

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: 2 July 2015

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

101st MOTION FOR FINDING OF DISCLOSURE VIOLATION
AND FOR ORDER OF DISCLOSURE: DJORDJE RISTANIC

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

The Accused:
Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves for a finding that the prosecution has once again violated Rule 68 by failing to disclose exculpatory material relating to Prosecution Witness Djordje Ristanic as soon as practicable. He also seeks an order for further disclosure.¹

Background

2. On 15-18 July 2011, Djordje Ristanic, the former President of the Republika Srpska Municipal Assembly and War Presidency in Brcko, testified at Dr. Karadzic's trial as a witness for the prosecution. In his amalgamated statement admitted pursuant to Rule 92 *ter*, Ristanic claimed that although he was President of the Serbian Assembly in Brcko, that body did not start functioning until October 1992, that the War Presidency had no power over the military, and that it and the police were unable to prevent crimes against non-Serbs.²

3. On 29 May 2015, Dr. Karadzic learned of a news report that Prosecution Witness Djordje Ristanic had been arrested in Bosnia. It was reported that the investigation against Ristanic was originally opened by the ICTY, which then referred the case to the Bosnian state prosecution.³

4. Dr. Karadzic sent a letter to the prosecution requesting that it disclose whether a potential prosecution of Mr. Ristanic was referred by the Office of the Prosecutor and if so, and if so, to be provided with the prosecution's correspondence with Bosnian officials concerning the referral and the underlying documents.⁴

5. On 5 June 2015, the prosecution acknowledged that it had made such a referral in 2009 and requested that Dr. Karadzic provide an explanation of the "forensic purpose" for his request. It indicated that if satisfied of the forensic purpose, it would consult with the Bosnian Chief Prosecutor to establish whether the disclosure of the entire referral documentation would prejudice further or ongoing investigations.⁵

¹ Because further disclosure is required to obtain all related exculpatory material to which Dr. Karadzic is entitled before delivery of the Trial Chamber's judgement, Dr. Karadzic believes that the matter could not wait until the 30 September 2015 date set by the Trial Chamber for the filing of the next disclosure violation motion. *Decision on Accused's Ninety-Eighth and Ninety-Ninth Disclosure Violation Motions* (8 June 2015) at para. 18

² Exhibit P3023, paras. 1,22,25

³ <http://www.justice-report.com/en/articles/djordje-ristanic-arrested>

⁴ Dr. Karadzic's letter is Annex "A".

⁵ The prosecution's letter is Annex "B".

6. On 10 June 2015, Dr. Karadzic provided an explanation of the forensic purpose for his request. He explained that:

That information falls within Rules 66(B) and 68 because it would likely contradict Mr. Ristanic's testimony that he had done no wrong while an authority in Brcko. The prosecution obviously believed that the information it was forwarding to Bosnian authorities for his prosecution demonstrated the contrary. As such, it was material to my defence under Rule 66(B) as it would have helped me to demonstrate that Mr. Ristanic's testimony should not be credited by the Trial Chamber. It was also exculpatory material under Rule 68 since it tends to contradict the evidence of a prosecution witness. I wish to use the material to re-open my case to the extent that it casts doubt on the credibility of Mr. Ristanic.⁶

7. Dr. Karadzic further indicated that the prosecution should not delay its disclosure to him while it sought the permission of the Bosnian Prosecutor, reiterated his request for the letter of referral, and requested to be informed of any other prosecution witnesses who had been the subject of a referral to Bosnian authorities for prosecution.

8. On 1 July 2015, the prosecution advised Dr. Karadzic that it had also referred the case of Momcilo Mandic for prosecution in Bosnia and that it would be consulting with the Bosnian Chief Prosecutor before making any disclosures.⁷

Disclosure Violation

9. The prosecution called Djordje Ristanic as its witness, offered his evidence that he had no responsibility for the crimes in Brcko, while at the same time failing to disclose to Dr. Karadzic the fact that it had referred Mr. Ristanic's case to the Bosnian prosecutor. This was a violation of Rule 68, since such a referral of necessity indicated that the prosecution possessed evidence that Mr. Ristanic was responsible for crimes in Brcko—a fact that he denied. In doing so, the prosecution violated its obligation under Rule 68 to disclose material which tended to contradict prosecution evidence⁸ and which affected the credibility of a prosecution witness.⁹

10. Dr. Karadzic was prejudiced by this violation of Rule 68 because he could have challenged the credibility of Mr. Ristanic's evidence with the fact of the referral. It

⁶ Dr. Karadzic's letter is Annex "C".

⁷ The prosecution's letter is Annex "D".

⁸ *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 178; *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 6

⁹ Rule 68(i)

could have altered his entire strategy with respect to Mr. Ristanic, whose credibility he did not seriously challenge based upon the information in his possession.

