

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-AR98bis.1

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. John Hocking

Date: 18 March 2013

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION TO DISMISS APPEAL AND
FOR APPOINTMENT OF AMICUS CURIAE PROSECUTOR

The Office of the Prosecutor:
Mr. Peter Kremer QC

The Accused:
Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves to dismiss the prosecution's appeal as a sanction for violation of its disclosure requirements. In addition, he moves for the appointment of an *amicus curiae* prosecutor to investigate whether the prosecution's disclosure violations and its certification that it had complied with its disclosure obligations constitute contempt of this Tribunal.

Procedural History

2. At the commencement of his trial in October 2009, the prosecution had disclosed to Dr. Karadzic a total of 1625 prior statements or testimony of its witnesses pursuant to Rule 66(A)(ii) and 224,448 pages of exculpatory material, pursuant to Rule 68.¹

3. It has since been revealed that the prosecution failed to disclose 411 witness statements and testimony which had been in its possession prior to May 2009, by which time it had been ordered to disclose all such statements and testimony. This means that the prosecution failed to disclose more than 25% of its witness statements and testimony.²

4. Since the commencement of the trial, the prosecution has disclosed 342,272 pages of exculpatory material, the vast majority of which was not disclosed as soon as practicable and which was in its various collections before the trial commenced. This means that the prosecution has disclosed more than 150% more exculpatory evidence after the trial commenced than it had in the entire Pre-Trial period.³

5. On 62 occasions during the course of the trial in this case, the Trial Chamber has made an express finding that the prosecution has violated its disclosure obligations.⁴

6. On 24 September 2012, the prosecution filed its *Prosecution Rule 98 bis Appeal Brief*. The brief did not contain the certification required by Rule 111(B) that disclosure had been completed.

¹ *Motion for New Trial for Disclosure Violations* (13 August 2012) at para. 2

² *Motion for New Trial for Disclosure Violations* (13 August 2012) at para. 3, supplemented by *75th Motion for Finding of Disclosure Violation (November 2012)*(5 December 2012), *77th Motion for Finding of Disclosure Violation (January 2012)*(11 February 2013), *78th Motion for Finding of Disclosure Violation and for Suspension of the Trial* (20 February 2013)

³ *Motion for New Trial for Disclosure Violations* (13 August 2012) at para. 4, supplemented by *Prosecution Periodic Disclosure Report* (August 2012 through February 2013)

⁴ *Motion for New Trial for Disclosure Violations* (13 August 2012) at para. 4, supplemented by Trial Chamber decisions on 75th through 78th Disclosure violation motions

7. On 27 September 2012, Dr. Karadzic moved to strike the prosecution's brief for failure to comply with Rule 111(B).⁵ The prosecution responded on 4 October 2012, resisting the filing of a certification that it had completed disclosure.⁶ Dr. Karadzic replied on 8 October 2012.⁷ On 9 November 2012, the Appeal Chamber ordered the prosecution to file the required certification.⁸

8. On 19 November 2012, the prosecution finally filed the required certification. In a declaration signed by Senior Trial Attorney Hildegard Uertz-Retzlaff, the prosecutor certified that "the Prosecutor has disclosed to the Accused all material under Rule 68(i) relating to Count 1 which has come into his actual knowledge..."⁹

The Violation

9. On 18 February 2013, the prosecution disclosed for the first time information provided by General Aleksandar Vasiljevic on 8 April 2009.¹⁰

10. Because General Vasiljevic was listed as a prosecution witness, pursuant to Rule 66(A)(ii), the prosecution was required to disclose this statement by 7 May 2009. It failed to do so.

11. The statement also contains exculpatory information and should also have been disclosed pursuant to Rule 68(i). The exculpatory nature of the statement was patently obvious to the prosecution as General Vasiljevic explicitly told them that his information on the events that occurred in Bosnia could be more beneficial to Karadzic's defence than to the prosecution.¹¹

12. General Vasiljevic went on to describe how he became aware of the existence of Bosnian Muslim paramilitary groups and arming of Muslims in 1991, how he had brought these matters to the attention of President Izetbegovic, and how they had committed crimes against the JNA, including murder. He explained that paramilitaries from Serbia, and not the Bosnian Serb Territorial Defence (TO), were involved in the

⁵ *Motion to Strike Prosecution's Brief*

⁶ *Response to Motion to Strike Prosecution's Rule 98 bis Appeal Brief*

⁷ *Reply to Motion to Strike Prosecution's Brief*

⁸ *Decision on Motion to Strike Prosecution's Brief*

⁹ *Corrigendum to Prosecution's Rule 98 bis Appeal Brief*

¹⁰ The letter of disclosure is attached as Annex "A" to the 78th *Motion for Finding of Disclosure Violation and for Suspension of the Trial* (20 February 2013). The statement is attached as Annex "B" to that same pleading.

