

MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-55-A

THE APPEALS CHAMBER

Before: Judge Theodor Meron
Judge William Hussein Sekule
Judge Vagn Prusse Joensen
Judge Jose Ricardo de Prada Solaesa
Judge Graciela Susana Gatti Santana

Registrar: Mr. Olufemi Elias

Date: 30 May 2017

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

REPLY BRIEF: MOTION TO ADMIT ADDITIONAL EVIDENCE

The Office of the Prosecutor:

Laurel Baig
Barbara Goy
Katrina Gustafson

Counsel for Radovan Karadzic:

Peter Robinson
Kate Gibson

1. On 24 April 2017 President Karadzic moved to admit evidence from Dragomir Vasic as additional evidence in his appeal.¹ The Prosecution responded on 24 May 2017.² President Karadzic now replies.

2. Two-thirds of the *Response* is irrelevant.

3. First, the fact that President Karadzic chose not to call Vasic as a witness at trial³ has no bearing on the issue presented in his motion. The motion is based solely on the last sentence of Rule 142:

Where the Appeals Chamber finds that the evidence was available at trial, it may still allow it to be admitted provided that the moving Party can establish that the exclusion of it would amount to a miscarriage of justice.

4. Each of the cases cited by the Prosecution dealt with motions brought under the part of Rule 142 where the party claimed the evidence was not available at trial.⁴ Here, President Karadzic acknowledges that the evidence was available at trial. His decision not to call Vasic was made after balancing the need for the testimony against the potential detriment to Vasic.

5. President Karadzic did not anticipate that the Trial Chamber would infer that he agreed to kill the prisoners from Srebrenica solely on the basis of Momir Nikolic's uncorroborated testimony that Deronjic had told Colonel Beara, in Vasic's presence, that President Karadzic had instructed that the prisoners be taken to Zvornik. Had President

¹ *Motion to Admit Additional Evidence* (24 April 2017)

² *Prosecution's Response to Karadzic's Motion to Admit Additional Evidence* (24 May 2017) ("Response")

³ *Response*, paras. 4-9

⁴ *Prosecutor v. Naletilic and Martinovic*, No.IT-98-34-A, *Decision on Naletilic's Consolidated Motion to Present Additional Evidence* (20 October 2004) para. 30 ("It is the accused's responsibility to make the "best case in the first instance"); *Prosecutor v. Nahimana et al.*, No.ICTR-99-52-A, *Decision on Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence Pursuant to Rule 115* (12 January 2007), para.5 ("The purpose of Rule 142 is to avoid a miscarriage of justice, not "to remedy any 'failures or oversights'" at trial."); *Prosecutor v. Popovic et al.*, No.IT-05-88-A, *Decision on Vujadin Popovic's Seventh Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115* (4 December 2014), p. 2, and *Prosecutor v. Stanisic and Zupljanin*, No.IT-08-91-A, *Decision on Mićo Stanisic's Second Motion Seeking Admission of Additional Evidence Pursuant to Rule 115*, (11 February 2015), para. 23 ("because he had the opportunity to present [that evidence] at the trial against him for the trial chamber to consider, it does not qualify as additional evidence on appeal."); *Prosecutor v. Galic* No.IT-98-29-A, *Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence before the Appeals Chamber* (30 June 2005), para.15 ("Rule 142 should be interpreted "to ensure the finality of judgements and the application of maximum effort during the trial to obtain and present the relevant evidence")

Karadzic foreseen the extremely thin reed upon which his genocide conviction would rest,⁵ Vasic's testimony would have taken on a greater significance.

6. The decision not to call Vasic was, in hindsight, a mistake. The result of that mistake, as President Karadzic acknowledged in his *Motion*, is that to have the evidence admitted on appeal, President Karadzic must meet the "heightened standard" of showing that a miscarriage of justice would occur if the evidence is not admitted.⁶

7. Second, the credibility of Vasic's evidence⁷ is largely irrelevant at this stage. The Appeals Chamber will refuse to admit additional evidence only if it is so lacking in terms of credibility and reliability that it is devoid of any probative value.⁸ Here, the testimony was given under oath in the *Perisic* trial.⁹ It was the Prosecution, who had called Vasic as its witness, who elicited the testimony. The *Perisic* Trial Chamber found Vasic's testimony credible enough to rely on it when making its factual findings.¹⁰ Issues relating to alleged inconsistencies or the alleged inculpatory nature of Vasic's evidence are for cross-examination at a hearing and/or the tendering of rebuttal evidence.¹¹ They are not grounds for denying the motion to admit additional evidence.

8. The only real issue raised by the *Response* is whether exclusion of Vasic's evidence would amount to a miscarriage of justice.

9. Vasic's evidence goes to a crucial issue in the case—whether President Karadzic, in his 13 July intercepted conversation with Miroslav Deronjic, ordered the prisoners to be taken to Zvornik to be killed or to Batkovici prison, a facility regularly inspected by the ICRC. To understand how crucial this issue is, one need only substitute Vasic's evidence for the Trial Chamber's finding.

