



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: 12 September 2014

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: 12 September 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

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

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby 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 “First Motion to Re-Open the Defence Case: USA Document”, filed on 26 August 2014 (“Motion”) and the Accused’s “Corrected Confidential Annexes to First Motion to Re-Open Defence Case: USA Document”, filed confidentially on 28 August 2014 (“Confidential Annex”),¹ 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 document from the bar table (“Document”).² The Accused submits that the Document was disclosed to him by the United States of America (“US”) pursuant to Rule 70 of the Rules of Procedure and Evidence (“Rules”).³ The Accused explains that the Document is a cable from Brigadier Jones, dated February 1993, which states that the Bosnian Muslims were responsible for all United Nations Protection Force (“UNPROFOR”) casualties.⁴ He also argues that he has met all the requirements for re-opening his case.⁵ First, “despite more than reasonable diligence” to obtain the Document from the US prior to the end of his case-in-chief, he was unable to do so.⁶ Further, the Document is relevant and has probative value as it goes to his defence that the Bosnian Muslims were responsible for the sniping and shelling incidents charged in the Third Amended Indictment (“Indictment”) and it corroborates the testimony of one of the defence witnesses relevant to the Sarajevo component of the case.⁷ According to the Accused, because he seeks the admission of the Document through the bar table, there will be no delay in the proceedings and therefore the Document’s probative value is not outweighed by the need to ensure a fair trial.⁸ Finally, the Accused submits that if the Chamber decides that Brigadier Jones should be called as a witness, the testimony will be brief and will not significantly delay the proceedings.⁹

¹ The Accused submits that the confidential annexes in the Motion were placed in the wrong order when the Motion was filed and that this is the reason why he filed the Confidential Annex. Confidential Annex, para. 1.

² Motion, paras. 1, 15, 17.

³ Motion, para. 10, Confidential Annex D. *See* Decision on the Accused’s Ninth Motion for Order Pursuant to Rule 70 (United States of America), 21 July 2014.

⁴ Motion, paras. 1, 4.

⁵ Motion, paras. 12–17.

⁶ Motion, paras. 3–12.

⁷ Motion, para. 15, Confidential Annex F.

⁸ Motion, paras. 14–15.

⁹ Motion, para. 16.

2. On 8 September 2014, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution Response to First Motion to Re-Open Defence Case: USA Document” (“Response”), requesting that the Chamber deny the Motion.¹⁰ The Prosecution submits that the Document has minimal probative value and thus does not warrant the delay that would be caused by re-opening the defence case.¹¹ The Prosecution submits, moreover, that the Document does not indicate a timeframe or a geographic location for the events discussed.¹² It also argues that without relying on information that is not contained in the Document, it is difficult to see how it is relevant to the Sarajevo portion of the case.¹³ In addition, the Prosecution argues that it is unclear that the Document was actually written by Brigadier Jones and how he obtained the information.¹⁴ Thus, given the issues with the Document, the Prosecution argues that Brigadier Jones must be called to testify about the circumstances in which the Document was produced and the basis for the conclusions contained therein.¹⁵ In addition, the Prosecution would seek to cross-examine Brigadier Jones.¹⁶ All of this, according to the Prosecution, will cause delays in the proceedings at this very advanced stage of this case.¹⁷

II. Applicable Law

3. 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.¹⁸

¹⁰ Response, paras. 1, 5.

¹¹ Response, paras. 1, 4.

¹² Response, Confidential Appendix, para. 1.

¹³ Response, Confidential Appendix, paras. 1, 4.

¹⁴ Response, Confidential Appendix, para. 1.

¹⁵ Response, para. 3.

¹⁶ Response, para. 3.

¹⁷ Response, paras. 4.

¹⁸ *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.

4. The primary consideration in determining an application for reopening 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.¹⁹ 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.²⁰

5. 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.²¹ 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.²²

6. 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.²³

III. Discussion

7. At the outset, the Chamber notes that the Document was provided to the Accused on 22 July 2014, after lengthy litigation with the US pursuant to Rule 70.²⁴ Thus, the Accused has used reasonable diligence in identifying the Document but was, nevertheless, unable to present it prior to

¹⁹ *Čelebići* Appeal Judgement, para. 283; *Popović* Re-opening Decision, para. 24; *Popović* Further Decision, para. 99.

²⁰ *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.

²¹ *Čelebići* Appeal Judgement, para. 283.