11. The cross-examination is obvious: Mr. Ristanic could have been confronted with the fact that the prosecution clearly did not believe his denials of responsibility since it had referred his case for prosecution. This could have affected his demeanor and the Trial Chamber's overall assessment of his credibility.

12. Therefore, the Trial Chamber is requested to make a finding that by failing to disclose to Dr. Karadzic the fact of its 2009 referral of Mr. Ristanic for prosecution in Bosnia, the prosecution violated its disclosure obligations pursuant to Rule 68.

Order for Further Disclosure

13. The Trial Chamber is further requested to order the prosecution to disclose the referral letter, the underlying evidence demonstrating Mr. Ristanic's responsibility for crimes in Brcko, and similar material for any other prosecution witness whose prosecution it referred to Bosnian authorities.

14. The prosecution's failure to disclose this information is inconsistent with the provisions of Rule 68(iv). That Rule provides that:

the Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential

15. With respect to the referral letter, the prosecution cannot credibly claim that its disclosure would prejudice any investigation given the fact that Mr. Ristanic has been arrested and the charges against him made public.

16. With respect to the information underlying the referral, the prosecution is required to make an application to the Trial Chamber if it believes that the material is subject to non-disclosure pursuant to Rule 68(iv). It cannot shield exculpatory material from disclosure by transferring it to local authorities and then claiming that disclosure would be contrary to the interests of those authorities.

17. Given the fact that information has been and can be disclosed to Dr. Karadzic on conditions that he not disseminate it beyond his defence team, which at this stage

consists only of his Legal Advisor Peter Robinson, and that there has been a history of compliance with such conditions by Dr. Karadzic and his team, it is hard to imagine the Trial Chamber approving an application under Rule 68(iv) of the Ristanic material.

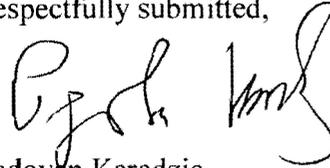
18. By delaying its application under Rule 68(iv), at a stage when the Trial Chamber is in the latter stages of its deliberations on the final judgement in Dr. Karadzic's case, the prosecution is frustrating the letter and spirit of the Rule.

19. Therefore, the Trial Chamber is respectfully requested to order that the prosecution disclose the Ristanic referral letter, the exculpatory material contained in the referral, and similar material for any other prosecution witness, to Dr. Karadzic forthwith.

20. Dr. Karadzic will examine that material and include any significant exculpatory material that was not disclosed in the disclosure violation motion set to be filed on 30 September 2015.

Word count: 1448

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', written in a cursive style.

Radovan Karadzic

ANNEX “A”

Radovan Karadzic
International Criminal Tribunal for
the former Yugoslavia

29 May 2015

Ms. Hildegard Uertz-Retzlaff
Office of the Prosecutor

Re: Djordje Ristanic

Dear Ms. Uertz-Retzlaff,

I have been advised that on 28 May 2015, it was reported in Bosnia that Prosecution Witness Djordje Ristanic was arrested. You can find the report at <http://www.justice-report.com/en/articles/djordje-ristanic-arrested>

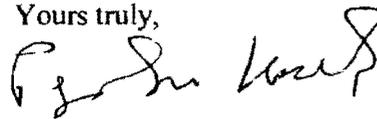
It was also reported that “the Bosnian state prosecution confirmed that the investigation against Ristanic was originally opened by the Hague tribunal, which then referred the case to the Bosnian state prosecution.”

In light of that report, I am requesting, pursuant to Rules 66(B) and 68, that you disclose whether a potential prosecution of Mr. Ristanic was referred by the Office of the Prosecutor and if so, to provide me with any and all documents contained in that referral, including witness statements and documents, as well as the correspondence with Bosnian officials concerning the referral.

I would also like to know why the fact of the referral, as well as the information requested above, was not disclosed to me earlier pursuant to Rule 68.

Thank you very much for your consideration of this request.

Yours truly,



Radovan Karadzic

ANNEX “B”



United Nations
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International
Criminal Tribunal
for the Former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

Office of the
Prosecutor

Bureau du
Procureur

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

05 June 2015

Subject: Your letter of 29 May 2015 regarding Đorđe Ristanić

Dear Mr Karadžić,

In the above mentioned letter, you requested information on a possible referral of an OTP case to the BiH State Prosecution Office. You requested the disclosure of the related correspondence and the documents provided to the BiH officials

1. I hereby confirm that on 21 October 2009, a case file pertaining to Mr Ristanić was transferred to the BiH Chief Prosecutor. The material transferred contained general documentation on the events in Brčko municipality as well as witness materials. The referral letter did not contain any legal memorandum or evaluation of the materials provided. The Karadžić trial team was not aware of any investigation against Mr Ristanić nor of this referral.

