

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: 14 March 2016

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public w/Confidential Annexes

108th MOTION FOR FINDING OF DISCLOSURE VIOLATION
AND FOR REMEDIAL MEASURES

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 its disclosure obligations pursuant to Rules 66(A)(ii) and 68 by failing to timely disclose exculpatory material. Dr. Karadzic also moves for remedial measures.

Koljevic statement on Srebrenica

2. Item #1 is a 7 December 1995 report of statements made by Republika Srpska Vice President Nikola Koljevic to a United Nations official in November 1995.¹ The report has apparently been in the possession of the prosecution for many years. It was not disclosed to Dr. Karadzic until 7 March 2016.

3. It was reported that Vice President Koljevic said that the government of Republika Srpska had nothing to hide regarding Srebrenica, and believed the reports of massacres to be fabrications. He explained that casualties suffered by the Bosnian Muslims occurred in the military battle after the fall of Srebrenica. He also maintained that numerous Bosnian Muslim soldiers fled Srebrenica after its fall and must have reached safety.

4. The exculpatory nature of this information is that it contradicts the prosecution's case that Dr. Karadzic and the Bosnian Serb leadership, including Vice-President Koljevic, were part of a joint criminal enterprise to expel and eliminate the Bosnian Muslims of Srebrenica and that they failed to punish the persons who committed massacres after the fall of Srebrenica.² The report supports Dr. Karadzic's case that he and the Bosnian Serb leadership were told that there were no massacres after the fall of Srebrenica and that he does not have superior responsibility for failing to punish such crimes since he did not know or have reason to know that they had occurred.

5. Dr. Karadzic was prejudiced by the prosecution's failure to disclose this information. Had the prosecution timely disclosed the statement, Dr. Karadzic could have sought admission of the document from the bar table, or introduced it during his cross examination of prosecution witnesses, such as prosecution expert witness Richard Butler, or through defence witnesses such as Tomislav Kovac or Dragan Kijac, who

¹ The report of this meeting is Confidential Annex A. The Rule 70 provider has requested anonymity, therefore the document has been filed confidentially.

² *Indictment*, paras. 20-22, 35, 44-47

testified about the 1995 Srebrenica events and efforts to investigate or punish those crimes.

6. In addition to making a finding that the prosecution violated its obligations under Rule 68, Dr. Karadzic requests, as remedial measures, that the Trial Chamber (1) allow Dr. Karadzic to reopen his defence case admit the report from the bar table,³ or by allowing him to recall Mr. Kovac or Mr. Kijac to testify; and (2) draw an adverse inference to the prosecution on the issue affected by its disclosure violation and infer from the disclosure violation that Dr. Karadzic did not know or have reason to know that executions of prisoners after the fall of Srebrenica had occurred.

Statement of Witness KDZ088

7. Item #2 is a report of a 29 May 1994 interview by Prosecution Witness KDZ088.⁴ The witness testified in September 2010. The report has been in the possession of the prosecution since December 2012.⁵ It was not disclosed to Dr. Karadzic until 1 March 2016.

8. Witness KDZ088 testified entirely in closed session. Therefore, the exculpatory nature of the report cannot be included in this public motion. It is included in Confidential Annex C.

9. However, the prosecution's failure to disclose this prior statement of its witness has to be of great concern to the Trial Chamber, despite its general annoyance with Dr. Karadzic for bringing these motions while it is trying to complete the drafting of its final judgement.

10. Firstly, this is the earliest prior statement of the witness. The Appeals Chamber has recognised that the record of the first interview with a witness is of the highest value because it is most likely to capture the witness's recollection accurately, being closest in time to the events and less vulnerable to any subsequent influence.⁶

³ The document fits into Dr. Karadzic's case because it corroborates his defence that the Republika Srpska leadership, as late as November 1995, believed in good faith that no executions of prisoners had occurred.

⁴ A draft English translation of the interview report from the Tribunal's Language Section ("CLSS") is Confidential Annex B. Should the final version of the translation differ materially from the draft, Dr. Karadzic will file it with the Chamber when he receives it from CLSS.

⁵ According to an e-mail from the Office of the Prosecutor to Legal Advisor Peter Robinson on 3 March 2016.

⁶ *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 33

11. Secondly, by December 2012, the prosecution was on the highest notice that it was obligated to comply with its obligation to disclose all prior statements of its witnesses and all exculpatory evidence. Seventy-five disclosure violation motions had been filed by 5 December 2012 and findings that the prosecution had violated its obligations to disclose the prior statements of its witnesses and exculpatory material had been made by the Trial Chamber in the overwhelming majority of its decisions on those motions.

12. As early as June 2010, the Trial Chamber had also expressed “considerable concern” about the quantity of errors related to the failure to disclose prior statements of prosecution witnesses, and stated that it “expects the prosecution to use all the resources available to it to ensure that the oversights made to date are avoided at all costs in the future.”⁷

13. In July 2010, the Trial Chamber had warned “it is imperative that the prosecution maintains an organised, efficient, and thorough system for the review of documentary evidence to ensure that all material falling within the various disclosure-related Rules is provided to the Accused in a prompt manner, in accordance with those Rules.”⁸

14. In August 2010, the Trial Chamber had reiterated “its serious concern about the further disclosure violations by the Prosecution and stresses the importance of ensuring that this is not repeated.”⁹

