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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-95-5/18-T

Date: 31 March 2010

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: **31 March 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO STRIKE SCHEDULED SHELLING INCIDENT ON GROUNDS OF COLLATERAL ESTOPPEL

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed 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 Accused's "Motion to Strike Allegation G9 on Grounds of Collateral Estoppel", filed on 4 March 2010 ("Motion"), and hereby issues its decision thereon.

1. In the Motion, the Accused asks that the Chamber remove one of the Sarajevo shelling incidents, alleged against him in Schedule G (incident 9) of the Third Amended Indictment ("Indictment"), on the basis of the principle of collateral estoppel. The Accused submits that the Appeals Chamber reversed the conviction of another accused before this Tribunal, General Dragomir Milošević, for this incident, because the Prosecution was not able to establish, beyond reasonable doubt, that the relevant shells were fired by the Bosnian Serb forces. For that reason, according to the Accused, the Office of the Prosecutor ("Prosecution") is now estopped from prosecuting him for the same incident.[1]

2. The Accused argues that the doctrine of collateral estoppel "prohibits a party from re-litigating an issue of fact or law that was found against it in a previous trial."[2] He outlines the elements of that doctrine, argues that they have been satisfied in this instance, and then spends several paragraphs attempting to distinguish a decision of the Supreme Court of the United States of America in which the Supreme Court held that the doctrine of collateral estoppel does not apply to criminal proceedings.[3] The Accused also refers to the Australian doctrine of abuse of process, pursuant to which the prosecutor cannot litigate the same issue concerning the same defendant twice.[4]

3. The Accused further notes that this Tribunal has never had to consider the applicability of collateral estoppel to its cases and refers to a decision issued by the International Criminal Tribunal for Rwanda ("ICTR") in which the Trial Chamber declined to accept a similar argument. Again, the Accused attempts to distinguish that decision from the present facts.[5] He concludes that the application of the collateral estoppel doctrine here "presents the Trial Chamber with an opportunity to promote judicial economy in a way which does not violate the

[1] Motion, paras. 1–4.
[2] Motion, para. 5.
[3] Motion, paras. 5–24.
[4] Motion, para. 25.
[5] Motion, paras. 26–27. *See Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Strike Allegation of Conspiracy with Juvenile Kajelijeli on the Basis of Collateral Estoppel, 16 July 2008 ("*Karemera* Decision").

rights of the [A]ccused" and notes that the Prosecution should not be given an opportunity to re-litigate this incident at the expense of the Accused.[6]

4. On 16 March 2010, the Prosecution filed the "Prosecution's Response to Motion to Strike Allegation G9 on Grounds of Collateral Estoppel" ("Response"), arguing that the Motion should be denied. The Prosecution submits that an independent doctrine of collateral estoppel does not exist in international criminal law,[7] nor is it a synonym for the principle of *res judicata*.[8] In addition, the Prosecution argues that the principle that a judicial determination involving an issue of fact or law cannot be contradicted in subsequent proceedings exists in international criminal law only to the extent that it is reflected in the customary rule of *non-bis-in-idem*.[9] Neither *res judicata* nor *non-bis-in-idem*, the Prosecution submits, applies to non-parties, which is the Accused's status given that he was not a party in the *Dragomir Milošević* case.[10]

5. The Chamber notes that this Tribunal has not, until now, been presented with the claim that collateral estoppel applies in the context of its cases. However, the Accused, other than simply asserting that his Motion has merit on the basis of collateral estoppel, presents no convincing arguments that this principle, used mainly in a civil context, applies to criminal proceedings, let alone that it is a principle relevant to international criminal law. Indeed, he had to distinguish the domestic decisions referred to in his Motion, so as to make them applicable to the present case. The Chamber is not persuaded, on the basis of what was presented to it by the Accused, that collateral estoppel is applicable in the context of international criminal law and/or to the present case.[11] The related principles of *res judicata* and *non-bis-in-idem*, however, have been recognised by this Tribunal as applicable in the context of international crimes.[12] Thus, the Chamber will consider the Accused's Motion with respect to those two principles.

6. An argument similar to the one raised in the Motion has been raised before the ICTR in the *Karemera et al.* case, in which the accused Joseph Nzirorea is represented by Mr. Peter Robinson, one of the Accused's legal advisers. The Nzirorera defence asked the *Karemera* Trial

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[6] Motion, para. 28.

[7] Response, paras. 2, 4–5, 7–9.

[8] Response, paras. 2, 19–22.

