



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: 7 May 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: 7 May 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

CONFIDENTIAL

DECISION ON ACCUSED'S SIXTH *BIS* 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 “Motion to Re-Open Defence Case No. Six *bis*: General Miletić Testimony”, filed confidentially on 14 April 2015 (“Motion”) and hereby issues its decision thereon.

I. Background and Submissions

1. On 9 May 2013, the Chamber issued the “Decision on Accused’s Motion to Subpoena Radivoje Miletić” (“Decision on Subpoena”), granting the Accused’s request that a subpoena be issued to Radivoje Miletić directing him to appear before the Chamber to give oral testimony.¹ The Subpoena *Ad Testificandum* was also issued on the same day.²

2. On 4 February 2014, Miletić requested that his testimony before the Tribunal be postponed, stating that it would not be possible for him to testify due to health reasons.³ The Chamber found that the information before it raised a serious concern about the impact on Miletić’s health should he be compelled to testify at the Tribunal, and therefore decided, *proprio motu*, to vacate its Subpoena.⁴

3. Both prior to and after the closure of the Accused’s defence case, the Accused was advised that Miletić’s medical condition had not sufficiently improved to allow him to testify.⁵ Following the Appeals Chamber’s judgement in the case against Miletić,⁶ the Accused’s legal adviser asked Miletić, through his counsel, whether he would agree to testify in this case.⁷ Counsel for Miletić advised that they were “expecting medical results in the next few weeks and if those results are not too bad, [Miletić] is willing to testify”.⁸

4. On 18 February 2015, the Accused filed the “Sixth Motion to Re-Open Defence Case: General Miletić’s Testimony” (“Sixth Motion”) in which he requested leave to re-open his defence case in order to hear the testimony of Miletić. On 3 March 2015, the Chamber denied the Sixth

¹ Decision on Subpoena, para. 17. Miletić refused to testify as a witness unless a subpoena was issued. *See* Decision on Subpoena, paras. 1, 14.

² Subpoena *ad Testificandum*, 9 May 2013 (“Subpoena”).

³ Request of Radivoje Miletić to Postpone his Court Appearance, confidential, 4 February 2014, paras. 3, 7.

⁴ Decision on Request by Radivoje Miletić to Postpone Date of Testimony, confidential, 13 February 2014, paras. 11–13.

⁵ Motion, paras. 7–9.

⁶ *Prosecutor v. Popović et. al.*, Case No. IT-05-87-A, Judgement, 30 January 2015.

⁷ Motion, para. 11.

⁸ Motion, para. 11.

Motion and found that there was “nothing before the Chamber which would suggest that Miletić’s health condition has improved to such an extent that the medical issues which were the basis for vacating the subpoena, are no longer a concern.”⁹ The Chamber also noted that “the decision whether or not to re-open a case at this very advanced stage of proceedings involves a very different assessment from the initial decision to subpoena a witness”.¹⁰

5. In the Motion, the Accused repeats his request for leave to re-open his defence case in order to hear the testimony of Miletić.¹¹ He notes that following a meeting on 9 April 2015, Miletić signed a declaration that his health issues had improved to such an extent that he was willing and able to testify in this case.¹² The Accused submits that therefore the medical issues which were the basis for vacating the subpoena are no longer a concern.¹³ The Accused refers to the submissions he made in the Sixth Motion regarding the information which Miletić could provide which are critical to his defence.¹⁴ The Accused argues that the probative value of Miletić’s evidence is so great, that it is not outweighed by any impact on the fairness of the trial that might result from any delay.¹⁵

6. On 6 February 2015, the Office of the Prosecutor (“Prosecution”) filed the confidential “Prosecution Response to Motion to Re-Open Defence Case No. Six *bis*: General Miletić Testimony” (“Response”), opposing the Motion.¹⁶ The Prosecution argues that the Accused has failed to specify what Miletić would testify about and also failed to show how this is “fresh” evidence, which would have sufficient probative value to warrant re-opening the defence case.¹⁷

7. The Prosecution argues that the Accused’s Motion is too vague and fails to identify the evidence he seeks to tender through Miletić.¹⁸ It submits that this makes it impossible to determine whether any aspect of Miletić’s evidence would constitute “fresh” evidence, given that the Accused already possessed substantial documentation pertaining to Miletić, and some of those documents have been tendered from the bar-table.¹⁹ It contends that it also impossible to assess the probative value of “this unspecified Miletić evidence” and thus the Accused has failed to show that

⁹ Decision on Accused’s Sixth Motion to Re-open Defence Case, 3 March 2015 (confidential) (“Decision on Sixth Motion”), para. 13.

¹⁰ Decision on Sixth Motion, para. 14.

¹¹ Motion, paras. 1, 21.

¹² Motion, paras. 16–17, Annex A.

¹³ Motion, para. 18.

¹⁴ Motion, para. 19, referring to Sixth Motion, para. 18.

¹⁵ Motion, para. 20.

