

THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-55-R90.3

THE PRESIDENT

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

Date Filed: 19 May 2014

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

REQUEST FOR DESIGNATION OF SINGLE JUDGE TO CONSIDER
APPOINTMENT OF AMICUS CURIAE PROSECUTOR
TO INVESTIGATE CONTEMPT BY OFFICE OF THE PROSECUTOR

Office of the Prosecutor:
Mr. Hassan Jallow

The Accused:
Dr. Radovan Karadzic

1. Dr. Radovan Karadzic respectfully requests, pursuant to Rule 90(C), that the President assign a Single Judge to consider the appointment of an *amicus curiae* prosecutor to investigate whether members of the Office of the Prosecutor have willfully interfered with the administration of justice at this Tribunal in violation of Rule 90(A) by failing to disclose all exculpatory evidence and falsely certifying that they had done so.

2. Rule 90(A) provides that “the Mechanism in the exercise of its inherent power may, with respect to proceedings before the ICTY, the ICTR, or the Mechanism, hold in contempt those who knowingly and willfully interfere with the administration of justice...”

3. Rules 90(C) provides that where there is reason to believe that a person may have violated Rule 90(A) and thereby be in contempt of the Mechanism, a Chamber or Single Judge shall request the President to assign a Single Judge who may (i) direct the Prosecutor to investigate; (ii) direct the Registrar to appoint an *amicus curiae* to investigate; or (iii) initiate proceedings himself.

4. Since there is presently no Chamber or Single Judge of the Mechanism seised of the *Karadzic* case, this request is made to the President.

5. Dr. Karadzic contends that there is reason to believe that members of the Office of the Prosecutor have knowingly and willfully interfered with the administration of justice by continually failing to disclose all exculpatory evidence and falsely certifying that they had done so.

6. On 19 November 2012, in a declaration signed by Senior Trial Attorney Hildegard Uertz-Retzlaff, the prosecution 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...”¹

7. This certification, which had been resisted by the prosecution,² was ordered by the Appeals Chamber pursuant to Rule 111(B) in connection with the prosecution’s appeal of Dr. Karadzic’s acquittal on Count One of the indictment for genocide in the municipalities of Bosnia.³

8. The certification soon proved to be untrue.

¹ *Corrigendum to Prosecution's Rule 98 bis Appeal Brief*

² *Response to Motion to Strike Prosecution's Rule 98 bis Appeal Brief* (4 October 2012)

³ *Decision on Motion to Strike Prosecution's Brief* (9 November 2012)

9. On 18 February 2013, the prosecution disclosed for the first time information provided by General Aleksandar Vasiljevic on 8 April 2009.⁴ 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.

10. The statement also contained 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.⁵

11. 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 April 1992 crimes in Zvornik municipality, and that he was not aware of the Serb paramilitary assistance being requested by the Bosnian Serbs.⁶

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

13. In fact, Ms. Uertz-Retzlaff was personally present at the interview of General Vasiljevic.⁷

14. 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

⁴ 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.

⁵ See Annex B at page 1, fourth paragraph

⁶ See Annex B at page 4, third and fourth paragraphs

⁷ See Annex B at page 1 under heading "Subject"

report.⁸ The Trial Chamber declined to provide any remedy for this violation due to lack of prejudice.⁹

16. Dr. Karadzic filed a *Motion to Dismiss Appeal and for Appointment of an Amicus Curiae Prosecutor* before the Appeals Chamber on 18 March 2013. The Appeals Chamber denied the motion, finding that dismissal of the appeal would be an “excessively punitive remedy” and that any motion for appointment of an *amicus curiae* prosecutor should be made to the Trial Chamber.¹⁰

17. By that time, the Residual Mechanism had acquired jurisdiction over contempt prosecutions at the ICTY.¹¹

18. Dr. Karadzic hoped that the proceedings before the Appeals Chamber and the prospect of contempt proceedings would have a salutary effect on the prosecution’s disclosure practices. He expected that all exculpatory evidence had now been disclosed to him. But the subsequent events proved him wrong. There have since been six findings by the Trial Chamber that the prosecution continued to violate its Rule 68 obligations.

19. On 21 November 2013, the Trial Chamber held that the prosecution had once again violated its disclosure obligations under Rule 68 by failing to disclose benefits it had provided to certain prosecution witnesses.¹² The exculpatory material had been in the prosecution’s possession since 1997, but was not disclosed until November 2013, despite the prosecution’s certification on 19 November 2012 that all Rule 68 material had been disclosed.¹³

20. On 16 January 2014, the Trial Chamber held that the prosecution had once again violated its disclosure obligations under Rule 68 by failing to disclose exculpatory information in its possession since October 2001 concerning responsibility for the

⁸ *Decision on Accused’s Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions* at para. 20

⁹ *Decision on Accused’s Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions* at para. 21

¹⁰ *Decision on Motion to Dismiss Appeal and for Appointment of an Amicus Curiae Prosecutor* (4 July 2013) at pp. 4-5

¹¹ Article 4(2) of Transitional Arrangements of the Mechanism

¹² *Decision on Accused’s Eighty-Third Disclosure Violation Motion* (21 November 2013) at para. 10 (confidential decision)