¹¹ See Annex B at page 1, fourth paragraph

April 1992 crimes in Zvornik municipality, and that he was not aware of the Serb paramilitary assistance being requested by the Bosnian Serbs.¹²

13. Zvornik municipality is one of the municipalities in which genocide has been alleged to have occurred in Count 1 of the Indictment and is therefore squarely covered by the certification by Ms. Uertz-Retzlaff that all Rule 68 material had been disclosed.

14. In fact, Ms. Uertz-Retzlaff was personally present at the interview of General Vasiljevic.¹³

15. This violation of disclosure was the subject of Dr. Karadzic's 78th *Motion for Finding of Disclosure Violation and for Suspension of the Trial* (20 February 2013). On 11 March 2013, the Trial Chamber specifically found that the prosecution had violated Rule 66(A)(ii) and Rule 68 by failing to timely disclose General Vasiljevic's interview report.¹⁴ The Trial Chamber declined to provide any remedy for this violation due to lack of prejudice.¹⁵

16. Because the matter implicates Count 1, is directly related to the certification provided to the Appeals Chamber,¹⁶ and provides the Appeals Chamber with an opportunity to put into practice its pronouncements on the importance of disclosure, Dr. Karadzic respectfully brings this motion before the Appeals Chamber.

Dismissal of the Appeal

17. Dr. Karadzic contends that dismissal of the prosecution's appeal is an appropriate remedy for the disclosure violation in this case.

18. The Appeals Chamber has held that the obligation to disclose under Rule 68 is as important as the obligation to prosecute.¹⁷ Since the obligation to disclose has not been met, the prosecution of Count One should also not proceed if the two obligations are indeed of equal importance.

¹² See Annex B at page 4, third and fourth paragraphs

¹³ See Annex B at page 1 under heading "Subject"

¹⁴ *Decision on Accused's Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions* at para. 20

¹⁵ *Decision on Accused's Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions* at para. 21

¹⁶ The Trial Chamber has declined to require such a certification from the prosecution.

¹⁷ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 183, 242; *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004)

19. The Appeals Chamber has made a number of pronouncements on the prosecution's violation of its disclosure obligations, but has never actually done anything about it.

20. In the *Krstic* case, the Appeals Chamber said:

The Appeals Chamber will not tolerate anything short of strict compliance with disclosure obligations, and considers its discussion of this issue to be sufficient to put the Office of the Prosecutor on notice for its conduct in future proceedings.¹⁸

21. In the *Kordic and Cerkez* case, the Appeals Chamber said:

The Appeals Chamber reiterates that the onus on the Prosecution to enforce the rules rigorously to the best of its ability is not a secondary obligation, and is as important as the obligation to prosecute... It is clearly required, however, notwithstanding the practical difficulties encountered by the Prosecution, that evidence of an exculpatory nature must also be disclosed to the defence forthwith.¹⁹

22. In the *Lukic & Lukic* case, the Appeals Chamber said:

The Appeals Chamber emphasises its concern at the failure of the Prosecution to meet its fundamental duty to disclose *prima facie* exculpatory material... The Appeals Chamber reminds the Prosecution of the paramount importance of its disclosure obligations and expects the Prosecution to undertake the necessary steps to prevent such disclosure violations from occurring in the future.²⁰

23. In the *Mugenzi & Mugiraneza* case at the ICTR the Appeals Chamber said:

The Appeals Chamber firmly emphasizes that the prosecution's disclosure obligation is as important as its obligation to prosecute, and exhorts the Prosecution to act in good faith and in full compliance with its positive and continuous disclosure obligations. The Appeals Chamber also underscores that any further violations of the prosecution's disclosure obligation under Rule 68 of the Rules could lead to appropriate sanctions, if warranted in the circumstances.²¹

¹⁸ *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 215

¹⁹ *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-A, *Judgement* (17 December 2004) at paras. 242-43

