



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: 9 March 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: 9 March 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S FIFTH MOTION TO RE-OPEN DEFENCE CASE:
ZIMMERMAN CABLE**

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 “Fifth Motion to Re-Open Defence Case: Zimmerman Cable”, filed on 2 February 2015 (“Motion”) and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused seeks leave to re-open his Defence case in order to request the admission of one document from the bar table.¹ The document is a cable dated 14 May 1992 from Ambassador Warren Zimmerman which describes a meeting in Belgrade held that day between him and the Accused (“Document”).² The Accused argues that the Document has probative value as the information contained therein is relevant to his state of mind with respect to the alleged joint criminal enterprise to expel Bosnian Muslims from Serb held territories in Bosnia and Herzegovina (“BiH”) and his intent to inflict terror upon the residents of Sarajevo.³ The Accused submits that the Document shows that he was in Belgrade and not in BiH on 14 May 1992 when the alleged shelling of Sarajevo was taking place.⁴ The Accused also argues that the information contained in the Document provides support to the position he has maintained throughout his Defence case.⁵

2. The Accused submits that he first became aware of the Document in October 2014 and requested that the Prosecution disclose it to him at that time.⁶ After learning that the Prosecution did not possess the Document, the Accused then sought its disclosure from the government of the United States of America (“U.S.”).⁷ The Document was subsequently disclosed to him on 27 January 2015 pursuant to Rule 70 of the Tribunal’s Rules of Procedure and Evidence (“Rules”).⁸ Therefore, the Accused argues that he exercised diligence in obtaining the Document but he could not have presented it by the time his case closed in March 2014.⁹

3. The Accused also argues that the probative value of the Document is not outweighed by the need to ensure a fair trial as re-opening the Defence case to admit the Document would not cause

¹ Motion, paras. 1, 20, 22.

² Motion, paras. 1, 13, 16.

³ Motion, paras. 1, 17.

⁴ Motion, para. 16.

⁵ Motion, para. 18.

⁶ Motion, para. 5, Annex B.

⁷ Motion, para. 7. *See* Letter to the United States of America, 29 October 2014.

⁸ Motion, para. 11. *See* Tenth Motion for Order Pursuant to Rule 70: United States of America, 9 December 2014; Decision on the Accused’s Tenth Motion for Order Pursuant to Rule 70 (United States of America), 26 January 2015.

⁹ Motion, para. 12.

any delay because he proposes to admit it from the bar table.¹⁰ Additionally, he proposes that if the Chamber requires, he is prepared to call a representative from the U.S. to testify to the foundation of the Document.¹¹

4. On 16 February 2015, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution Response to Fifth Motion to Re-Open Defence Case: Zimmerman Cable” (“Response”), opposing the Motion.¹² The Prosecution submits that the Document is not fresh evidence as the Accused has been in possession of nearly identical information in Ambassador Zimmerman’s book which has been in the public domain and was on the Prosecution’s Rule 65 *ter* list and subsequently disclosed to him in March 2009.¹³ In addition, the Prosecution submits that the Accused used Ambassador Zimmerman’s account of this meeting during John Wilson’s cross-examination on 21 June 2010.¹⁴ The Prosecution further argues that the Document has no probative value for the Defence case, is highly inculpatory, and duplicative of other evidence.¹⁵ Finally, it argues that the Chamber should use its discretion to deny the Motion given the very advanced stage of the proceedings and the delay that a re-opening would likely cause.¹⁶

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.¹⁷

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

¹⁰ Motion, para. 20.

¹¹ Motion, para. 21. The Accused submits that Ambassador Zimmerman is deceased.

¹² Response, para. 1.

¹³ Response, paras. 2, 4.

¹⁴ Response, para. 5.

¹⁵ Response, paras. 8–16.

¹⁶ Response, para. 18.

¹⁷ *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.

could have been identified and presented in the case-in-chief of the party making the application.¹⁸ 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.¹⁹

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.²⁰ 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.²¹

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.²²

III. Discussion

9. As stated above, the Chamber notes that the Accused knew that Ambassador Zimmerman had written about the 14 May 1992 meeting in his memoirs.²³ In addition, Ambassador Zimmerman’s book was on the Prosecution’s Rule 65 *ter* list and also disclosed to the Accused in 2009.²⁴ In his book, Ambassador Zimmerman describes, in detail, the meeting with the Accused and Koljević on 14 May 1992.²⁵ Therefore, the information contained in the Document does not add anything of substance to the information already in the possession of the Accused. However, the Accused submits that he only discovered the existence of the actual Document in October 2014 and subsequently received it in January 2015 pursuant to Rule 70 of the Rules. The Chamber finds

¹⁸ *Čelebići* Appeal Judgement, para. 283; *Popović* Re-opening Decision, para. 24; *Popović* Further Decision, para. 99.

¹⁹ *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.

²⁰ *Čelebići* Appeal Judgement, para. 283.

²¹ *Čelebići* Appeal Judgement, para. 283.

²² *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).

²³ See John Wilson, T. 4011 (21 June 2010).

²⁴ Response, para. 4.

²⁵ See Rule 65 *ter* number 01413, e-court pp. 233–235.

that the Accused could have, through reasonable diligence and given the material already in his possession, identified the Document earlier by requesting it from the U.S. Therefore, the Chamber finds that the Document is not fresh evidence.

10. In any event, the Chamber considers that, contrary to the submissions of the Accused, the information contained in the Document is inculpatory and has little or no probative value to the Defence case. The Chamber has reviewed the Document and notes that it describes the unwillingness of the Accused and Koljević to give firm commitments to peace negotiations and Ambassador Zimmerman's view that the SDS was using force to gain territory for the Republika Srpska.²⁶ The Chamber further notes the very advanced stage of proceedings and also considers that re-opening the case to secure the admission of the Document would cause an unjustifiable delay in proceedings. Considering these factors, the Chamber finds that exceptional circumstances do not exist which would warrant the Chamber to exercise its discretion to re-open the case in the interests of justice to allow for the admission of the Document.

IV. Disposition

11. Accordingly, the Chamber, pursuant to Rules 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 ninth day of March 2015
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ See Motion, Annex A.