



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 July 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 July 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S TENTH 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 “Tenth Motion to Re-Open Defence Case: Drago Nikolić Statement”, filed publicly with a confidential annex on 19 June 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 admit the answers of Drago Nikolić to a set of written questions (“Statement”) pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹

2. In the Accused’s submission, the Statement shows that the evidence of Momir Nikolić, who was called as a witness by the Office of the Prosecutor (“Prosecution”), that he travelled to Zvornik and met with Drago Nikolić on the evening of 13 July 1995 is false.² The Accused contends that Drago Nikolić’s evidence is highly probative with respect to the credibility of Momir Nikolić and shows he was not informed about the execution of prisoners.³ The Accused argues that Drago Nikolić’s evidence would support his case that there was “no intention to destroy the Bosnian Muslims of Eastern Bosnia” and that the execution of prisoners from Srebrenica was not planned prior to the evening of 13 July 1995.⁴

3. The Accused argues that Drago Nikolić’s evidence was not available during his defence case as he refused to testify voluntarily while the appeal he launched from his conviction was pending.⁵ Drago Nikolić’s conviction was affirmed by the Appeals Chamber on 30 January 2015 after which he agreed to answer a series of written questions that could be used in the Accused’s case.⁶ These answers were certified by an official of the Tribunal’s Registry.⁷ The Accused submits that it was not possible to compel Drago Nikolić to testify because the requirements for seeking a subpoena could not be satisfied given that similar evidence was available from other witnesses.⁸ The Accused argues that the Statement is admissible pursuant to Rule 92 *bis* because it does not go to his acts, conduct or mental state and that in addition it was cumulative of other

¹ Motion, paras. 1, 16.

² Motion, para. 2.

³ Motion, para. 12.

⁴ Motion, para. 2.

⁵ Motion, paras. 3, 8–9, 11.

⁶ Motion, paras. 4–5 referring to Case. No. IT-05-88-A, *Prosecutor v. Popović et. al.*, Judgement (30 January 2015).

⁷ Motion, para. 5.

⁸ Motion, para. 10.

evidence relating to Momir Nikolić's credibility.⁹ While the Accused acknowledges that the Statement is cumulative of other evidence, he argues it is important in evaluating Momir Nikolić's credibility because he does not know "where the tipping point is" for the Chamber in terms of not relying on his evidence.¹⁰

4. The Accused concludes that the probative value of the Statement is not outweighed by the need to ensure a fair trial given that re-opening the case would not consume any court time if the Statement were to be admitted pursuant to Rule 92 *bis*.¹¹ He also submits that it would not delay deliberations given the "targeted" scope of the Statement.¹²

5. On 2 July 2015, the Prosecution filed the "Prosecution Response to Tenth Motion to Re-Open Defence Case: Drago Nikolić Testimony" ("Response"), opposing the Motion.¹³ The Prosecution's primary argument is that the Accused has failed to establish that he exercised all reasonable diligence to obtain Drago Nikolić's evidence prior to the close of his case or that the Statement is "fresh" evidence which was unobtainable until now.¹⁴

6. The Prosecution notes that the Accused has offered no correspondence or factual support for the proposition that Nikolić was unwilling to testify while his own case was pending.¹⁵ It also submits that the Accused did not exercise all reasonable diligence as he did not attempt to obtain a subpoena to compel Drago Nikolić to testify.¹⁶ It further notes that the Accused's own assessment that the subpoena test could not be satisfied is "not a proper substitute for the Accused following the procedures available to him".¹⁷ It also argues that the Accused's argument that Drago Nikolić's evidence was available through other witnesses and presented in this case, undermines his claim that the Statement constitutes "fresh" evidence.¹⁸

7. The Prosecution concludes that the Motion should be denied, but that if the Chamber grants the Motion, the request for admission of the Statement pursuant to Rule 92 *bis* should be denied and Drago Nikolić's evidence should be presented *viva voce*.¹⁹ The Prosecution submits that Drago

⁹ Motion, para. 13.

¹⁰ Motion, para. 14.

¹¹ Motion, para. 15.

¹² Motion, para. 15.

¹³ Response, paras. 1, 14.

¹⁴ Response, paras. 1–6.

¹⁵ Response, para. 4.

¹⁶ Response, para. 5.

¹⁷ Response, para. 5. It notes that in seeking a subpoena he could have relied on the same argument he raised in the Motion that while cumulative, the evidence was important in evaluating the credibility of Momir Nikolić.

¹⁸ Response, para. 5.

¹⁹ Response, paras. 2, 14.

Nikolić's evidence fails to meet the requirements of Rule 92 *bis* given that it relates to live and important issues in dispute in this case relating to the credibility of an important Prosecution witness. In addition the Prosecution contends that the Statement is of questionable reliability and should not be admitted without the author being subject to cross-examination.²⁰ The Prosecution contends that its lack of reliability means the Statement has minimal probative value and thus does not warrant re-opening the case at this very advanced stage of the trial.²¹ It also points to the delay that re-opening would likely cause given that the Statement is not suitable for admission pursuant to Rule 92 *bis*.²²

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.²³

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.²⁴ 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.²⁵

²⁰ Response, paras. 2, 7–9. In this regard the Prosecution asserts that (i) the Statement consists of "brief, unexplained and unexplored answers"; (ii) the Statement is contradicted by evidence tendered in this case and amount to a self-serving denial with respect to events for which Drago Nikolić has already been convicted; and (iii) Drago Nikolić has not previously testified under oath with respect to the matters in the Statement.

²¹ Response, paras. 2, 11–13.

²² Response, para. 13.

²³ *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.

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

²⁵ 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*

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.²⁶ 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.²⁷

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.²⁸

III. Discussion

12. The Accused asserts that Drago Nikolić refused to testify voluntarily while the appeal from his conviction was pending but, after the Appeals Chamber affirmed his conviction on 30 January 2015, he agreed to answer a series of written questions for the Accused's case. Having regard to this scenario, the Chamber does not consider that the Statement amounts to "fresh" evidence for the purposes of re-opening the Defence case. The Chamber is of the view that the Accused's assertion that it was not possible to compel Drago Nikolić to testify because the requirements for seeking a subpoena could not be met is based on mere speculations. Therefore, the Chamber is not satisfied that the Accused exercised all reasonable diligence in order to obtain Drago Nikolić's evidence before the presentation of his case ended.

13. The Chamber therefore denies the Motion. Accordingly the Chamber does not need to consider whether it would have exercised its discretion to re-open the case to admit the Statement pursuant to Rule 92 *bis* at this very advanced stage of the trial.

in its Case on Rebuttal and to Reopen its Case for a Limited Purpose, 13 September 2004 ("*Blagojević* Trial Decision"), para. 9.

²⁶ *Čelebići* Appeal Judgement, para. 283.

²⁷ *Čelebići* Appeal Judgement, para. 283.

²⁸ *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).

IV. Disposition

14. 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 ninth day of July 2015
At The Hague
The Netherlands

[Seal of the Tribunal]