¹⁶ Response, para. 1.

¹⁷ Response, para. 1.

¹⁸ Response, para. 2.

¹⁹ Response, para. 3.

exceptional circumstances exist which would allow for the case to be re-opened to admit this new evidence.²⁰

8. The Prosecution further contends that the summary of Miletić's anticipated testimony in a filing pursuant to Rule 65 *ter* of the Tribunal's Rules of Procedure and Evidence ("Rules") is also insufficient to satisfy the test for re-opening as it is unclear what aspects of the summary would form the basis of Miletić's testimony if the case were to be re-opened.²¹ It also argues that the Accused has failed to provide a basis for his belief that Miletić's testimony would have probative value given the evidence already heard in this case on the same topics.²² In this regard, the Prosecution notes that evidence has already been heard from the Accused's military advisors regarding the Accused's knowledge of the contents of Directive 7 and that it is not evident that Miletić is in a position to add anything of substance on this issue.²³

9. The Prosecution argues that the Accused's claims as to how Miletić would be able to refute the Prosecution's case are "largely speculative" and in some cases unsupported or even contradicted by the Rule 65 *ter* Summary.²⁴

II. Applicable Law

10. 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.²⁵

²⁰ Response, para. 4.

²¹ Response, para. 5 referring to Supplemental Rule 65 *ter* Summary and List of Exhibits for General Radivoje Miletić, 18 June 2013 ("Rule 65 *ter* Summary").

²² Response, para. 5.

²³ Response, fn. 18.

²⁴ Response, para. 6.

²⁵ *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.

11. 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.²⁶ 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.²⁷

12. 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.²⁸ 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.²⁹

13. 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.³⁰

III. Discussion

14. The Chamber recalls that in denying the Sixth Motion, it found that there was “nothing before the Chamber which would suggest that Miletić’s health condition has improved to such an extent that the medical issues which were the basis for vacating the subpoena, are no longer a concern.”³¹ The Chamber notes that Miletić has now declared that those health concerns would no longer prevent him from testifying in this case.³²

²⁶ *Čelebići* Appeal Judgement, para. 283; *Popović* Re-opening Decision, para. 24; *Popović* Further Decision, para. 99.

²⁷ *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.

²⁸ *Čelebići* Appeal Judgement, para. 283.

²⁹ *Čelebići* Appeal Judgement, para. 283.

³⁰ *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).

³¹ Decision on Accused’s Sixth Motion to Re-open Defence Case, 3 March 2015 (confidential) (“Decision on Sixth Motion”), para. 13.

³² Motion, Annex A.

15. However, the Chamber reiterates its observation that “the decision whether or not to re-open a case at this very advanced stage of proceedings involves a very different assessment from the initial decision to subpoena a witness”.³³ In assessing whether to re-open the case, the Chamber recalls that it issued the Subpoena in May 2013, well before all the evidence had been presented in the defence case and before other subpoenaed Defence witnesses testified. The Chamber also considered that on 27 February 2014, following its decision to vacate the Subpoena, the Chamber granted in full the Accused’s motion to admit several documents from the bar table which he had proposed to introduce as exhibits through Miletić’s testimony.³⁴

16. Given the lack of detail as to the content of Miletić’s proposed evidence in the Motion and the Sixth Motion,³⁵ the Chamber has also re-visited the Rule 65 *ter* Summary which was submitted in 2013.³⁶ The Chamber has had regard to the content of the Rule 65 *ter* Summary and considered the other evidence which has already been presented in this case on the very issues which the Accused still seeks to refute by reference to Miletić’s testimony. In addition, the Chamber notes that some of the Accused’s submissions as to how Miletić would be able to refute the Prosecution’s case are unsupported and in some cases contradicted by the Rule 65 *ter* Summary. Finally, the Chamber notes that the Accused in the Sixth Motion simply cites to paragraphs of the Prosecution Final Brief to identify the areas of the Prosecution case which he argues Miletić would refute. The Chamber notes that these are general aspects of the Prosecution’s case and there is nothing to suggest that Miletić’s evidence would be so probative with respect to those issues so as to warrant re-opening the defence case now that deliberations are well under way. The Chamber has also had regard to the delay that any such re-opening would necessarily entail. Having considered these factors, the Chamber concludes that there is nothing to suggest in light of other evidence now on the record, that Miletić’s evidence would have such probative value with respect to these issues that the case should be re-opened at this very advanced stage of the proceedings.

³³ Decision on Sixth Motion, para. 14.

³⁴ Decision on Accused’s Motion for Admission of Documents from Bar Table: General Miletić’s Documents, 27 February 2014.

³⁵ The Accused refers to the arguments he raised in the Sixth Motion about the information which, in his submission, Miletić has which would be critical to his defence: Motion, para. 19.

³⁶ See Rule 65 *ter* Summary.

IV. Disposition

17. 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 seventh day of May 2015
At The Hague
The Netherlands

[Seal of the Tribunal]