¹³ The material pertained to five witnesses whose testimony was replied upon by the prosecution to prove Count One of the indictment: Witness KDZ017 (Foca), Witness KDZ092 (Prijeedor), Mevludin Sejmanovic (Prijeedor), Witness KDZ605 (Bratunac), and Witness KDZ044 (Vlasenica).

massacre at Koricanske Stijena, a major event relied upon by the prosecution to prove the genocide allegations in Count One.¹⁴

21. On 21 January 2014, the Trial Chamber held that the prosecution had once again violated its disclosure obligations under Rule 68 by failing to disclose exculpatory information in its possession since 2009 showing that, contrary to the allegation that they intended to destroy the Bosnian Muslims, Bosnian Serb authorities assisted a Muslim citizen to cross a bridge from Zvornik to the FRY.¹⁵

22. On 18 March 2014, the Trial Chamber held that the prosecution had once again violated its disclosure obligations under Rule 68 by failing to disclose exculpatory information in its possession for many years concerning the 1992 events in Prijedor that refuted prosecution claims of an intention to destroy the Bosnian Muslims of that municipality.¹⁶ Prijedor is one of the municipalities that are the subject of the genocide charges in Count One

23. On 16 April 2014, the Trial Chamber held that the prosecution had once again violated its disclosure obligations under Rule 68 by failing to disclose exculpatory information in its possession since 1998 and 2001 concerning the 1992 events in Foca that refuted prosecution claims of an intention to destroy the Bosnian Muslims of that municipality.¹⁷ Foca is one of the municipalities that are the subject of the genocide charges in Count One.¹⁸

24. On 7 May 2014, the Trial Chamber held that the prosecution had once again violated its disclosure obligations under Rule 68 [and Rule 66(A)(ii)] by failing to disclose an interview of one of its witnesses wherein the witness explained that he had been told that prisoners at the Vuk Karadzic School in Bratunac were killed when they tried to escape. Bratunac is one of the municipalities that are the subject of the genocide charges in Count One.

25. The prosecution has provided varying explanations for its continuing violation

¹⁴ *Decision on Accused's Eighty-Fourth Disclosure Violation Motion* (16 January 2014) at para. 14

¹⁵ *Decision on Accused's Eighty-Fifth Disclosure Violation Motion* (21 January 2014) at para. 20

¹⁶ *Decision on Accused's Eighty-Eighth Disclosure Violation Motion* (18 March 2014) at para. 10

¹⁷ *Decision on Accused's Eighty-Ninth and Ninetieth Disclosure Violation Motions* (16 April 2014) at paras. 17-20

¹⁸ Notably, the witnesses whose statements were not disclosed were witnesses who had been interviewed by the prosecution in connection with the *Krnjelac* trial, of which Ms. Uertz-Retzlaff was the lead prosecutor.

of its disclosure obligations such as that the material was discovered as a result of searches undertaken for the purpose of other cases before this Tribunal using improved search criteria compared to those originally employed in this case,¹⁹ due to human error the material was not identified as material falling within Rule 68,²⁰ or by denying that the material was exculpatory in nature.²¹ These claims are impossible to verify absent an independent investigation.

26. If the prosecution had acted in good faith, as it claims, it has nothing to fear from an investigation. Where a *prima facie* case has been made out that an inaccurate certification was made before the Appeals Chamber, it is only right that an independent investigation be undertaken to determine the circumstances, including the *mens rea* of the prosecution and members of its staff.

27. An *amicus curiae* prosecutor can conduct interviews with prosecution staff, review internal prosecution documents, and report the results of his/her investigation to the Mechanism. The fact of such an investigation, and the accountability it would bring, would, in and of itself, contribute to deter future violations in this case and others. It would also demonstrate that Judges take violations of the prosecution's disclosure obligation seriously.

28. If the prosecution's explanation for these continuing violations is simply accepted at face value, there would be no investigation, and no remedy for its violation of its disclosure obligations and its inaccurate certification before the Appeals Chamber. This would promote the very impunity that the Tribunal was created to combat.

29. Dr. Karadzic believes that the prosecution's continuing violation of its disclosure obligations pursuant to Rule 68 demonstrate that the certification provided to the Appeals Chamber was false and that the facts provide reason to believe that members of the prosecution team in his case may have knowingly and willfully interfered with the administration of justice at the ICTY within the meaning of Rule 90(A).

¹⁹ *Prosecution Response to Karadzic's Eighty-Third Disclosure Violation Motion* (13 November 2013) at para. 2; *Prosecution Response to Karadzic's Eighty-Eighth Motion for Finding of Disclosure Violation and for Remedial Measures* (12 March 2014) at fn. 4

²⁰ *Prosecution Response to Karadzic's Eighty-Fourth Disclosure Violation Motion* (18 December 2013) at para. 2

²¹ *Prosecution Response to Karadzic's Eighty-Fifth Disclosure Violation Motion* (13 January 2014) at paras. 3-4; *Prosecution Response to Karadzic's Ninetieth Motion for Finding of Disclosure Violation* (21 March 2014) at paras. 2-8

30. Therefore, he respectfully requests that the President assign a Single Judge to consider appointing an *amicus curiae* prosecutor to investigate the matter pursuant to Rule 90(C)(ii).

Word count: 2013

Respectfully submitted,

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

Radovan Karadzic