

**UNITED  
NATIONS**

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International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of the  
former Yugoslavia since 1991

Case No.: IT-09-92-T

Date: 26 August 2014

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**IN TRIAL CHAMBER I**

**Before:** Judge Alphons Orie, Presiding  
Judge Bakone Justice Moloto  
Judge Christoph Flügge

**Registrar:** Mr. John Hocking

**THE PROSECUTOR**

v.

**RATKO MLADIĆ**

*Public*  
*with Confidential Annexes A and B*

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**PROSECUTION MOTION TO RE-OPEN ITS CASE-IN-CHIEF**

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**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

**Case No. IT-09-92-T**

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**I. INTRODUCTION**

1. Pursuant to Rules 73, 85, and 89 of the Rules of Procedure and Evidence (“Rules”), the Prosecution seeks leave to re-open its case-in-chief to present previously unavailable evidence in relation to a recently discovered mass grave in Tomašica, Prijedor municipality (“Tomašica Mass Grave”).

2. The Prosecution’s request satisfies the test for the re-opening of a party’s case-in-chief. The proposed evidence described in this Motion and Annexes is fresh evidence, which could not have been identified and presented during the Prosecution’s case. This fresh evidence is highly probative and directly relevant to the charged joint criminal enterprise to permanently remove non-Serbs from Bosnian Serb-claimed territory in Bosnia and Herzegovina in 1992 through the commission of crimes including genocide as charged in Count 1 of the Indictment.<sup>1</sup>

3. The Prosecution learned of the discovery of the Tomašica Mass Grave in September 2013. Local Bosnian authorities began excavating the grave in early September 2013,<sup>2</sup> with forensic, archaeological, pathological and identification

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<sup>1</sup> *Prosecutor v. Ratko Mladić*, Case No.IT-09-92-T (“*Mladić*”), Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, 16 December 2011 (“Indictment”), paras.5-6, 8-13; Counts 1, 3, 4-6.

<sup>2</sup> 65ter#31086, ICMP Summary Excavation Report, Excavations at Tomašica Mine Complex, BIH, from 4<sup>th</sup> September to 20<sup>th</sup> December 2013 (“ICMP Report”), paras.1, 31-33.

analysis beginning in autumn 2013 and continuing in 2014. On 27 November 2013, the Prosecution notified the Trial Chamber and the Defence of its intention to re-open its case-in-chief to present evidence on the Tomašica Mass Grave, expecting that the evidence would be available in the first half of 2014.<sup>3</sup>

4. The Prosecution is now in a position to introduce this body of evidence and therefore requests leave to re-open its case-in-chief. The new evidence consists of the proposed testimony of seven fact witnesses (two Rule 92*ter* witnesses and five Rule 92*bis* witnesses)<sup>4</sup> and six expert witnesses (three of whom have already testified in the Prosecution's case),<sup>5</sup> as described in **Confidential Annex A**. The proposed evidence also includes 43 documents, enumerated in **Confidential Annex B**, which have been disclosed to the Defence.<sup>6</sup>

5. The presentation of the proposed evidence would require 9 hours, which would not cause undue delay to the proceedings. Further, the Defence has been on notice of the Prosecution's intention to present evidence pertaining to the Tomašica Mass Grave since 27 November 2013 and as such is not prejudiced.<sup>7</sup> The introduction of the proposed evidence will not affect the fair trial rights of the Accused and is in the interest of justice.

6. Considering the nature of this Motion, which *inter alia* requires a discussion of the proposed evidence as well as of the legal standards regarding the re-opening of a party's case-in-chief, the Prosecution seeks leave to exceed the maximum word limit for motions.

## II. APPLICABLE LAW

7. Where new evidence comes to light only after the close of one party's case-in-chief, the party may be permitted to re-open its case and introduce the additional evidence.<sup>8</sup> A party seeking to re-open its case to present newly discovered evidence must show that the proposed evidence constitutes "fresh" evidence and that such

<sup>3</sup> *Mladić*, T.20022-20024.