²² *Čelebići* Appeal Judgement, para. 283.

²³ *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 reopen a case. *Čelebići* Trial Judgement, para. 27 (quoted with approval in *Čelebići* Appeal Judgement, para. 288).

²⁴ See Motion, paras. 3–10. The Chamber denied the Accused’s request for a binding order to the US on the basis that the US had continuously co-operated with him since his initial request for the Document in September 2013 and that the US was still working on responding to his request. Decision on Accused’s Sixth Motion for Binding Order (United States of America), 7 April 2014.

the end of his case-in-chief.²⁵ Therefore, the Chamber finds that the Document is fresh evidence, which could not have been presented during the Accused's case.

8. Turning next to the issue of discretion, the Chamber notes that the Motion comes at a very advanced stage of the proceedings as the Accused's case-in-chief was closed on 1 May 2014.²⁶ Further, the final trial briefs have now been filed by both parties, while the closing arguments are scheduled to commence on 29 September 2014.²⁷

9. As for the probative value of the Document, the Accused submits that the Document is relevant to his case that Bosnian Muslims were responsible for the sniping and shelling incidents charged in the Indictment.²⁸ In addition, he says that it will corroborate the testimony of one of the defence witnesses whose credibility has been challenged.²⁹ The Chamber has reviewed the Document and notes that it consists of a short paragraph, which the Accused submits is a cable, and contains a conclusion that Bosnian Muslims were the cause of all UNPROFOR casualties. Thus, contrary to the Accused's submission, the Document does not refer to Sarajevo or any of the charged Sarajevo incidents and/or the alleged civilian victims. Further, it does not identify the author of the said conclusion nor does it contain a date.³⁰ Accordingly, its probative value as a stand-alone Document is extremely low.

10. In order for it to be comprehensible, the Document must be used in conjunction with the memorandum contained in Annex A to the Motion, as well as the correspondence between the US and the Accused, attached in the Confidential Annexes to the Motion. However, neither has been tendered by the Accused. In addition, even if the Chamber were to admit, *proprio motu*, the Document together with the memorandum and the correspondence, it appears that both the memorandum and the correspondence are challenging the accuracy of the conclusion in the Document. Accordingly, the probative value of the Document would remain equally low.

11. For the above reasons and contrary to the Accused's submission, the Document cannot be admitted from the bar table and it would be necessary to call Brigadier Jones as a witness to testify

²⁵ While the Accused received the Document in July, he continued negotiating the specific Rule 70 conditions with the US during the month of August. Motion, Confidential Annexes C-E.

²⁶ Further Order on Closure of Defence Case, 2 May 2014.

²⁷ See Defence Final Trial Brief, confidential, 29 August 2014; Prosecution's Submission of Final Trial Brief, confidential with confidential appendices, 29 August 2014; Order on Closing Arguments, 7 April 2014.

²⁸ Motion, para. 15.

²⁹ Motion, para. 4, Confidential Annex F.

³⁰ While the Accused submits that the Document is dated February 1993 and authored by Brigadier Jones, the date and the author's identity are not contained in the Document itself. In fact, the reference to February 1993 is based on the date of a meeting at which the Document was discussed. The information about Brigadier Jones is found in the memorandum and correspondence from the US contained attached in the Annexes to the Motion. Motion, para. 1, Annex A and Confidential Annexes D and E.

to its content and authenticity. In order to organise this testimony, the Accused would have to spend significant time liaising with the US. Furthermore, if Brigadier Jones did in fact testify, the Prosecution would have to be given time to cross-examine him. Contrary to the Accused's submission, the resulting total time that would be spent in order to hear the evidence of Brigadier Jones at this late stage in the case would cause a significant delay in the proceedings and the Chamber's deliberations. Thus, the Chamber considers that the probative value of the Document is outweighed by the need to ensure a fair trial.³¹

12. Accordingly, given the very advanced stage of the proceedings, the very low probative value of the Document, and the substantial delay that will be caused by re-opening the Defence case, the Chamber will deny the Motion.

IV. Disposition

13. 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 twelfth day of September 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

³¹ This is particularly so given that the Chamber has already received similar evidence on Bosnian Muslims causing UNPROFOR casualties. *See e.g.* P2414 (Witness statement of KDZ182 dated 8 March 2011), p. 42 (under seal); P1762 (Witness statement of David Fraser dated 17 October 2010), p. 36.