

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

IN TRIAL CHAMBER No. 3

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 23 January 2015

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

FOURTH MOTION TO RE-OPEN DEFENCE CASE:
MIRSADA MALAGIC STATEMENT

The Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:
Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves the Trial Chamber for leave to re-open his case in order to secure the admission of a November 2013 statement of Prosecution Witness Mirsada Malagic at the ICTY Legacy Conference in Sarajevo.¹

2. According to a transcript of her remarks, distributed on 16 January 2015, Ms. Malagic stated, in part that:

The last and most important message is to the ICTY and its judges. They should put themselves in the position of victims, and punish the criminals with the highest and adequate punishment, as they deserve. Otherwise, instead of Karadžić, Mladić and others, you will bear on your own conscience over 10,000 people from Srebrenica, and all other innocent citizens throughout our Bosnia and Herzegovina.

3. Dr. Karadzic respectfully submits that the above statement is evidence of the bias of the witness and should be considered by the Trial Chamber when deciding on her credibility and objectivity.

Legal Considerations

4. This Chamber has already set forth the requirements for re-opening a party's case in its *Decision on Prosecution Motion to Re-Open Its Case* (20 March 2014). The Chamber held that:

- (A) A party may seek leave to re-open its case to present "fresh" evidence, that is, evidence that could not be obtained by the moving party by the conclusion of its case-in-chief despite exercising all reasonable diligence to do so.
- (B) 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.
- (C) The Chamber has the discretion, pursuant to Rule 89(D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. 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

¹ A copy of the statement was published in the ICTY publication, *Twenty Years of the ICTY: Anniversary Events and Legacy Proceedings* and can be found at pp. 60-62 at http://www.icty.org/x/file/Press/Events/2013/20_Years_of_the_ICTY_en.pdf If Dr. Karadzic is allowed to re-open his case, he will upload the statement to e-court.

adjournment in the overall context of the trial; as well as (iii) the probative value of the evidence to be presented.

Timeliness

5. Ms. Malagic testified as a prosecution witness in this case on 24 January 2012. She made the above statement at a conference in Sarajevo on 27 November 2013. The defence first became aware of her statement a few days after 16 January 2015 when a publication of the remarks at the conference was distributed by the ICTY.²

6. Dr. Karadzic closed his defence case in March 2014. At that time, he had no knowledge of Ms. Malagic's statement at the Sarajevo conference. No disclosure of this statement was made to him by the prosecution pursuant to Rules 66(A)(ii) or 68, no representative of Dr. Karadzic's defence team was invited to the conference, and no media or other sources reported the above statements of Ms. Malagic.

7. Therefore, the statement of Ms. Malagic could not reasonably have been identified and presented by Dr. Karadzic at the time he closed his defence case.

Probative Value of the Document

8. The probative value of the statement is the fact that it shows that the witness wants to see Dr. Karadzic subject to the highest punishment for the crimes at Srebrenica. This is information relevant and probative of the bias and objectivity of the witness and bears upon the credibility of the evidence that she gave in this case.

9. In the *Lukic & Lukic* case, the Appeals Chamber held that the Trial Chamber failed to give a reasoned opinion when it accepted the reliability of three witnesses without discussing the impact of their association with a victim's group.³ This demonstrates that advocacy for conviction and high punishment is relevant to the credibility of witnesses before this Tribunal.

10. Dr. Karadzic implies no criticism of Ms. Malagic by this motion, but wishes to ensure that the Trial Chamber considers all relevant information when rendering its judgement.

The Need to Ensure a Fair Trial

² <http://www.icty.org/sid/11614>

³ *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para.62

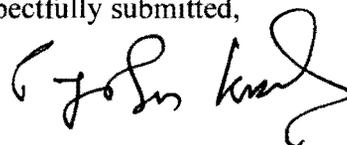
11. The probative value of the statement is not outweighed by the need to ensure a fair trial. Re-opening the defence case to admit the statement would not cause any delay. The authenticity of the statement, contained in an official ICTY publication, cannot be in dispute. Dr. Karadzic recalls that the Trial Chamber had already admitted Ms. Malagic's written evidence without cross examination pursuant to Rule 92 *bis* prior to the prosecution's decision to call her as a live witness at the trial.⁴

12. Should the Trial Chamber believe that cross-examination is required concerning the statement, re-calling Ms. Malagic to give testimony about the statement would be extremely brief and would not significantly delay the Trial Chamber's deliberations.

13. Therefore, the discretionary factors weigh in favor of allowing Dr. Karadzic to re-open his defence case and admitting the statement.

Word count: 989

Respectfully submitted,



Radovan Karadzic

⁴ *Decision on Prosecution's Fifth Motion for Admission of Statements in lieu of Viva Voce Testimony pursuant to Rule 92 bis (Srebrenica)*(21 December 2009) at para. 67(B)(2); *Decision on Prosecution's Motion for Leave to Convert Mode of Admission of One Witness* (7 December 2011) at para. 5