<sup>4</sup> See Rule 65*ter* Witness List in **Confidential Annex A**.

<sup>5</sup> The expert witnesses are: Ian Hanson, Bruno Franjić, Elmira Karahasanović, Thomas Parsons, John Clark and Ewa Tabeau (these last three have already testified in the Prosecution's case as expert witnesses). See Rule 65*ter* Witness List in **Confidential Annex A**.

<sup>6</sup> **Confidential Annex B** indicates the disclosure date for each of these documents.

<sup>7</sup> *Mladić*, T.20022-20024.

<sup>8</sup> *Prosecutor v. Delalić et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001, ("Čelebići Appeal Judgement"), paras.279-293.

evidence, with the exercise of reasonable diligence, could not have been identified and presented in the party's case-in-chief.<sup>9</sup>

8. An evaluation of what constitutes "fresh" evidence and whether a party has met its obligation of reasonable diligence is highly contextual, depending on the factual circumstances of each case. Thus, any assessment in this respect should be carried out on a case-by-case basis.<sup>10</sup> "Fresh" evidence typically includes newly-obtained evidence or evidence not in the possession of a party at the closing of its case-in-chief.<sup>11</sup> "Fresh" evidence may also include evidence already in a party's possession, which however becomes significant only in the light of other new ("fresh") evidence.<sup>12</sup>

9. A party seeking to re-open its case must also establish that the proposed evidence satisfies the admissibility requirements of Rule 89.<sup>13</sup> The proposed evidence must be relevant and probative,<sup>14</sup> and its probative value must not be substantially outweighed by the need to ensure a fair trial.<sup>15</sup>

### III. DISCUSSION

#### A. Background

10. The Tomašica Mass Grave was discovered by Bosnian authorities in September 2013 on the premises of the Tomašica mine.<sup>16</sup> This mass grave is located within a large mining complex belonging to the LJUBIJA RŽR DP PRIJEDOR ("Ljubija Mining Company"), approximately 15 to 20 kilometers south east of Prijedor town. In the 1990s, the Ljubija Mining Company comprised the following mining areas: the Central Mine (where the Ljubija Mine is located), the Southern Mine (where Jakarina Kosa is located), the Eastern Mine (where the Tomašica Mine

<sup>9</sup> *Čelebići* Appeal Judgement, paras.279-283; *Prosecutor v. Popović et al.*, Case No.IT-05-88-AR73.5, Decision on Vujadin Popović's Interlocutory Appeal against the Decision on the Prosecution's Motion to Reopen its Case-in-Chief, 24 September 2008 ("*Popović* Appeal Decision"), para.11; *Prosecutor v. Gotovina et al.*, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case, Case No.IT-06-90-AR73.6, 1 July 2010 ("*Gotovina* Appeal Decision"), paras.23, 24.

<sup>10</sup> *Popović* Appeal Decision, para.10; *Gotovina* Appeal Decision, para.24.

<sup>11</sup> *Čelebići* Appeal Judgement, para.276.

<sup>12</sup> *Popović* Appeal Decision, para.11.

<sup>13</sup> *Čelebići* Appeal Judgement, para.283.

<sup>14</sup> Rule 89(C).

<sup>15</sup> Rule 89(D); *Čelebići* Appeal Judgement, paras.283, 290; *Gotovina* Appeal Decision, paras.23, 24.

<sup>16</sup> A detailed description of the characteristics of the site and physical properties of the grave is provided in the ICMP Report, 65ter#31086.

is located) and the Omarska Mine.<sup>17</sup> The area of the Tomašica Mine was used for mining activities, exploitation and served as a waste site for mining activities.