⁵ *Radovan Karadzic's Appeal Brief* (5 December 2016), paras. 746-781

⁶ *Prosecutor v. Krstic*, No. IT-98-33-A, *Reasons for the Decisions on Applications for Admission of Additional Evidence*, 6 April 2004, para. 12

⁷ *Response*, paras. 18-20

⁸ *Prosecutor v. Galic*, No. IT-98-29-A, *Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence before the Appeals Chamber* (30 June 2005), para. 95

⁹ Testimony given under oath at a subsequent ICTY trial was *prima facie* credible for purposes of admission under Rule 115. *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Vujadin Popovic's Third and Fifth Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115* (23 May 2014), para. 28

¹⁰ See e.g. *Prosecutor v. Perisic*, No. IT-04-81-T, *Judgement* (6 September 2011), paras. 626, 644-45, 667

¹¹ President Karadzic does not oppose the Appeal Chamber calling Vasic to give his additional evidence *viva voce*. See *Response*, para. 21

10. Accepting that President Karadzic ordered the prisoners to be taken to Batkovici prison, but that they were instead taken to Zvornik, changes everything. Instead of a joint criminal enterprise in which President Karadzic and the VRS were acting in concert, President Karadzic ordered one thing, consistent with incarcerating the prisoners, and the VRS did another, killing the prisoners. Vasic's evidence undermines the entire premise of a joint criminal enterprise in which President Karadzic was wrongly found to be a member.

11. Therefore, it would be a miscarriage of justice if the Appeals Chamber did not hear Vasic's evidence before deciding Ground 40 of President Karadzic's appeal, which challenges the Trial Chamber's finding on that very issue.

12. The Prosecution's claim that there was other evidence consistent with the Chamber's finding¹² refers to inferences, not evidence:

- Yes, President Karadzic was in contact with Kovac, Karisik, Tolimir, Bajagic, and Deronjic. But Kovac,¹³ Karisik,¹⁴ Tolimir,¹⁵ and Bajagic¹⁶ testified they never informed him of the killings.¹⁷ The alleged conversation with Mladic was in the presence of three other witnesses,¹⁸ all of whom said there was no discussion of killings as far as they could tell.¹⁹ Deronjic is deceased.²⁰ Not a single report or intercepted conversation indicated that President Karadzic was informed of the killings of the prisoners.²¹

¹² *Response*, at para. 15

¹³ D3960, paras. 129-30

¹⁴ D3749, para. 63

¹⁵ T45063

¹⁶ D3853, para. 36D

¹⁷ The danger of finding facts based upon an inference from the fact that two people had met was brought home in the *Sljivancanin* case, where the Appeals Chamber later admitted additional evidence from one of the participants to the meeting, whose evidence had been available at trial, and then overturned its finding based upon the inference. *Prosecutor v Sljivancanin*, No. IT-95-13/1-R.1, *Review Judgement* (8 December 2010), para. 32.

¹⁸ T26081-82 (Ristic) T27406, T27410-11 (Premovic), and D2905, paras. 32, 34 (Trifkovic)

¹⁹ The Trial Chamber refused President Karadzic's request that General Mladic testify as to whether he informed him of the killing of prisoners. See Ground 21.

²⁰ Two people who met with Deronjic and President Karadzic about Srebrenica immediately after the meeting testified that there was no mention of killing of prisoners. D3561, para. 8 (D. Katanic) and T43352 (Krajisnik)

²¹ *Defence Final Trial Brief* (29 August 2014), paras. 3082-3112

- The other evidence cited by the Prosecution—use of coded language; that President Karadzic assisted Deronjic in having the prisoners moved from Bratunac; that the prisoners were transported to Zvornik; that President Karadzic was involved in the Srebrenica aftermath—issuing orders, declaring war, denying atrocities, and praising those in the operation—are all equally consistent with the reasonable inference that President Karadzic had no knowledge of the killings.

13. If Vasic's evidence is accepted, the inference that President Karadzic was part of a joint criminal enterprise to kill the men becomes unsustainable. If President Karadzic's order was to take the prisoners to Batkovici, no reasonable Chamber could find him guilty of the murder of the prisoners and, consequently, extermination and genocide.

14. The Trial Chamber's finding that President Karadzic ordered the prisoners from Srebrenica to be taken to Zvornik where they were killed is unsafe, unsound, and untrue. The additional evidence of Dragomir Vasic is necessary to avoid the miscarriage of justice that would result from affirming this erroneous finding.

15. Therefore, it is respectfully requested that the Appeals Chamber admit additional evidence from Dragomir Vasic pursuant to Rule 142.

Word count: 1556

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter Robinson". The signature is written in a cursive, flowing style with large, connected letters.

PETER ROBINSON

Counsel for Radovan Karadzic