15. In November 2010, the Trial Chamber had reminded the prosecution “that the size and complexity of this case is not an excuse for its failure to properly organise itself to ensure that disclosure is carried out in accordance with the Rules” and reiterated that the Office of the Prosecutor “must take seriously its disclosure obligations and ensure that all necessary resources are dedicated to ensuring timely disclosure of material to this accused, as, indeed, to all other accused at this Tribunal.”¹⁰

16. The Trial Chamber had stated that it remained “deeply disturbed, nonetheless,

⁷ *Decision on Accused's Second Motion for Finding Disclosure Violation and for Remedial Measures* (17 June 2010) at paras. 15,19

⁸ *Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures* (20 July 2010) at para. 44

⁹ *Decision on Accused's Seventh and Eighth Motions for Finding of Disclosure Violations and for Remedial Measures* (18 August 2010) at para. 22

¹⁰ *Oral Decision on Accused's Twenty-Sixth Disclosure Violation Motion T8907-08* (3 November 2010)

by the continuing violations of the Prosecution's disclosure obligations, under both Rule 66(A)(ii) and Rule 68".¹¹

17. The Trial Chamber had stated that:

At this stage in the life of the Tribunal, the Chamber would expect that the procedures in place inside the Office of the Prosecutor for ensuring absolute compliance with its disclosure obligation in all cases should function efficiently and properly, rather than in the unsatisfactory manner evident in this case. The Chamber trusts that the Prosecutor himself, along with his staff, will do his utmost to ensure that the progress of this case is not further hindered by late disclosure.¹²

18. In December 2010, the Chamber again expressed "its deep concern at the lack of organisation and the unsystematic manner in which the Rule 68 searches are being conducted in this case."¹³

19. In January 2011, the Chamber promised to "continue to be vigilant in ensuring that this pattern of disclosure violations is brought to an end".¹⁴

20. In February 2011, the Chamber observed that there was "an underlying failure by the Prosecution to give adequate weight to the importance of its disclosure obligations under the Rules and to heed the repeated calls by the Chamber to improve its disclosure practices."¹⁵

21. In April 2011, the Chamber expressed its concern "yet again, that the Prosecution's system for disclosure appears so inefficient and plagued by errors."¹⁶

22. In May 2011, after the trial had to be suspended due to the prosecution's disclosure violations, the Chamber said that "this further suspension and disruption to proceedings underscores the fact that the Prosecution should have disclosed all of the Rule 68 material in its possession, including "witness-related" material, as soon as practicable, and adds to the Chamber's concerns with the way in which the Prosecution

¹¹ *Decision on the Accused's Twenty-Second, Twenty-Fourth, and Twenty-Sixth Disclosure Violation Motions* (11 November 2010) at para. 32

¹² *Decision on the Accused's Twenty-Second, Twenty-Fourth, and Twenty-Sixth Disclosure Violation Motions* (11 November 2010) at para. 43

¹³ *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010) at para. 12

¹⁴ *Decision on Accused's Twenty-Ninth Disclosure Violation Motion* (11 January 2011) at para. 16

¹⁵ *Decision on Accused's Motion for Fourth Suspension of the Proceedings* (16 February 2011) at para. 13

¹⁶ *Decision on Accused's Forty-Third to Forty-Fifth Disclosure Violation Motions* (8 April 2011) at para.

has approached its disclosure obligations in this case.”¹⁷

23. In June 2011, the Chamber stated “the reasons proffered by the Prosecution for the failure to identify and disclose the Rule 68 documents have often been completely inadequate.”¹⁸

24. Therefore, by the time the 1994 prior statement of Witness KDZ088 arrived in the Office of the Prosecutor in December 2012, all systems should have been in place to identify the statement as that belonging to a prosecution witness, and to disclose it immediately under Rule 66(A)(ii).

25. Even if by some small chance it was not noticed that this was a statement of a prosecution witness, anyone reading the content should have immediately recognized its exculpatory nature and disclosed it pursuant to Rule 68.

26. With all the warnings and statements of the Trial Chamber urging the prosecution to ensure that such statements were disclosed to the accused, the fact that such a statement was not disclosed until more than 3 years later, on the eve of the Trial Chamber’s judgement, is unacceptable.

27. Dr. Karadzic was prejudiced by the prosecution’s failure to disclose this information. Had the prosecution timely disclosed the interview, Dr. Karadzic could have moved to recall Witness KDZ088 and put to him the inconsistencies between the newly disclosed statement and his trial testimony. The non-disclosure of this important first interview until the eve of the judgement has prevented the Trial Chamber from adequately assessing the credibility of Witness KDZ088.

28. In addition to making a finding that the prosecution violated its obligations under Rules 66(A)(ii) and 68, Dr. Karadzic requests, as a remedial measure, that the Trial Chamber either recall Witness KDZ088 for further cross examination, or exclude the evidence of Witness KDZ088 and withdraw any findings it may have tentatively made in its final judgement based upon his evidence.

¹⁷ *Decision on Accused’s Forty-Seventh Disclosure Violation Motion* (10 May 2011) at para. 25

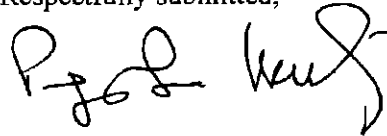
¹⁸ *Decision on Accused’s Forty-Ninth and Fiftieth Disclosure Violation Motions* (30 June 2014) at para. 53

Other Remedies

29. Dr. Karadzic requests that the Trial Chamber take all additional means necessary to assure itself that all exculpatory material has been disclosed before issuing its final judgement. Otherwise that judgement will be unsafe.

Word count: 2260

Respectfully submitted,

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

Radovan Karadzic