11. The Tomašica Mass Grave is located in an area of the mining complex where clay and rock from mining activity were deposited.<sup>18</sup> In response to information provided by witnesses,<sup>19</sup> the area had been investigated in 2002, 2004 and 2006 when some human remains were recovered.<sup>20</sup> Significantly, DNA analysis of remains identified in the course of these exhumations revealed linkages between remains from the Tomašica site and a suspected secondary mass grave at Jakarina Kosa, which had been identified in 2001.<sup>21</sup>

12. In 2013, on the basis of new information received from confidential informants, the Missing Persons Institute of Bosnia and Herzegovina (“MPI”) and the Prosecutor’s Office of Bosnia and Herzegovina (“POBIH”) conducted a new search for bodies at the Tomašica site.<sup>22</sup> On 4 and 5 September 2013, the MPI and the POBIH recovered remains as a result of new trenches they dug in the area.<sup>23</sup> These remains were found in areas west of the 2004 and 2006 excavations, areas which in some cases were as deep as nine metres.<sup>24</sup> This constituted an unusual depth which added to other difficulties the area presented for an exhumation.<sup>25</sup> The ICMP provided technical assistance and support.<sup>26</sup>

13. Based on this discovery, excavations were conducted between 4 September and 20 December 2013.<sup>27</sup> An area of 70m x 120m was excavated over 79 days.<sup>28</sup> A total of 401 remains were recovered from the Tomašica Mass Grave and surrounding

<sup>17</sup> See 65ter#31075 and 31077.

<sup>18</sup> 65ter#31086, ICMP Report, para.35.

<sup>19</sup> 65ter#31086, ICMP Report, paras.2, 26.

<sup>20</sup> See 65ter#31086, ICMP Report, paras.27-31, 44.

<sup>21</sup> 65ter#31086, ICMP Report, para.30. See also para.30 below.

<sup>22</sup> 65ter#31086, ICMP Report, para.31.

<sup>23</sup> 65ter#31086, ICMP Report, paras.37-38 and Figure 1, para.61 and Figure 17.

<sup>24</sup> 65ter#31086, ICMP Report, paras.26, 44..

<sup>25</sup> Indeed, the site of the Tomašica mass grave is a particularly difficult area for exhumations, forming a flat terrace sloping up to a large “hill” of mine waste composed of clay and rock deposits from mining activity. This “hill” of mine waste was also topped by a second upper terrace covered by sparse weeds and grasses and surrounded by young sapling trees (65ter#31086, ICMP Report, paras.35-36).

<sup>26</sup> 65ter#31086, ICMP Report, para.31.

<sup>27</sup> 65ter#31086, ICMP Report, para.32. The PHBIH concluded the excavation on 20 December 2013: 65ter#31086, ICMP Report, p.22.

<sup>28</sup> 65ter#31086, ICMP Report, paras.3, 72.

area, comprising 275 complete bodies, 102 body parts and 24 bags of general remains.<sup>29</sup>

14. Throughout the excavation process, the Office of the Prosecutor of the ICTY (“OTP”) was in contact with the local authorities and was kept informed of the progress of the work.

### **B. Proposed Evidence**

15. In light of the recent and highly probative discovery of the Tomašica Mass Grave, the Prosecution requests leave to re-open its case-in-chief to introduce the evidence of seven fact witnesses (two Rule 92*ter* witnesses and five Rule 92*bis* witnesses)<sup>30</sup> including former employees of the Ljubija Mining Company and survivors, and six expert witnesses who have produced reports of their findings on the Tomašica Mass Grave.<sup>31</sup>

16. The Prosecution also seeks to introduce limited documentary evidence related to the mining operations, as well as the personnel and machinery of the Ljubija Mining Company in 1992-1995.<sup>32</sup>

### **C. The proposed evidence is “fresh” and could not have been identified or presented earlier with the exercise of reasonable diligence**

17. Although excavations conducted in 2004 and 2006 recovered some bodies and body parts, the full extent of the human remains contained in the area remained undiscovered until September 2013.<sup>33</sup> Upon learning of this newly identified mass grave, local authorities moved quickly to exhume the grave and analyse the human remains. The exhumation began in early September 2013 and lasted until December 2013, with further processing and analysis of data undertaken until April 2014.<sup>34</sup> Post-mortem examinations of the remains were carried out between November 2013 and

<sup>29</sup> 65*ter*#31086, ICMP Report, para.32. The bodies were lying within a deposit of mixed yellow grey clay, over which another layer of mixed brown clay was found, which formed a massive deposit from the hill of mine waste across the entire lower terrace (*Ibid.*, paras.44-46).

