

IT-95-5/18-PT  
D 12065 - D 12060  
07 NOVEMBER 2008

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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-PT

IN TRIAL CHAMBER No. 3

Before: Judge Patrick Robinson, Presiding  
Judge Iain Bonomy, Pre-Trial Judge  
Judge Michele Picard

Registrar: Mr. Hans Holthuis

Date Filed: 7 November 2008

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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MOTION FOR FULL DISCLOSURE  
OF SUPPORTING MATERIAL

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The Office of the Prosecutor:

Mr. Allan Tieger  
Mr. Mark Harmon

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves, pursuant to Rules 66(A)(i) and 73, for an order requiring the prosecution to disclose to him forthwith, copies of all supporting material which accompanied the indictments when confirmation was sought.

2. On 29 October 2008, the prosecution certified to this Trial Chamber that it had complied with Rule 66(A)(i).<sup>1</sup> Mr. Karadzic contends that this is not at all the case.

### **Serbian Transcripts**

3. In its *Decision on the Accused's Request that all Materials, Including Transcripts, be Disclosed to him in Serbian and Cyrillic Script* (25 September 2008), the Trial Chamber specifically ordered that:

The Trial Chamber notes that insofar as the Motion's request for "all materials" pertains to material disclosed pursuant to Rule 66(A) of the Rules, the materials supporting the indictment under Rule 66(A)(i) must indeed be communicated to the Accused in a language he understands. Additionally, statements of all witnesses whom the Prosecutor intends to call to testify at trial must also be provided in a language which the accused understands within a time-limit prescribed by the Trial Chamber in accordance with Rule 66(A)(ii). Further, given the importance of this material and the current self-represented status of the Accused, the Trial Chamber considers that **any transcripts disclosed pursuant to Rule 66(A) should be transcribed into a language that the accused understands rather than provided to him in audio format.**<sup>2</sup> (emphasis added)

4. The prosecution has not complied with this provision. Instead, on 29 October 2008, it served Dr. Karadzic with 64 B/C/S audio files of the testimony of witnesses whose transcripts comprised part of the supporting materials. Pursuant to the Trial Chamber's Decision, these 64 transcripts must be translated into Serbian before the prosecution will have been deemed to have complied with Rule 66(A)(i).<sup>3</sup>

5. Therefore, the Trial Chamber is respectfully requested to order the prosecution to comply with its decision and furnish the 64 transcripts to Dr. Karadzic in Serbian.

### **Serbian Statements**

6. Dr. Karadzic's comparison of the table of accompanying the supporting material and the statements translated into Serbian disclosed on 29 October 2008

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<sup>1</sup> *Notice Concerning Provision of Supporting Material for the Proposed Second Amended Indictment*

<sup>2</sup> Para. 11

<sup>3</sup> Were the accused required to listen to these tapes in lieu of transcripts, it would presumably take him 64 days, representing one day of listening for each day of court proceeding.

indicates that three witness statements have not been provided to him in Serbian. They are items #135, 171, and 172 of the table denoted Appendix "C"—Index to Supporting Materials.<sup>4</sup>

#### **Materials Covered by Delayed Disclosure Order**

7. Dr. Karadzic understands that at least one transcript which formed part of the supporting material is being withheld from him pursuant to a delayed disclosure order entered in the *Krajisnik* case, and recently "noted" as having continuing effect in his case.<sup>5</sup>

8. He contends that that when the prosecution consciously chooses to include in its supporting material for an indictment, the transcript of a witness who has been the benefit of a delayed disclosure order, it obligates itself to disclose the material to the accused pursuant to Rule 75(F)(ii). After all, a person whose transcript is included in the supporting material, may, or may not, ultimately be called as a witness at trial.

9. Supporting material for an indictment is the very first duty of disclosure for the prosecution. Rule 66(A) provides in pertinent part:

- (A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands
  - (i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused.

10. Significantly, Rule 66(A) is not made expressly subject to Rule 75(F), which is the basis upon which the delayed disclosure is being withheld from Dr. Karadzic.

11. Therefore, delayed disclosure orders cannot trump the prosecution's obligation to disclose supporting material to an accused at the outset of the case, regardless of whether it ultimately intends to call the witness at a trial on that indictment.

12. The distinct role played by the disclosure of supporting material in the process of the Tribunal is re-enforced by the provisions of Rule 72(A). That Rule sets the time for filing of preliminary motions "not later than thirty days after disclosure by the

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<sup>4</sup> Because the material is classified as confidential, Dr. Karadzic does not state the name of the witnesses in question in this motion, but can provide it to the prosecution in the event it does not understand his reference to the table.

