

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: 19 November 2014

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public w/ Confidential Annexes

95th MOTION FOR FINDING OF DISCLOSURE
VIOLATION AND FOR EXCLUSION OF
TESTIMONY OF FADIL BANJANOVIC

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 timely disclose exculpatory material that affects the credibility of Prosecution Rule 92 bis witness Fadil Banjanovic. He further moves that the Trial Chamber exclude Mr. Banjanovic's evidence as a remedy and sanction for this violation.

2. On 10 November 2009, the Trial Chamber admitted the testimony of Fadil Banjanovic from the *Milosevic* trial pursuant to Rule 92 bis and ruled that he would not be required to attend for cross-examination.¹ Mr. Banjanovic, the former mayor of Kozluk, testified that the Bosnian Muslims of Kozluk were forcibly deported to Serbia and that Bosnian Serb leaders from Zvornik Municipality Brano Grujic and Jovo Mijatovic participated in this deportation.²

3. During the defence case, two defence witnesses, Brano Grujic³ and Witness KW317,⁴ testified that there was no deportation of Bosnian Muslims from Kozluk and that the leaders of the Kozluk community, including Mr. Banjanovic, had requested their assistance in leaving the area.

4. Therefore, Mr. Banjanovic's credibility was clearly in issue in this case.

5. On 17 November 2014, the prosecution disclosed, for the first time, a document that directly relates to the credibility of Mr. Banjanovic. In Confidential Annex "A", Dr. Karadzic sets out the portions of the document that undermine the credibility of Mr. Banjanovic and therefore constitute exculpatory evidence under Rule 68. The document, which is subject to Rule 70 protection, is attached as Confidential Annex "B".

6. Rule 68 provides that the Prosecutor shall, **as soon as practicable**, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or **affect the credibility of Prosecution evidence.**" (emphasis added).

7. The prosecution is believed to have had this document in its possession for a

¹ *Decision on Prosecution's First Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony pursuant to Rule 92 bis (Witnesses for Eleven Municipalities)*(10 November 2009) at paras. 30-33

² P57 at T26027-28

³ T40451; D3724 at para. 47

⁴ T39397; D3654 at para. 58

considerable period of time.⁵

8. The Trial Chamber is requested to make a finding that by failing to disclose the document attached as Confidential Annex "B", the prosecution violated its disclosure obligation under Rule 68.

9. The Trial Chamber is further requested to exclude the testimony of Mr. Banjanovic as a remedy and sanction for the latest disclosure violation.

10. Dr. Karadzic has been prejudiced by the prosecution's failure to disclose the material as soon as practicable. Had this material been disclosed in time, Dr. Karadzic could have used it to persuade the Trial Chamber that Mr. Banjanovic needed to be called for cross-examination, or could have called Mr. Banjanovic as a witness in his own case for the purpose of eliciting information of the nature described in Confidential Annex "A".

11. In addition, the disclosure violation prevented Dr. Karadzic from investigating the matters in Austria and Bosnia described in the newly disclosed material and developing even more information that undermined the credibility of Mr. Banjanovic.

12. The new information demonstrates that Mr. Banjanovic's evidence was particularly unsuitable for admission under Rule 92 *bis*. He was the only witness to testify about the alleged deportation from Kozluk and two defence witnesses specifically refuted his testimony. In admitting his evidence, the Trial Chamber relied upon the fact that it was corroborated by Witness KDZ461.⁶ In fact, the prosecution never called KDZ461. That witness was later called by the defence and contradicted, rather than corroborated, Mr. Banjanovic's evidence.

13. The prosecution's reliance on Mr. Banjanovic's evidence as the sole evidence of the involuntary circumstances of the deportation from Kozluk is reflected in its final brief.⁷ The Kozluk incident is one of only two identified instances of deportation that supports Count 7 of the indictment.⁸ It would be an injustice for the Trial Chamber to make a finding that credited the evidence of Mr. Banjanovic while the prosecution failed

⁵ See *Report on Disclosure Issues arising from 93rd Disclosure Violation Motion* (18 November 2014) at para. 13

⁶ *Decision on Prosecution's First Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony pursuant to Rule 92 bis (Witnesses for Eleven Municipalities)* (10 November 2009) at para. 27

⁷ *Prosecution Final Trial Brief* (29 August 2014) at Appendix A, Zvornik, at paras. 24-27

⁸ *Defence Final Trial Brief* (29 August 2014) at para. 2801

to disclose evidence that undermined his credibility.

14. It is well established that a Chamber has an inherent power to reconsider its own decisions if the existence of a clear error of reasoning has been demonstrated or if reconsideration is necessary in order to prevent an injustice.⁹ The circumstances presented by this motion indicates that reconsideration of the admission of the testimony of Mr. Banjanovic is necessary to prevent an injustice and that his evidence should be excluded.

15. Unfortunately, it is not possible to now call Mr. Banjanovic for cross-examination, as he passed away in December 2011.¹⁰ The timing of the late disclosure prevented Dr. Karadzic from bringing this matter to the attention of the Chamber during Mr. Banjanovic's lifetime.

16. The Trial Chamber should also consider exclusion of the evidence of Mr. Banjanovic as a long-overdue sanction to the prosecution for its massive violations of its disclosure obligations in this case—violations which continue even after the evidence in the trial has closed. Violations of a party's disclosure obligations are not only offenses against the other party, but they are offenses against the administration of justice. By exclusively focusing on prejudice to the accused, this Trial Chamber has failed to support the administration of justice at this Tribunal and has instead fostered impunity by which these violations have been allowed to continue throughout the process. Exclusion of evidence or other sanction is long overdue in this case.

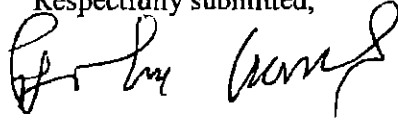
17. For all of the above reasons, it is respectfully requested that the Trial Chamber make a finding that the prosecution has again violated its disclosure obligations pursuant to Rule 68, and exclude the evidence of Mr. Banjanovic.

⁹ *Nikolic v Prosecutor*, No. IT-02-60/1-A, *Decision on Appellant's Urgent Motion for Reconsideration of Decision on Second Defence Motion to Enlarge Time for Filing of Replies Dated 1 April 2005* (6 April 2005) at page 4; *Prosecutor v Seselj*, No. IT-03-67-AR72.1, *Decision on Motion for Reconsideration of the "Decision on the Interlocutory Appeal Concerning Jurisdiction Dated 31 August 2004* (15 June 2006) at para. 9

¹⁰ <http://www.nezavisne.com/novosti/bih/Premينو-Fadil-Banjanovic-Bracika-119115.html>

Word count: 1483

Respectfully submitted,

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

Radovan Karadzic