved in the context of this complex, multi-accused case will be quite minimal.

39. What remains in terms of prejudice to the Accused is the fact that this evidence relates to an incident not specified in the Indictment and which is being introduced late in the proceedings. However, the Trial Chamber is not persuaded that this presents a sufficient basis upon which it should exercise its discretion to deny the Motion. Given the very nature of an application to reopen, the introduction of this evidence at this stage of the trial cannot *per se* amount to a fair trial concern which outweighs the probative value of this evidence. Moreover, because the executions at Bišina are not specified in the Indictment, it is not possible for Popović—or any of the other six Accused—to be found criminally responsible for those executions. Rather, the evidence is relevant and probative as to Popović's knowledge, intent and "pattern of conduct" during the period relevant to the executions which are alleged in the Indictment and for which the Prosecution's evidence has been led.

## V. DISPOSITION

40. For the foregoing reasons the Trial Chamber hereby **GRANTS** the Prosecution leave to file the Reply, **GRANTS** both parties leave to exceed the applicable word limitations, and **GRANTS** the Motion.

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

Judge O-Gon Kwon

Dated this ninth day of May 2008
At The Hague
The Netherlands

**[Seal of the Tribunal]**