<sup>30</sup> See Rule 65*ter* Witness List in **Confidential Annex A**. The proposed evidence is detailed in the same Annex.

<sup>31</sup> The expert witnesses are: Ian Hanson, Bruno Franjić, Elmira Karahasanović, Thomas Parsons, John Clark and Ewa Tabeau (these last three have already testified in the Prosecution’s case as expert witnesses). Their proposed evidence is detailed in **Confidential Annex A** to this Motion. In an effort to provide sufficient notice to the Defence, the Prosecution is filing the Rule 94*bis* Notice for these expert witnesses concurrently, although this Notice is of course subordinated to the Chamber’s decision on this Motion.

<sup>32</sup> See 65*ter*##31035 to 31078, **Confidential Annex B**.

<sup>33</sup> See paras.10-13 above.

<sup>34</sup> 65*ter*#31086, ICMP Report, para.32-33.

February 2014.<sup>35</sup> DNA identifications of the remains were performed on a continuing basis in the course of 2013 and 2014. The OTP received DNA identifications from the ICMP in May and June 2014.<sup>36</sup>

18. Once the magnitude of the grave site was revealed, the Prosecution started investigating the circumstances surrounding its creation, including the planning and organisation that would have been required for a grave that size. Witnesses were interviewed and statements taken between January and July 2014.

19. The Prosecution obtained the majority of the proposed witness evidence as well as the proposed expert reports after the Tomašica Mass Grave was identified and after the Prosecution closed its case.<sup>37</sup> Two witness statements were taken after the discovery of the Tomašica Mass Grave and after the Prosecution had given notice of its intention to seek to re-open its case to adduce related evidence, but just before the Prosecution closed its case.<sup>38</sup> Consistent with its notification in November 2013,<sup>39</sup> the Prosecution did not seek a delay in the proceedings to adduce one limited part of the evidence related to the Tomašica Mass Grave, preferring instead to present all the relevant evidence after the investigation and expert analyses had been completed. The proposed evidence thus constitutes “fresh” evidence.

20. The proposed documentary evidence also constitutes “fresh” evidence because these materials, including records and logs, were only acquired or seized by the Prosecution during investigative missions in February, April and July 2014.<sup>40</sup> The relevance of the remaining items, which are documents that were already in the possession of the Prosecution prior to the close of its case-in-chief,<sup>41</sup> only became apparent after the discovery of the mass grave and interviews with witnesses had been conducted. Thus, these documents also constitute “fresh” evidence.<sup>42</sup>

<sup>35</sup> 65ter#31090, John Clark, Tomašica Grave-site, Prijedor, Bosnia – 2013/14, Report on the Autopsy Findings (“Clark Report”), p.1.

<sup>36</sup> See 65ter#31087, Explanatory Note to ICMP List of DNA matches, dated 6 May 2014 (R094-1026-R094-1026); 65ter#31088, ICMP Excel Match List of Samples from Tomašica, and Linked Cases from Jakarina Kosa, dated 6 May 2014; and 65ter#31089, ICMP Updated Excel list with records of DNA identifications of victims exhumed from Tomašica mine, ICMP.FSD.DNA.688.2, dated 9 June 2014.

<sup>37</sup> The Prosecution closed its case-in-chief on 24 February 2014. See *Mladić*, Prosecution Notice of the Close of its Case-In-Chief, 24 February 2014.

<sup>38</sup> See 65ter#31081 and 31082.

