



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: 17 December 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: 17 December 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S THIRD 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 seized of the Accused’s “Third Motion to Re-Open Defence Case: Fadil Banjanović Document”, filed on 9 December 2014 (“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 document from the bar table, which, in his submission pertains to the credibility of witness Fadil Banjanović (“Document”).¹ The Document was provided pursuant to Rule 70 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and the Accused seeks its admission under seal but requests the Office of the Prosecutor (“Prosecution”) to contact the Rule 70 provider to allow for its public admission.² The Document was only disclosed to the Accused by the Prosecution on 17 November 2014 even though it had been in its possession for 10 years.³

2. The Document was the subject of the Accused’s “95th Motion for Finding of Disclosure Violation and for Exclusion of Testimony of Fadil Banjanović” filed on 19 November 2014 (“Ninety-Fifth Motion”). On 5 December 2014, the Chamber issued the “Decision on Accused’s Ninety-Fifth Disclosure Violation Motion” (“Ninety-Fifth Decision”). The Chamber found that the Prosecution violated Rule 68 of the Rules by failing to disclose the Document as soon as practicable but found that the Accused was not prejudiced by this violation.⁴

3. The Accused submits that through no fault of his own, and due to the Prosecution’s disclosure violation, he was unable to present the Document earlier.⁵ With respect to the probative value of the Document, the Accused refers to the Ninety-Fifth Motion.⁶ He submits that in finding that “certain portions [of the Document] could affect the credibility of Banjanović” the Chamber demonstrated that the Document has probative value.⁷ The Accused further submits that the Chamber’s finding that the information in the Document was not of any important

¹ Motion, para. 1.

² Motion, para. 1.

³ Motion, para. 3.

⁴ Disclosure Decision, paras. 10–11.

⁵ Motion, para. 5.

⁶ Motion, para. 6.

⁷ Motion, para. 7.

significance to the assessment of Banjanović's credibility is an issue of weight and does not affect its admissibility.⁸

4. The Accused argues that the probative value of the document is not outweighed by the need to ensure a fair trial and would have been admitted in his case-in-chief, if not for the Prosecution's disclosure violation.⁹ He submits that it would be an "error to consider whether exceptional circumstances exist" which would warrant the Chamber to exercise its discretion to re-open the case given that the timing of the request is solely due to the Prosecution's disclosure violation.¹⁰ The Accused also notes that re-opening would not cause any delay as he seeks its admission from the bar table.¹¹ In addition, he submits that if the Chamber considers that cross-examination is required he would be prepared to call the author of the Document as a witness if permitted to do so by the Rule 70 provider and that his testimony would be "extremely brief".¹²

5. On 12 December 2014, the Prosecution filed the "Prosecution Response to Third Motion to Re-Open Defence Case: Fadil Banjanović Document" with confidential appendix ("Response"), requesting that the Chamber deny the Motion.¹³ The Prosecution submits that the Document has such minimal probative value and thus does not warrant re-opening at this very advanced stage of the proceedings.¹⁴ It argues that even if the Document is found by the Chamber to be "fresh" evidence, the Chamber can exercise its discretion pursuant to Rule 89(D) of the Rules to deny re-opening if the probative value of the Document is so low that it is outweighed by factors such as the advanced stage of the trial and the delay caused by re-opening.¹⁵

6. The Prosecution emphasises that "it is only in exceptional circumstances where the justice of the case so demands" that a re-opening of a case would be permitted to allow the presentation of new evidence.¹⁶ The Prosecution refers to the Chamber's assessment of the low significance of the Document in the Ninety-Fifth Decision and its own submissions with respect to the Ninety-Fifth Motion as to the low probative value of the Document.¹⁷ The Prosecution also argues that the Accused in the Motion confuses the standard for re-opening the case and the standard for

⁸ Motion, para. 8.

⁹ Motion, para. 9.

¹⁰ Motion, para. 10.

¹¹ Motion, para. 11.

