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: 20 April 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: **20 April 2015**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S SEVENTH 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 "Seventh Motion to Re-Open Defence Case: Mladen Blagojević", filed on 30 March 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 hear the testimony of Mladen Blagojević.[1] The Accused refers to an interview in October 2004 of Blagojević ("Interview") conducted by the Government of the United States of America ("USA"). An investigator from the Office of the Prosecutor ("Prosecution") was also present during the Interview.[2] According to the Accused, in the Interview, Blagojević said that Momir Nikolić told his subordinates on 14 July 1995 that prisoners being transported to Zvornik would be exchanged.[3]

2. In the Accused's submission this contradicts Nikolić's evidence in this case that he had been informed by 12 July 1992 that prisoners were to be executed.[4] Blagojević testified as a defence witness in the *Mladić* case in March 2015 and was cross-examined by reference to the Interview.[5] After Blagojević's testimony, the Accused's Legal Adviser requested a copy of the Interview from the Prosecution, which then provided it to the Accused on 16 March 2015.[6]

3. The Accused contends that the Prosecution's failure to disclose the Interview as soon as practicable amounted to a violation of Rule 68 of the Tribunal's Rules of Procedure and Evidence ("Rules") as it contains information which contradicts the Prosecution's case.[7] He argues that this disclosure violation prevented him from presenting Blagojević's evidence before his Defence case closed and that thus the Motion is timely.[8] He submits that the probative value of Blagojević's testimony is "extremely high as it goes to a highly contested and pivotal issue in the case", namely the truthfulness of Nikolić's testimony that a plan existed to execute prisoners from 12 July 1992.[9]

[1] Motion, para. 1.
[2] Motion, para. 1.
[3] Motion, para. 2.
[4] Motion, para. 3.
[5] Motion, paras. 5–6.
[6] Motion, para. 7.
[7] Motion, paras. 8–9, 14.
[8] Motion, paras. 10–11, 14.
[9] Motion, para. 12.

4. The Accused further argues that the probative value of the document is not outweighed by the need to ensure a fair trial, given that Blagojević would have been called as a Defence witness had the Interview been disclosed by the Prosecution prior to the close of his defence case.[10] He further submits that Blagojević's testimony took less than two days in the *Mladić* case and could be "considerably shortened in this trial" and would thus not cause significant delay.[11] While the Accused states that he prefers to call Blagojević to testify live to test his credibility, if delay is a concern to the Chamber, he requests that the Interview be admitted pursuant to Rule 92 *bis*.[12]

5. The Accused acknowledges that Blagojević's credibility can be attacked by his subsequent convictions and contradictions, but submits that those are issues which go to weight and not the admissibility of his evidence.[13]

6. On 13 April 2015, the Prosecution filed the "Prosecution Response to Seventh Motion to Re-Open Defence Case: Mladen Blagojević" ("Response"), opposing the Motion.[14] The Prosecution argues that the Motion is based on an irrelevant and unsupported argument that the disclosure of the Interview was a violation of its disclosure obligations under Rule 68 of the Rules.[15] In addition, the Prosecution argues that (i) the information in the Interview does not contradict Prosecution evidence, (ii) the Interview is in any event of negligible probative value; and (iii) re-opening the case to admit such marginal material is not warranted given the very advanced stage of the trial.[16]

7. The Prosecution observes that the Interview only came into its possession in late 2014 after the closing arguments in this case had ended when it received it from the USA.[17] It disputes the Accused's argument that this still amounted to a disclosure violation because an investigator of the Prosecution was present during the Interview which was conducted by the Government of the USA.[18] The Prosecution proceeds to argue that the content of the Interview is not contrary to Momir Nikolić's evidence about the intention to execute prisoners as suggested by the Accused.[19] It observes that Momir Nikolić never claimed to have told Blagojević that prisoners were being

[10] Motion, para. 14.
[11] Motion, para. 16.
[12] Motion, para. 17.
[13] Motion, para. 13.
[14] Response, para. 1.
[15] Response, para. 1.
[16] Response, para. 1.
[17] Response, para. 2.
[18] Response, para. 3.
[19] Response, para. 4.

taken to Zvornik to be killed and Blagojević was not present during the conversations where the execution of prisoners was discussed.[20]

8. The Prosecution further points to indicators which, in its submission, undermine Blagojević's credibility.[21] This includes the fact that Blagojević was found to have committed immigration fraud in the USA by failing to declare his involvement in VRS operations in Srebrenica. He was deported to Bosnia and Herzegovina and subsequently tried and convicted for crimes against humanity and, in the Prosecution's submission, he continued to lie about events pertaining to his service in the VRS.[22] It notes that contrary to the Accused's submission in this regard, the Chamber is entitled to consider the probative value of the evidence when evaluating a request to re-open the case.[23] It submits that given the minimal probative value of the evidence which the Accused seeks to tender, the Chamber should exercise its discretion to decline to re-open the case.[24] It concludes that, in any event, the Chamber should deny the request given that the probative value of the evidence is so low and is outweighed by factors such as the very advanced stage of the trial and the delay that would likely be caused.[25]

II. Applicable Law

9. 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.[26]

10. 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

[20] Response, para. 4.
[21] Response, para. 6.
[22] Response, paras. 6–7.
[23] Response, para. 7.
[24] Response, para. 8.
[25] Response, para. 9.
[26] *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.[27] 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.[28]

11. 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.[29] 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.[30]

12. 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.[31]

III. Discussion

13. The Chamber notes that the Interview was only disclosed to the Accused by the Prosecution in March 2015. Thus, the Accused could not have through reasonable diligence identified the Interview earlier. Therefore, the Chamber finds that the Interview is fresh evidence, which could not have been presented during the Accused's case. The Chamber has limited itself to assessing whether the newly disclosed material in the Interview warrants re-opening and does not consider that the issue of whether or not there was a disclosure violation by the Prosecution is relevant to that assessment.

14. The Chamber reviewed the portions of the Interview referred to by the Accused. In the Interview, Blagojević is questioned about why prisoners were being taken to Zvornik and claimed

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

[28] *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.

[29] *Čelebići* Appeal Judgement, para. 283.

[30] *Čelebići* Appeal Judgement, para. 283.

[31] *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).

that he had not been told anything but that he heard "everybody", including Momir Nikolić, talk about "the exchange".[32] When questioned further, Blagojević maintained that even though Momir Nikolić had pleaded guilty with respect to events in Srebrenica, he was told that there would be an exchange.[33] Contrary to the Accused's assertion, these vague answers given by Blagojević in the Interview do not contradict or even relate to the specific evidence of Momir Nikolić about personal conversations he had with respect to the execution of prisoners. The Chamber has also had regard to the context in which Blagojević gave these answers.

15. The Chamber therefore finds that Blagojević's expected testimony as presented in the Motion would have no probative value with respect to the content of Momir Nikolić's evidence in this case. The Chamber therefore finds that there is no reason to exercise its discretion to re-open the case to hear the evidence of Blagojević, or to admit the Interview in writing, at this very advanced stage of proceedings.

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 twentieth day of April 2015
At The Hague
The Netherlands

[Seal of the Tribunal]

[32] Motion, Annex A, pp. 104–105.
[33] Motion, Annex A, p. 106.