<sup>39</sup> *Mladić*, T.20023.

<sup>40</sup> See 65ter#31045 to 31071, 31073 to 31076 and 31078, **Confidential Annex B**.

<sup>41</sup> See 65ter#31035 to 31044, 31072 and 31077, **Confidential Annex B**.

<sup>42</sup> See *Popović* Appeal Decision, para.11.

21. The proposed evidence could not, with reasonable diligence, have been identified or presented earlier by the Prosecution, since all previous investigative efforts to locate bodies in Tomašica did not lead to the discovery of the full extent of human remains buried at the grave site. Only once the Tomašica Mass Grave was located in September 2013, could the accompanying forensic, archaeological, pathological, DNA identifications, and other investigative efforts commence. As demonstrated above, the Prosecution at all times was reasonably diligent.

**D. The proposed evidence is relevant and probative and thus satisfies the requirements of Rule 89**

22. The proposed evidence is highly probative of the implementation of the overarching joint criminal enterprise to permanently remove non-Serbs from Bosnian Serb-claimed territory in Bosnia and Herzegovina in 1992, through the commission of crimes including genocide as charged in Count 1 of the Indictment.<sup>43</sup> The proposed evidence further reveals the significant role the VRS played in the murder, burial and re-burial of non-Serbs in Prijedor municipality and contextualises existing evidence, including a reference to Tomašica found in Mladić's notebooks.<sup>44</sup> Moreover, the number of bodies exhumed from the Tomašica Mass Grave, as well as the size and organised nature of the burials, bear on the planned, systematic and large-scale nature of killings in Prijedor.

23. The Tomašica Mass Grave was created at a time when operations to forcibly remove the non-Serb population were ongoing, and before the detention facilities in the Prijedor municipality were closed. The Prosecution has presented evidence that in July 1992, Bosnian Serb forces under the command of the VRS carried out an ethnic cleansing operation in the southern part of Prijedor municipality.<sup>45</sup> At that time, there was no significant combat in the municipality.<sup>46</sup> During the operations, non-Serb civilians were rounded up and/or killed in Bišćani,<sup>47</sup> Mrkalji,<sup>48</sup> Hegići,<sup>49</sup> Briševo,<sup>50</sup>

<sup>43</sup> See *Mladić*, Indictment, paras.5-6, 8-13; Counts 1, 3, 4-6.

<sup>44</sup> P00358, pp.154-155. See also para.26 below.

<sup>45</sup> See e.g. P02440; RM097, P02431, pp.31-34, 37-39, 44-47; RM038, P02946, pp.9-15, 108; RM023, P03234, pp.9-11; RM095, P03617, pp.8-9, 23-24; RM060, P02596, pp.9-11; RM704, P02602, pp.2-3; RM003, P00168, paras.43-53, 55, 62-65. See also AFs#906-908 and P04009.

<sup>46</sup> P01001; P02892.

<sup>47</sup> RM097, P02431, pp.31-34, 37-39, 44-47; RM038, P02946, p.108; RM704, P02602, pp.2-3; RM060, P02596, pp.9-13.

<sup>48</sup> RM038, P02946, pp.9-15; AF#908.

<sup>49</sup> RM038, P02946, pp.9-15; AF#909.

<sup>50</sup> RM003, P00168, paras.43-53, 55, 62-65.

Čarakovo,<sup>51</sup> and Rizvanovići.<sup>52</sup> One group of approximately 114 non-Serbs were taken to and killed at Miška Glava Dom, Ljubija Stadium, and at the Ljubija Mine.<sup>53</sup> Another group was taken to Omarska and killed.<sup>54</sup> A third group was taken to Keraterm<sup>55</sup> and subsequently murdered in Room 3 by VRS personnel (Scheduled Incident B13.1).<sup>56</sup>

24. The proposed evidence shows, *inter alia*, that after these operations concluded, a VRS officer ordered the bodies of persons killed in the Bišćani area (Scheduled Incident A6.6) to be disposed of.<sup>57</sup> Witnesses have estimated that several hundred bodies of murder victims were collected and transported during this operation.<sup>58</sup> The morning after the massacre in Room 3, bodies were loaded into a truck at Keraterm camp at the direction of the Prijedor police and military police.<sup>59</sup> The bodies of large numbers of persons killed in the Bišćani and Room 3 massacres were found in the Tomašica Mass Grave.