<sup>5</sup> *Decision on Protective Measures for Witnesses* (30 October 2008) at para. 32

Prosecutor to the defence of **all** material and statements referred to in Rule 66 (A)(i).”  
(emphasis added)

13. If delayed disclosure orders from prior trials are found to automatically apply to supporting material, the accused will not have received **all** of the supporting material until sometime in the midst of his trial, 30 days before the witness who was the beneficiary of the delayed disclosure order appears as a witness. Delaying the filing of preliminary motions until the middle of a trial would frustrate the very purpose of Rule 72(A), which is to require that fundamental decisions on the indictment be resolved before the trial commences.<sup>6</sup>

14. Therefore, delayed disclosure orders cannot be said to “automatically” apply when the prosecution includes the transcript of the witness’ testimony in the supporting material for an indictment.

15. Instead, by deciding to include the transcript in the supporting material for an indictment, the prosecution triggers the provision of Rule 75(F)(ii) and must then discharge its Rule 66(A)(i) disclosure obligation by disclosing the transcript to the accused, subject to the other conditions of confidentiality imposed in the earlier case.

16. The Trial Chamber should therefore find that the prosecution has not complied with the disclosure requirements of Rule 66(A)(i) with respect to witnesses who are the beneficiaries of delayed disclosure orders, and order the prosecution to immediately disclose the transcript of the testimony of such witnesses included in the supporting materials to Dr. Karadzic pursuant to Rule 75(F)(ii)

#### **Supporting Material for Underlying Indictments**

17. The indictment for which confirmation or leave is now being sought is an amended indictment. Therefore, the Trial Chamber is, to an extent, relying on the decisions of the Judges who confirmed the earlier indictments now sought to be amended. Therefore, Dr. Karadzic contends that he is entitled to disclosure of all supporting material for all of the previous indictments.

18. The docket for this case indicates that 111 pages of supporting material were filed *ex parte* on 24 July 1995 in support of the indictment in case number 95-5, and an

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<sup>6</sup> Rule 72(A) requires that the preliminary motions be disposed of before the commencement of the opening statements.

unknown number of pages of supporting material was filed on 14 November 1995 in support of the indictment in case number 95-18. On 25 June 1996 and again on 26 July 1996, some 717 pages of supporting material were filed in connection with the Rule 61 confirmation procedure held at that time. Further supporting material was filed on 28 April 2000 in support of the first amended indictment.

19. Dr. Karadzic has been unable to find any jurisprudence on the issue of whether an accused is entitled to supporting material for the underlying indictments when an amended indictment is being sought. However, he contends that by seeking an amended indictment, as opposed to a completely new indictment, the prosecution relies on the confirmation of the earlier indictments, and therefore must disclose the supporting material in support of the earlier indictments as well.

#### **Other Representations Made by the Prosecution**

20. In seeking confirmation of the indictments in this case, the prosecution has made other *ex parte* representations to the confirming Judges. Dr. Karadzic respectfully moves the Trial Chamber to order disclosure of all of those representations.

21. The docket for this case indicates that the prosecution submitted a "brief" on 24 July 1995 in connection with the confirmation of the indictment in case no. 95-5, and another "brief" on 14 November 1995 in connection with the confirmation of the indictment in case no. 95-18. The decision confirming the 2000 indictment indicates that the prosecutor made oral representations to the confirming judge on 26 May 2000.

22. In the *Ojdanic* case, the confirming Judge ordered disclosure of all of this type of material.<sup>7</sup> Since all of the Judges who confirmed the earlier indictments against Dr. Karadzic have left the Tribunal, Dr. Karadzic respectfully requests that this Trial Chamber order the disclosure of all representations made by the prosecution to the confirming Judges when seeking indictments in his case.

#### **Conclusion**

23. Dr. Karadzic respectfully requests that the Trial Chamber order that the prosecution disclose all of the material he is entitled to receive pursuant to Rule 66(A)(i), as highlighted above. Once he has received all of that material, he can be in a position to

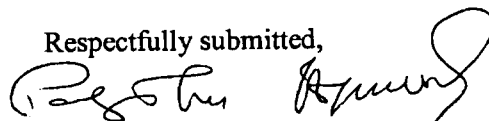
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<sup>7</sup> *Prosecutor v Milutinovic et al*, No. IT-99-37-PT, *Decision on Application by Dragoljub Ojdanic or Disclosure of Ex Parte Submissions* (8 November 2002)

file a response to the prosecution's motion to amend the indictment. The Pre-Trial Judge has ordered that the time for filing such a response will begin to run from the date he receives all supporting material in B/C/S.<sup>8</sup> Dr. Karadzic is still waiting for that to occur.

Word count: 1515

Respectfully submitted,



Dr. Radovan Karadzic

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<sup>8</sup> *Order on Provision of Supporting Material for Motion to Amend the Indictment (28 October 2008) at 2b*