²⁰ *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 23

²¹ *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Decision on Motions for Relief for Rule 68 Violations* (24 September 2012) at para. 40

24. The Appeals Chamber later repeated in that same case that:

It is clear that the Prosecution's repeated violations of its obligations under Rule 68 of the Rules in this case negatively impacted the conduct of the proceedings and prejudiced the interests of justice. The Appeals Chamber therefore firmly reminds the prosecution of the fundamental importance of its positive and continuous obligation to disclose exculpatory material under Rule 68 of the Rules.²²

25. Now, after the prosecution has been found to have violated its disclosure obligations in this case on more than 60 occasions involving over 400 witness statements and 340,000 pages of exculpatory material, if there is ever an occasion for the Appeals Chamber to act, this is it.

26. Dismissal of the prosecution's appeal, as opposed to simply uttering disapproving words, will send the message that the prosecution has clearly not received from the Appeals Chamber's earlier pronouncements—that violation of disclosure obligations has consequences.

27. Dismissal in this instance is a modest remedy, since it involves only one count of an eleven count indictment, and since the Trial Chamber is likely to acquit the accused on that count even if the prosecution's appeal is allowed.

28. Therefore, it is respectfully requested that the Trial Chamber dismiss the prosecution's appeal of Dr. Karadzic's acquittal on Count One.

Appointment of Amicus Curiae Prosecutor

29. Rule 77(A) provides for holding in contempt any person who knowingly and willfully interferes with the Tribunal's administration of justice. Rule 77(C) provides for the appointment of an *amicus curiae* prosecutor when there is reason to believe that a person is in contempt of the Tribunal and where the Prosecutor has a conflict of interest.

30. Now that it has been established by the Trial Chamber that the prosecution failed to disclose General Vasiljevic's 2009 statement in violation of Rule 68, the 2013 certification that "the Prosecutor has disclosed to the Accused all material under Rule 68(i) relating to Count 1 which has come into his actual knowledge..."²³ is clearly untrue.

²² *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2013) at para, 63

²³ *Corrigendum to Prosecution's Rule 98 bis Appeal Brief*

31. Such an untrue certification, when viewed in the light of the history of the disclosure violations in this case, provides reason to believe that the Prosecutor and/or members of his office, has interfered with the Tribunal's administration of justice. Since the Prosecutor cannot reasonably be expected to investigate his own conduct or that of his office, the appointment of an *amicus curiae* prosecutor is required.

32. Prosecutions for contempt, and appointments of *amicus curiae* prosecutors, have been ordered in this Tribunal without any showing of prejudice from the alleged violation to a party or other person.²⁴ Therefore, the oft-invoked excuse that there has been no prejudice as a result of the disclosure violation is inapplicable.

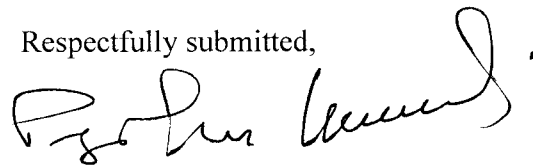
33. For all of the above reasons, the Appeals Chamber is respectfully requested to order the appointment of an *amicus curiae* prosecutor to investigate the violation of disclosure and inaccurate certification of compliance filed with the Appeals Chamber in this case.

Conclusion

34. The Appeals Chamber and other judicial bodies have often repeated the maxim that "justice must not only be done, but must be seen to be done." After a decade of warning the prosecution about its disclosure violations, the Appeals Chamber has the opportunity to actually do something. Squandering this opportunity would promote the very impunity that this Tribunal was created to end.

Word count: 2250

Respectfully submitted,



Radovan Karadzic

²⁴ *Prosecutor v Seselj*, No. IT-03-67-R77.2, *Judgement on Allegations of Contempt* (24 July 2009); *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009); *Prosecutor v Seselj*, No. IT-03-67-R77.3, *Judgement* (31 October 2011); *Prosecutor v Margetic*, No. IT-95-14-R77.6, *Judgement on Allegations of Contempt* (7 February 2007); *Prosecutor v Marijacic & Rebic*, No. IT-95-14-A, *Judgement* (27 September 2006); *Prosecutor v Jovic*, No. IT-95-14-R77-A, *Judgement* (15 March 2007); *In the matter of Vojislav Seselj*, No. IT-03-67-R77.4, *Judgement* (28 June 2012)