25. The proposed evidence further establishes that personnel present at Tomašica Mine during the same period saw vehicles loaded with dead bodies being driven or escorted into the mine by men wearing military uniforms. These bodies were then dumped in the Tomašica Mass Grave.<sup>60</sup>

26. On 27 May 1993, General Mladić recorded in his notebook information he received from the Security Organ of the VRS 1<sup>st</sup> Krajina Corps that there were approximately “5,000 bodies in a mine in Tomašica”.<sup>61</sup> According to this notebook entry, Colonel Bogojević reported that General Arsić was involved in dealing with the

<sup>51</sup> RM008, P03224, paras.12-15; RM023, P03234, pp.10-11; AFs#902-903. Killings in Čarakovo included a massacre at the local mosque committed by, *inter alia*, two members of the VRS. People killed in that massacre were exhumed from Tomašica. See *Confidential Annex A*, p.8, para.1.

<sup>52</sup> RM045, P00998, pp.4-9.

<sup>53</sup> RM045, P00998, pp.12-13, 19-26, 33-36, 40-44; RM064, P02600, pp.3-5; AFs#911-918 and 1079-1082.

<sup>54</sup> RM017, P03228, pp.10, 13-21; RM080, P0048, pp.22-27, 38-50. While Omarska was in the police chain of command, a VRS colonel was involved with interrogating prisoners (P02895), the VRS was responsible for securing the perimeter and laying mines around the camp (P02900), and VRS soldiers were seen and involved in crimes inside Omarska camp (RM094, P00283, paras.52-57; RM080, P00480, pp.50-52, 76-77). In early August, Mladić gave an order to prepare Omarska for a visit by international journalists: P00201, P02879.

<sup>55</sup> Keraterm was a mixed facility staffed by Prijedor police and military police. See P02900; AF#1028.

<sup>56</sup> AF#1052; RM002, P03388, pp.22-24; RM008, P03224, paras.38-46; RM083, P00158, paras.57-71.

<sup>57</sup> See *Confidential Annex A*, pp.5-6, paras.3-5 and p.6, paras.2-3.

<sup>58</sup> RM038, P02946, pp.85-88; RM704, P02602, p.6; *Confidential Annex A*, p.6, para.7. See also AF#904.

<sup>59</sup> See *Confidential Annex A*, p.7, paras.3-4.

<sup>60</sup> See *Confidential Annex A*, p.4, paras.4-6.

<sup>61</sup> P00358, pp.154-155.

issue.<sup>62</sup> Shortly thereafter, General Talić commended the 43<sup>rd</sup> Motorised Brigade, which had been under General Arsić's command in 1992, when the victims exhumed from the Tomašica Mass Grave were murdered.<sup>63</sup>

27. Bodies exhumed from the Tomašica Mass Grave have been identified as victims of incidents charged in the *Mladić* Indictment. Ewa Tabeau's report confirms that the exhumed remains include victims killed in the following incidents from Schedules A and B to the Indictment: A6.1, A6.2, A6.4, A6.5, A6.6, A6.8, B13.1, B13.2 and B13.3.<sup>64</sup> Tabeau's report reflects that the largest numbers of killed persons are linked to Scheduled Incidents A6.5, A6.6 and B13.1.

