

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: 30 July 2014

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

SECOND MOTION FOR NEW TRIAL
FOR DISCLOSURE VIOLATIONS

The Office of the Prosecutor:

Mr. Alan Tieger

Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic hereby moves for an order granting him a new trial. He contends that the numerous violations by the prosecution of its disclosure obligations and the cumulative prejudice from those violations to the defence, has resulted in an unfair trial. Starting the trial over, and getting it right this time, is the only remedy that can ensure that the trial of Dr. Karadzic is a fair one.

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.

3. By the close of the prosecution's case in May 2012, the prosecution had been shown to have failed to disclose 406 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. The prosecution had also belatedly disclosed 335,126 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. On 58 occasions prior to the close of the prosecution's case, the Trial Chamber made an express finding that the prosecution has violated its disclosure obligations.

4. On 13 August 2012, Dr. Karadzic filed his *Motion for New Trial for Disclosure Violations*. On 3 September 2012, the Trial Chamber denied the motion, holding that while the disclosure violations "reflected badly on the Prosecution", Dr. Karadzic had not suffered sufficient prejudice to warrant a remedy of a new trial.¹

5. Dr. Karadzic opened his defence case on 16 October 2012. The prosecution's disclosure violations continued during and after his defence case. The prosecution was found to have violated Rule 66(A)(ii) by failing to disclose an additional 18 statements of its own witnesses, bringing to 424 the total number of statements it failed to disclose. The prosecution was also found to have failed to disclose an additional 211 exculpatory documents in violation of Rule 68. The total number of occasions upon which the Trial Chamber found that the prosecution violated its disclosure obligations grew from 58 to 73.

¹ *Decision on Accused's Motion for a New Trial for Disclosure Violations* at paras. 14,17

The Cumulative Violations Warrant a Sanction

6. Although the Trial Chamber has declined to provide a sanction for individual violations of the prosecution's disclosure obligations, it is respectfully submitted that a new trial should be ordered as a sanction against the prosecution for the cumulative violations described above.

7. Since at least 2004, the Appeals Chamber has held that the obligation to disclose is as important as the obligation to prosecute,² and that the prosecution's compliance with its disclosure obligations is essential for a fair trial.³ It has issued clear warnings to the prosecution that violations of these obligations will not be tolerated.⁴ Before the Appeals Chamber, the prosecution certified in November 2012 that it had disclosed all exculpatory material.⁵ This certification has proven to be untrue.⁶

8. In addition, the Trial Chamber in this case continually warned to prosecution to comply with its disclosure obligations in full, yet the disclosure violations continue to be uncovered to this day—almost 5 years after the trial commenced.

9. This Tribunal is founded on the concept that when impunity for wrongdoing is ended, the wrongdoing will cease. This same principle must be applied to the prosecution, which has violated its disclosure obligations with impunity. Therefore, it is respectfully requested that the Trial Chamber grant a new trial in this case as a sanction for the prosecution's multiple violations of its disclosure obligations.

² *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 72; *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)

³ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 9

⁴ *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 215; *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 37; *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

⁵ *Corrigendum to Prosecution's Rule 98 bis Appeal Brief* (19 November 2012)

⁶ See *Prosecutor v Karadzic*, No. MICT-13-55-R90.3, *Request for Designation of Single Judge to Consider Appointment of Amicus Curiae Prosecutor to Investigate Contempt by Office of the Prosecutor* (19 May 2014)

The Cumulative Prejudice to the Defence

10. Should the Trial Chamber decline to order a new trial as a sanction against the prosecution, it should nevertheless order a new trial as a remedy for the prejudice suffered by Dr. Karadzic that has polluted the fairness of his trial.

11. While the Trial Chamber has found that Dr. Karadzic was not prejudiced by the individual violations of the prosecution's disclosure obligations, this motion asks the Chamber to consider whether the cumulative violations has prejudiced the defence such that a new trial is warranted.

12. Such an approach would be consistent with Appeals Chamber jurisprudence holding that a Trial Chamber must consider whether cumulative pleading defects in the indictment warrant a remedy greater than individual pleading defects.⁷

13. The withholding of hundreds of thousands of exculpatory documents is an extraordinary breach of the prosecution's disclosure obligations. The Tribunal does not have an investigative judge whose duty is to seek information from both sides equally during the pre-trial phase of a case. Instead, an accused at this Tribunal must count on the prosecution to reveal, not conceal, exculpatory material. Such material is the backbone of any defence, given the prosecution's superior, and often sole, access to collections of relevant material from governments, non-governmental organizations, and individuals.

14. The prosecution can and has obtained material through the execution of search warrants, a tool which is not available to the defence. The idea that favorable material within the possession of the prosecution would not be made available to the accused before the trial so that he can plan and prepare a coherent defence is antithetic to the very notion of a fair trial.

15. Dr. Karadzic was entitled to review the hundreds of thousands of pages of exculpatory material before he made his opening statement, before he began to cross examine the first prosecution witness, and certainly before he began his defence case. Because of the prosecution's violations of its disclosure obligations, Dr. Karadzic's trial

⁷ *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence* (18 September 2006) at para. 26; *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 217; *Ntabakuze v Prosecutor*, No. ICTR-98-41A-A, *Judgement* (8 May 2012) at para. 133

got off on the wrong foot. The volume of the violations and their continuing nature assured that his defence never recovered during the prosecution's case and continued to suffer during the defence case.

16. Dr. Karadzic was prejudiced because he was entitled to know the prosecution's case from the beginning, not learn it as he went along. Considering the nature of his case, where he had no personal involvement in the hundreds of crimes charged in his indictment, he could not have been expected to know the facts from his own knowledge or experiences. Therefore, the positions he has taken on the prosecution's case necessarily had to come from the material that was disclosed to him, or from his own investigation.

17. The fact that exculpatory material was not disclosed to him on time caused him to conduct exploratory, rather than focused cross examinations. This resulted in his cross examination time being curtailed and sometimes terminated throughout the trial.

18. Dr. Karadzic understands that the Trial Chamber has already held that he suffered no cumulative prejudice from the disclosure violations discovered through the end of the prosecution's case.⁸ However, inasmuch of those violations continued and multiplied during the defence case, he requests that the Trial Chamber take another look at the issue of cumulative prejudice. Dr. Karadzic intends to raise this issue on appeal if he is convicted, and would be remiss if he did not provide the Trial Chamber with an opportunity to re-assess the cumulative prejudice at the conclusion of the evidence in this case.

19. The Trial Chamber should find that the cumulative effect of the prosecution's withholding of hundreds of thousands of pages of exculpatory material, as well as over 400 witness statements and testimony, not only during its own case, but throughout the entire trial, prejudiced Dr. Karadzic, and that a new trial is required to remedy that prejudice.

Conclusion

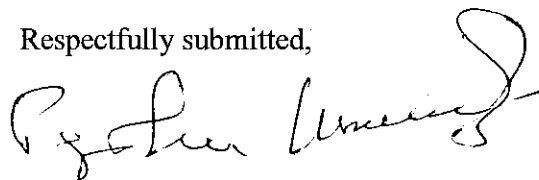
20. The prosecution has failed in its obligations to the Chamber and the defence. The Trial Chamber, as the guardian of the right of the accused to a fair trial, should not

⁸ *Decision on Accused's Motion for a New Trial for Disclosure Violations* (3 September 2012)

simply look the other way in embarrassment. When disclosure is a failure, the trial is a failure. The Trial Chamber should order a new, and fair, trial.

Word count: 1668

Respectfully submitted,

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

Radovan Karadzic