



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: 24 February 2015
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: 24 February 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S FOURTH MOTION TO RE-OPEN DEFENCE CASE

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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 “Fourth Motion to Re-Open Defence Case: Mirsada Malagić Statement”, filed on 23 January 2015 (“Motion”) and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused seeks leave to re-open his defence case in order to request the admission of one statement from the bar table, which, in his submission pertains to the credibility of witness Mirsada Malagić (“Statement”).¹ The Statement includes the remarks of Malagić at a conference in Sarajevo in November 2013, which in the Accused’s submission is evidence of bias and should be considered by the Chamber in assessing her credibility.² In the Statement, Malagić calls for the Accused to be subject to the highest punishment for the alleged crimes in Srebrenica.³ The Accused submits that this is of relevance and probative value with respect to the objectivity of the evidence Malagić gave in this case.⁴

2. The Accused submits that his Defence team only became aware of the Statement shortly after 16 January 2015 when a publication of the remarks at the conference was distributed by the Tribunal.⁵ He concludes that the Statement could not reasonably have been presented before his Defence case closed in March 2014, because at the time, he had no knowledge of the Statement and it was not disclosed to him, nor was it reported on by the media or any other source.⁶ The Accused argues that the probative value of the Statement is not outweighed by the need to ensure a fair trial and that re-opening the case to admit the Statement would not cause any delay; should the Chamber consider that cross-examination is required, this would be extremely brief.⁷

3. On 6 February 2015, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution Response to Fourth Motion to Re-Open Defence Case: Mirsada Malagić” (“Response”) opposing the Motion.⁸ The Prosecution argues that the information in the Statement was available to the Accused with the exercise of reasonable diligence and that in any event re-opening the case at such

¹ Motion, paras. 1, 3.

² Motion, paras. 1–3, 5.

³ Motion, para. 8.

⁴ Motion, para. 8.

⁵ Motion, para. 5.

⁶ Motion, paras. 6–7.

⁷ Motion, paras. 11–12.

⁸ Response, para. 1.

an advanced stage would not be warranted considering the Statement has negligible probative value.⁹

4. The Prosecution points to information which had already been disclosed to the Accused and admitted in this case, in which Malagić made a statement of a similar nature wherein she expresses her belief that Mladić and other senior military officers were responsible for the alleged killings in Srebrenica.¹⁰ It notes that even if the Chamber were to consider the Statement to be “fresh” evidence, the Motion should be denied given that it has virtually no probative value.¹¹ It submits that the witness’s belief as to the responsibility of the Accused for events in Srebrenica does not affect the reliability or credibility of her evidence about events on the ground in Srebrenica.¹² The Prosecution also points to the very advanced stage of proceedings and submits that under the circumstances the Chamber should exercise its discretion and decline to re-open the case.¹³

II. Applicable Law

5. The Rules do not specifically address whether a party may re-open its case-in-chief in order to introduce additional evidence. According to the jurisprudence of the Tribunal, a party may seek leave to re-open its case to present “fresh” evidence, that is, evidence that was not in the possession of the moving party and which could not have been obtained by the moving party before the conclusion of its case-in-chief despite exercising all reasonable diligence to do so.¹⁴

6. The primary consideration in determining an application for re-opening 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.¹⁵

⁹ Response, para. 1.

¹⁰ Response, paras. 2–4.

¹¹ Response, para. 5.

¹² Response, paras. 5–7.

¹³ Response, paras. 10–11.

¹⁴ *Prosecutor v. Popović et al.*, 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. Popović et al.*, Case No. IT-05-88-T, Further Decision on Prosecution’s Motion to Admit Evidence in Rebuttal and to Reopen its Case, confidential, 27 March 2009 (“*Popović* Further Decision”), para. 98; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Second Motion to Reopen its Case and/or Admit Evidence in Rebuttal, confidential, 8 May 2009 (“*Popović* Second Re-opening Decision”), para. 67; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”), para. 283; *Prosecutor v. Delalić et al.*, 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; *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, paras. 8–14.

¹⁵ *Čelebići* Appeal Judgement, para. 283; *Popović* Re-opening Decision, para. 24; *Popović* Further Decision, para. 99.

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.¹⁶

7. Further, if it is shown that the evidence could not have been found with the exercise of reasonable diligence before the close of the case, the Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness of admitting it late in the proceedings.¹⁷ These latter factors can be regarded as falling under the general discretion reflected in Rule 89(D) of the Rules, to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial.¹⁸

8. 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; and (iii) the probative value of the evidence to be presented.¹⁹

III. Discussion

9. The Chamber notes the Prosecution submission that the Accused possessed similar information to that contained in the Statement, in which Malagić expressed her belief that Mladić and other senior military officers were responsible for the alleged killings in Srebrenica.²⁰ However, the Chamber considers that the information in the Statement goes beyond that, and does in that sense find that it is fresh evidence, which could not have been presented during the Accused’s case.

10. However, having regard to the content of Malagić’s testimony, the Chamber finds that the comment in the Statement has no probative value in evaluating the credibility of her evidence. The Chamber has also had regard to the very advanced stage of proceedings. Considering these factors, the Chamber finds that exceptional circumstances do not exist which would warrant the Chamber

¹⁶ *Popović* Re-opening Decision, para. 24; *Popović* Further Decision, para. 99; *Popović* Second Re-opening Decision, para. 68; *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.

¹⁷ *Čelebići* Appeal Judgement, para. 283.

¹⁸ *Čelebići* Appeal Judgement, para. 283.

¹⁹ *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. With respect to the weighing exercise, the Tribunal’s jurisprudence establishes that it is only in “exceptional circumstances where the justice of the case so demands” that a Chamber should exercise its discretion to re-open a case. *Čelebići* Trial Judgement, para. 27 (quoted with approval in *Čelebići* Appeal Judgement, para. 288).

²⁰ Response, paras. 2–4.

to exercise its discretion to re-open the case in the interests of justice to allow for the admission of the Statement.

11. The Chamber has observed that following the closing arguments in this case, the Accused and his legal adviser have not paid regard to its repeated instruction to avoid filing frivolous motions which simply delay the expeditious nature of the trial and do not promote the interests of justice or advance his own case. The Chamber reminds the Accused's legal adviser that the filing of motions should not be viewed as a numerical exercise to keep the Chamber and the parties occupied and will consider what measures it can take if this warning is not taken seriously.

IV. Disposition

12. For the reasons outlined above, the Chamber, pursuant to Rule 54 and 89(D) of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-fourth day of February 2015
At The Hague
The Netherlands

[Seal of the Tribunal]