28. The proposed evidence connects victims killed in each of these primary incidents to the Tomašica Mass Grave. It further establishes that the remains found at Tomašica represent a minimum of 293 individuals, the vast majority of whom were men between 15 to 60 or more years of age. Nearly all died of gunshot injuries from high velocity rifles.<sup>65</sup> Some of the bodies were wrapped in blankets,<sup>66</sup> which is consistent with witness evidence.<sup>67</sup> Rubber gloves and other items associated with body handling (disposal or removal of bodies) were found in and around the grave.<sup>68</sup> Gas masks, which were part of the military equipment of the JNA inherited by the VRS, were also excavated from the grave.<sup>69</sup>

29. The size of the Tomašica Mass Grave is such that its creation required planning and organisation, as well as the co-operation of the municipal authorities and Serb forces. The proposed evidence demonstrates that in April or May 1992, the Prijedor Crisis Staff, acting in co-ordination with the VRS, took charge of the facilities of the Ljubija Mining Company, including the Tomašica Mine, and that access to the mine facility was strictly controlled by the VRS and Ljubija Mining Company guards.<sup>70</sup> The proposed evidence corroborates existing evidence that many of the senior managers of the Ljubija Mining Company were mobilized to assist the

<sup>62</sup> P00358, pp.154-155.

<sup>63</sup> P04049.

<sup>64</sup> 65ter#31097, Ewa Tabeau, Proof of Death Analysis, Tomašica Mine, Prijedor ("Tabeau Report"), p.43, Table 42.

<sup>65</sup> 65ter#31090, Clark Report, p.18; 65ter#31093, Bruno Franjić, Report on the ballistic, DNA and fingerprint analysis, Tomašica Mine, Prijedor municipality ("Franjić Report"), pp.101-108.

<sup>66</sup> 65ter#31086, ICMP Report, paras.18, 28, 101 (see also Figures 8 and 35).

<sup>67</sup> See *Confidential Annex A*, p.6, para.5. See also RM038, P02946, pp.40-43, 45.

<sup>68</sup> 65ter#31086, ICMP Report, paras.100-102 (see also Figure 36); 65ter#31095, Elmira Karahasanović, Report on the biological, chemical and fingerprint analysis of various artifacts found at the Tomašica mass grave ("Karahasanović Report"), pp.2-4, 19.

<sup>69</sup> 65ter#31095, Karahasanović Report, pp.17-18, 20; 65ter#31086, ICMP Report, para.100.

<sup>70</sup> See *Confidential Annex A*, p.9, para.2.

VRS.<sup>71</sup> It further demonstrates that manpower engaged for the security of the mine facility was placed at the disposal of the VRS as part of a mandatory work obligation, as were motor vehicles, equipment and machines of all types.<sup>72</sup>

30. The proposed evidence also shows that between 1993 and 1995, some of the remains in the mass grave at Tomašica were removed and taken to a secondary grave in Jakarina Kosa.<sup>73</sup> This evidence includes details about subsequent excavations at the Tomašica Mass Grave in 1995 by persons wearing military uniforms.<sup>74</sup> DNA matching confirmed the linkage between bodies exhumed from the Jakarina Kosa and Tomašica graves.<sup>75</sup> This bears on the scope of the burial and reburial operation, showing a large scale level of coordination and organization that is consistent with the charged joint criminal enterprise.

31. Evidence of a mass grave of the size and nature of the Tomašica Mass Grave, and the involvement of the local authorities and the VRS in its creation and use, are probative of the Bosnian Serb authorities' planning and intentions related to attacks on villages in Prijedor municipality and the operation of camps.

**E. The probative value of the proposed evidence is not substantially outweighed by the need to ensure a fair trial and the re-opening of the Prosecution case will not prejudice the Defence**

32. In the exercise of its discretion whether to admit the "fresh" evidence, the Trial Chamber should also consider whether the probative value of the new evidence is substantially outweighed by the need to ensure a fair trial.<sup>76</sup> When making this determination, the Trial Chamber should for example consider (i) the stage of the trial and (ii) the potential delay that would be caused to the trial.<sup>77</sup>

33. The Prosecution's request to re-open its case falls within the first months of the Defence case, after only 32 witnesses (out of the approximately 330 scheduled) have been called to testify.<sup>78</sup> Further, the Defence has been on notice of the

<sup>71</sup> See 65ter#31035 and P03278, p.19 (English transcript of the video). See also 65ter#31036.