2. The scope of the proceedings against Mr Ristanić is addressed in the media you referred to and reflects the events in Brčko that were in part also the subject in the trial against you. In your letter you have not stated any forensic purpose for receiving the materials contained in the referral file. You are kindly requested to provide this information. After receiving your response, the OTP will contact the BiH Chief Prosecutor to establish whether the disclosure of the entire referral documentation would prejudice further or ongoing investigations.

Yours sincerely,

Hildegard Uertz-Retzlaff
Senior Trial Attorney

ANNEX “C”

Radovan Karadzic
International Criminal Tribunal for
the former Yugoslavia

10 June 2015

Ms. Hildegard Uertz-Retzlaff
Office of the Prosecutor

Re: Disclosure Matters

Dear Ms. Uertz-Retzlaff,

I have two disclosure related matters to raise with you:

Ristanic and Rules of the Road referrals

I am in receipt of your letter of 5 June 2015 pertaining to Prosecution Witness Djordje Ristanic. Thank you for your prompt response.

In your letter, you request that I state the forensic purpose for my request for copies of the information forwarded to Bosnia concerning the recommended prosecution of Mr. Ristanic.

That information falls within Rules 66(B) and 68 because it would likely contradict Mr. Ristanic's testimony that he had done no wrong while an authority in Brcko. The prosecution obviously believed that the information it was forwarding to Bosnian authorities for his prosecution demonstrated the contrary. As such, it was material to my defence under Rule 66(B) as it would have helped me to demonstrate that Mr. Ristanic's testimony should not be credited by the Trial Chamber. It was also exculpatory material under Rule 68 since it tends to contradict the evidence of a prosecution witness. I wish to use the material to re-open my case to the extent that it casts doubt on the credibility of Mr. Ristanic.

I take note of your stated intention to delay disclosure of this material to me while you contact the BiH Chief Prosecutor. With all due respect, this is misguided. Your duty to disclose exculpatory material under Rule 68 exists independently of the fact of continuing investigations. For material to be disclosed under Rule 66(B), you need to seek an order of the Trial Chamber under Rule 66(C) before refusing to disclose the information on those grounds. In any event, the confidentiality undertakings that you have from me and my defence team, and which we have honored throughout the trial, makes any concern that disclosure might interfere with the case against Mr. Ristanic unfounded.

Ms. Hildegard Uertz-Retzlaff
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I would also request that you disclose to me the 21 October 2009 letter referring the case of Mr. Ristanic for prosecution, as I would like to use it as an exhibit to be admitted in my case were I to be allowed to re-open it.

I am also concerned that the failure to disclose the fact that a criminal case on a prosecution witness who denied wrongdoing had been referred to State authorities may not be limited to Mr. Ristanic. Therefore, I am requesting, pursuant to Rules 66(B) and 68, that the prosecution disclose to me any and all such referrals for prosecution witnesses, and the substantive material contained in those referrals.

Material obtained from Republika Srpska

I have been informed that the government of Republika Srpska, in response to a request for production of material #0665 on 14 November 2008, and request #0800 on 11 October 2013 provided a number of documents pertaining to the prosecution of crimes committed against non-Serbs during 1992-1995.

I am requesting, pursuant to Rules 66(B) and 68, that the prosecution now provide me any material received pursuant to these requests that has not yet been disclosed to me.

Thank you very much for your consideration of these requests.

Yours truly,



Radovan Karadzic

ANNEX “D”



United Nations
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l'ex-Yougoslavie

Office of the
Prosecutor

Bureau du
Procureur

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

01 July 2015

Subject: Your letter of 10 June 2015 regarding Đorđe Ristanić and other issues

Dear Mr Karadžić,

In the above mentioned letter, you inquired whether the Prosecution had referred other cases to the BiH authorities including Prosecution witnesses and requested the disclosure of these referral correspondence and the substantive materials contained in those referral files.

I hereby confirm that the Prosecution on 10 March and 12 December 2006 referred a transfer file concerning Momčilo Mandić to the BiH authorities. The case numbers in BiH is X-KRŽ-05/58.

After having received your above mentioned letter including explanations regarding the forensic purpose for receiving the materials contained in the referral files, the Prosecution will contact the BiH Chief Prosecutor also in relation to the Mandić referral to establish whether the disclosure of the transfer files documentation would prejudice further or ongoing investigations. If that is not the case, the materials can be disclosed to you without entering the procedure foreseen in Rule 68 (iv).

Yours sincerely,

Hildegard Uertz-Retzlaff
Senior Trial Attorney