¹² Motion, para. 12.

¹³ Response, paras. 1, 7.

¹⁴ Response, para. 1.

¹⁵ Response, para. 2.

¹⁶ Response, para. 3.

¹⁷ Response, para. 3.

admission of evidence.¹⁸ The Prosecution argues that there is no basis in law for the Accused's assertion that the Chamber should create an exception to the test for re-opening and determine whether the Document should be admitted as though it had been offered during the course of the trial.¹⁹ The Prosecution also details why re-opening with respect to the Document would cause an unjustifiable delay including the need to liaise with multiple Rule 70 providers.²⁰ The Prosecution also refers to a previous decision of the Chamber to deny the admission of a document with "extremely low" probative value at a very advanced stage of the proceedings.²¹ It concludes that denying the Motion would best promote the interest of justice in a fair and expeditious trial.²²

7. The Prosecution also refers to extracts of the Document which, in its submission, are "either vague, unsourced or unsupported" and which are unreliable for admission from the bar table in the absence of witnesses who could testify and contextualise them.²³ The Prosecution submits that it would seek to cross-examine such witnesses if they were called and the whole process would cause unavoidable delay.²⁴

II. Applicable Law

8. 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

¹⁸ Response, para. 4.

¹⁹ Response, para. 4.

²⁰ Response, para. 5, Confidential Appendix, paras. 2-3.

²¹ Motion, para. 5 referring to Decision on Accused's First Motion to Re-Open Defence Case, 12 September 2014.

²² Response, para. 6.

²³ Response, Confidential Appendix, para. 1.

²⁴ Response, Confidential Appendix, para. 3.

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.

9. 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

10. 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

11. 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

12. At the outset, the Chamber notes that the Document was disclosed to the Accused on 17 November 2014 and the Chamber found that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure.³¹ Thus, the Accused could not have through reasonable diligence identified the Document earlier. Therefore, the Chamber finds that the Document is fresh evidence, which could not have been presented during the Accused’s case.

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 Ninety-Fifth Decision, paras. 10, 13.

13. The Chamber turns now to the question of whether the probative value of the Document is such that exceptional circumstances exist which would warrant the Chamber to exercise its discretion to re-open the case in the interests of justice. The Chamber finds no legal basis for the Accused's assertion that given his Motion is based on a disclosure violation by the Prosecution, it would be an error to apply this test to determine the merits of the Motion.

14. The Chamber in the Ninety Fifth Decision already reviewed the Document and found that the information contained therein was not of any important significance to the assessment of Banjanović's credibility.³² In light of the Accused's submissions in the Motion, the Chamber has reviewed the Document again and remains of the view that it is of extremely low probative value given that it relates largely to Banjanović's involvement in political discussions pertaining to the post-conflict re-settlement of Bosnian Muslims which post-date and are unconnected to the core content of his evidence in this case. The Chamber has also had regard to very advanced stage of proceedings and also considers that any attempt to re-open the case to secure the admission of the Document would cause an unjustifiable delay in proceedings, particularly given the nature of the information contained in the Document and the need to seek Rule 70 clearance to identify and potentially cross-examine the sources of that information which remain vague and unsupported.³³ 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.

15. The Chamber also notes that the Motion does not illustrate an efficient use of the Accused's resources or that of the Chamber. The Motion could have been an alternative remedy in his Ninety-Fifth Motion. Instead, the Accused in filing a separate motion required an extra response from the Prosecution and an additional decision to be issued by the Chamber. This is not the best use of judicial resources or the resources of the parties. The Chamber encourages the Accused and his legal adviser to avoid filing motions of this type which simply delay the expeditious nature of the trial and do not promote the interests of justice or advance his own case.

³² Ninety-Fifth Decision, para. 11.

³³ See Response, Confidential Appendix.

IV. Disposition

16. 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 seventeenth day of December 2014
At The Hague
The Netherlands

[Seal of the Tribunal]