<sup>72</sup> See *Confidential Annex A*, p.9, para.2 and 65ter#31035.

<sup>73</sup> 65ter#31086, ICMP Report, paras.25, 30.

<sup>74</sup> See *Confidential Annex A*, p.3, para.6.

<sup>75</sup> 65ter#31086, ICMP Report, paras.30, 105; 65ter#31088 and 65ter#31089; 65ter#31097, Tabeau Report, pp.2, 6, 12-13, and 65ter#31098, pp.65-91(Annex 2 to the Tabeau Report).

<sup>76</sup> *Čelebići* Appeal Judgement, para.283; *Gotovina* Appeal Decision, paras.23, 24.

<sup>77</sup> *Čelebići* Appeal Judgement, paras.283, 290; *Gotovina* Appeal Decision, paras.23, 24.

<sup>78</sup> In previous cases before this Tribunal, Trial Chambers granted Prosecution requests to re-open the case-in-chief either when such requests were made before the beginning of the Defence case (see *Prosecutor v. Popović et al.*, Case No.IT-05-88-T, Trial Chamber, Decision on Motion to Reopen the Prosecution Case, 9 May 2008) and after the Defence had rested its case (see *Prosecutor v. Gotovina et*

Prosecution's intention to present evidence with regard to the Tomašica Mass Grave since November 2013.<sup>79</sup> The Defence has had sufficient notice and given the relatively early timing of the Prosecution's request, has ample time to factor into its defence the proposed evidence and prepare for cross-examinations. The Defence would thus not be unduly prejudiced by the re-opening of the Prosecution's case.

34. Additionally, the Prosecution has, since May 2014, been disclosing Tomašica related materials on an ongoing basis until the filing of this Motion. The Prosecution reviewed and disclosed all known witness related documents and potentially exculpatory materials for the additional witnesses it intends to call. With the exception of a few outstanding translations, as of the date of this filing the Prosecution knows of no other material in its possession falling under the ambit of Rule 66(A)(ii) and Rule 68 for the additional witnesses it intends to call. The Prosecution is mindful of its ongoing obligation to disclose potentially exculpatory material pursuant to Rule 68(i) and will promptly disclose any such material which may come into its actual knowledge.

35. No adjournment would be necessary to accommodate the Prosecution's request to re-open its case as the re-opening can occur at any stage during the Defence case. The Prosecution is prepared to present the proposed evidence at any time deemed appropriate by the Trial Chamber.

36. Further, re-opening the Prosecution's case would only add a minimal amount of additional time to the trial proceedings. The Prosecution estimates that no more than 9 hours would be necessary to present the new evidence.

37. In conclusion, allowing the Prosecution to re-open its case to introduce evidence regarding the Tomašica Mass Grave is not substantially outweighed by the need to ensure a fair trial, does not occasion any unfairness to the Defence and is in the interest of justice because the proposed evidence is highly relevant and probative.

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*al.*, Case No.IT-06-90-T, Trial Chamber, Decision on Prosecution's Motion to Reopen its Case, 21 April 2010).

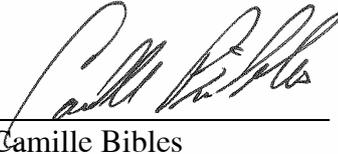
<sup>79</sup> *Mladić*, T.20022-20024.

#### IV. CONCLUSION

38. For the reasons set out above, the Prosecution requests leave to re-open its case-in-chief in order to present the proposed evidence set out in ***Confidential Annexes A and B*** concerning the Tomašica Mass Grave.

Word count: 4,273

Respectfully submitted,

		
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Dated this 26<sup>th</sup> day of August 2014  
The Hague, The Netherlands