[9] Response, paras. 3, 6, 10–13.

[10] Response, paras. 3, 15–18.

[11] The Chamber notes that, even if that doctrine were applicable in international criminal law, the Accused has not established that it extends to non-parties. *See* Motion, paras. 12–14.

[12] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Judgement, 16 November 1998 ("*Čelebići* Trial Judgement"), para. 228; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, 15 November 1995, paras. 9, 20; *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on Orić's Motion Regarding Breach of *Non-Bis-In-Idem*, 7 April 2009, p. 5.

Chamber to strike the allegation against Joseph Nzirorera, that of conspiring with an accused from another case, Juvenal Kajelijeli, on the basis of collateral estoppel, because Kajelijeli was acquitted of this charge of conspiracy during his trial. In its decision, the *Karemera* Chamber first equated collateral estoppel to the principle of *res judicata* and noted that both *res judicata* and the principle of double jeopardy were recognised principles in international law. It then proceeded to deny the request on the basis that Nzirorera was not a party in the *Kajelijeli* case, as well as the fact that the allegations against the two men differed factually.[13] The Accused now relies on this decision and, while accepting that he was not a party to the *Dragomir Milošević* case, notes that the allegations relating to incident nine listed in Schedule G of the Indictment concern the same facts that were at issue in *Dragomir Milošević*.[14] However, this, in the Chamber's view, is not enough of a distinction between the *Karemera* decision and the facts here, since it is obvious that the main reason behind the *Karemera* Chamber's denial of Nzirorera's request related to the fact that Nzirorera was not a party to the *Kajelijeli* case. That same fact is what prevents the Accused from obtaining the relief he now seeks.

7. Other Tribunal jurisprudence also points to the same conclusion. In the *Čelebići* case, the defence made an argument identical to the one made by the Accused in the Motion, without referring explicitly to collateral estoppel. It claimed that the Prosecution should not be permitted to argue that an international armed conflict existed in Bosnia and Herzegovina in 1992, when this issue had already been adjudicated in the *Tadić* case to which the Prosecution was also a party. The Trial Chamber held, however, that the issue concerning the nature of the armed conflict relevant to the *Čelebići* case was not *res judicata*, since that principle applies only *inter partes* in a case where a matter has already been judicially determined within that case itself. The Chamber also clarified that, in criminal cases, the doctrine of *res judicata* is limited to the question of whether, when the previous trial of a particular individual is followed by another trial of the same individual, a specific matter has already been fully litigated. Finally, the Chamber held that it was not bound by decisions of other Trial Chambers in past cases and, instead, should make its own findings based on the evidence presented to it.[15]

8. This Trial Chamber is of the same the view and considers that, in the trial of an individual who has not been tried before, both the Prosecution and the defence should be able to present their best evidence in relation to all the issues relevant to the case, including those that may have been touched upon or adjudicated by previous Chambers. Accordingly, the Accused's Motion cannot possibly succeed in light of the fact that he was not a party in the *Dragomir*

[13] *Karemera* Decision, paras. 4–7.
[14] Motion, para. 26.
[15] *Čelebići* Trial Judgement, para. 228.

Milošević case and, therefore, the ninth incident listed in Schedule G of the Indictment has not been litigated in relation to him. For that same reason, the doctrine of *non-bis-in-idem* also does not help the Accused to obtain the relief he now seeks.

9. As indicated earlier,[16] the Accused bases his Motion on the assertion that collateral estoppel applies in this context and that its elements have been satisfied in relation to the present facts. He then fails to point to any authorities establishing collateral estoppel as a principle applicable in international criminal law, and proceeds to base his further analysis of the applicability of its elements on decisions that clearly do not support his argument, which he, therefore, attempts to distinguish. The Chamber also notes that the Accused's legal adviser was behind the unsuccessful request in the *Karemera* case referred to above and, thus, would have known how low the likelihood of it succeeding would be here. Yet the Accused was advised to file an almost identical request with this Chamber making, at the same time, a poor attempt at distinguishing the *Karemera* decision. All these factors contribute to the Chamber's view that this Motion is bordering on frivolous, and it advises the Accused, once again, to focus his resources and efforts on his preparations for the hearing of evidence at trial.

10. Accordingly, the Trial Chamber, pursuant to Rule 54 of the Tribunal's Rules of Procedure and Evidence, hereby **DENIES** the Motion.

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

Judge O-Gon Kwon
Presiding

Dated this thirty first day of March 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

[16] *See* above, para. 5.