UNITED NATIONS

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 NINTH 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 "Ninth Motion to Re-Open Defence Case: Radomir Bjelanović Statement", filed on 11 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 a statement of Radomir Bjelanović pursuant to Rule 92 *quater* of the Tribunal's Rules of Procedure and Evidence ("Rules").[1] In this regard, the Accused refers to a statement taken by the Office of the Prosecutor ("Prosecution") in 2003 ("Statement").[2]

2. In the Accused's submission, Bjelanović gives important evidence in the Statement, which refutes the existence of a joint criminal enterprise to expel Bosnian Muslims from areas controlled by Bosnian Serbs.[3] The Accused points to portions of the Statement where Bjelanović i) states that as Chief of Police in Vlasenica, he saved the lives of many Bosnian Muslims, in spite of which he was still appointed by Mićo Stanišić as Chief of Police of Milići; and (ii) provides information on the arming of and killing of civilians committed by Bosnian Muslims.[4] He argues that the Statement has probative value as it tends to show that the authorities in Republika Srpska ("RS") were not in favour of crimes against Bosnian Muslims and protected Bosnian Muslims in their jurisdiction.[5] In addition he suggests that evidence of Bosnian Muslims arming themselves and committing crimes against civilians tends to show that Bosnian Serbs were not armed with the purpose of expelling Bosnian Muslims.[6]

3. The Accused submits that the Motion is timely given that the Prosecution did not disclose the Statement to him until 26 May 2015.[7] He contends that the probative value of the Statement is not outweighed by the need to ensure a fair trial because the Statement would have been offered during his case had the Prosecution not violated its disclosure obligations.[8] The Accused repeats

[1] Motion, para. 1.
[2] Motion, para. 1.
[3] Motion, paras. 1–2.
[4] Motion, para. 2 referring to Statement, paras. 25, 35–36, 38, 44–49, 71 (the Chamber notes that the Motion erroneously refers to paragraph 74 and not to paragraph 71 which is the last paragraph in the Statement). The Statement is attached in Annex A to the Motion.
[5] Motion, para. 5.
[6] Motion, para. 5.
[7] Motion, para. 4.
[8] Motion, para. 6.

his observation that it is an error for the Chamber to assess whether there are "exceptional circumstances" which would warrant exercise of the discretion to re-open the case.[9]

4. On 18 June 2015, the Prosecution filed the "Prosecution Response to Ninth Motion to Re-Open Defence Case: Radomir Bjelanović Statement" ("Response"), opposing the Motion.[10] The Prosecution submits that the Statement is of minimal probative value and does not warrant the delay that would be caused by re-opening the case at this very advanced stage of proceedings.[11] The Prosecution notes that the Chamber has previously held that the question of whether there has been a disclosure violation is irrelevant to the determination of whether exceptional circumstances exist which would warrant the exercise of its discretion to re-open the case.[12] It emphasises that the pertinent issue is the lack of probative value.[13]

5. The Prosecution contends that the Statement simply suggests that Bjelanović may have taken some protective action in favour of Bosnian Muslims, but does not suggest that his stance was supported by other authorities in RS.[14] For example, it notes that Bjelanović himself stated that while he had been the Chief of Police in Vlasenica, he had to resign given the threats to him and his family for his actions in protecting Bosnian Muslims.[15] In addition, the Prosecution argues that the Accused has failed to explain how evidence of Bosnian Muslims arming themselves and committing crimes tends to show that the arming of Bosnian Serbs was not done for the purpose of expelling Bosnian Muslims.[16] In any event, the Prosecution argues that the information contained in the Statement on this issue is "both general and limited in scope" and covers an issue which has been the subject of extensive evidence and submissions in this case.[17]

II. Applicable Law

6. 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

[9] Motion, para. 7.
[10] Response, paras. 1, 7.
[11] Response, paras. 1, 5–6.
[12] Response, para. 2 referring to Decision on Accused's Third Motion to Re-Open Defence Case, 17 December 2014, para. 13 and Decision on Accused's Seventh Motion to Re-Open Defence Case, 20 April 2015, para. 13.
[13] Response, para. 2.
[14] Response, para. 3.
[15] Response, para. 3.
[16] Response, para. 4.
[17] Response, para. 4.

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]

7. 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.[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]

8. 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]

9. 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]

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[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.

[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 re-open a case. *Čelebići* Trial Judgement, para. 27 (quoted with approval in *Čelebići* Appeal Judgement, para. 288).

III. Discussion

10. The Chamber notes that the Statement was only disclosed to the Accused by the Prosecution in May 2015. Thus, the Accused could not have through reasonable diligence identified the Statement earlier. Therefore, the Chamber finds that the Statement is fresh evidence, which could not have been presented during the Accused's case.

11. The Chamber reviewed the portions of the Statement referred to by the Accused.[24] It does contain information that Bjelanović claimed to have "saved the lives of many Muslims" by helping to transfer Bosnian Muslims to "safe areas".[25] However, the Chamber notes that this information is couched in very general terms about the individual actions which Bjelanović claimed to have taken. In addition the Chamber considered that Bjelanović stated that he felt threatened and thus left his position as Chief of Police in Vlasenica after the actions he took. Similarly, Bjelanović makes no connection between the actions he took and his subsequent appointment as Chief of Police in Milići, nor is there any suggestion that Mićo Stanišić was aware of his actions. Contrary to the Accused's assertion, this information has minimal probative value and does not support the proposition that the authorities in RS opposed crimes against Bosnian Muslims.

12. The Statement also contains information regarding the arming of Bosnian Muslims and about Bosnian Muslim forces killing civilians.[26] In many cases, Bjelanović simply relates information he had been told. The Chamber finds that this evidence is of minimal or no probative value to the issues in this case. In addition, this information does not in any way suggest that the arming of Bosnian Serbs was not for purpose of expelling Bosnian Muslims as claimed by the Accused.

13. Having regard to the minimal probative value of the Statement and the very advanced stage of the proceedings, the Chamber finds that there is no reason to exercise its discretion to re-open the case in order to admit the Statement pursuant to Rule 92 *quater*. Having considered the merits of the Motion, the Chamber expresses its concern that the filing of motions to re-open the case by the Accused has also become a numerical exercise. The Accused is reminded that such motions are not a productive use of valuable judicial resources.

[24] Statement, paras. 25, 35–36, 38, 44–49, 71.
[25] Statement, paras. 35–36.
[26] Statement, paras. 25, 44–49.

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]