

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Michèle Picard
Judge Christoph Flügge

Registrar: Mr Hans Holthuis

Date Filed: 3 December 2008

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

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

Public

MOTION FOR DISCLOSURE OF RULE 68 MATERIAL
OBTAINED UNDER RULE 70(B)

The Office of the Prosecutor

Mr Alan Tieger
Mr Mark Harmon

The Accused

Dr Radovan Karadžić

Introduction

1. Dr Radovan Karadžić has reason to believe that the Prosecution has in its possession a large number of documents relevant to this case that are not being disclosed pursuant to Rule 68 because of restrictions claimed under Rule 70(B). Documents in this class are likely to include exculpatory or potentially exculpatory information.
2. Dr Karadžić is concerned that no safe process is in place to ensure that Rule 70(B) material which is exculpatory or potentially exculpatory will finally be disclosed to him or otherwise be dealt with through “counter-balancing” measures in a manner consistent with his right to a fair trial.
3. Therefore, Dr Karadžić requests that the Prosecution be required to notify Dr. Karadžić and the Chamber of the number of Rule 68 documents and the number of pages being withheld from disclosure pursuant to Rule 70(B), and of the steps, if any, the Prosecution is taking to determine if the documents can be disclosed to the defence.

Argument

4. Article 21(2) of the Tribunal’s Statute provides that “In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute”. Article 22 of the Statute is about the protection of victims and witnesses. Nothing in that article applies to providers of information to the Prosecution who are not victims or witnesses. Article 21(3) imports the presumption of innocence as a fundamental procedural right of an accused. Article 21(4) extends several “minimum guarantees” to an accused, including, at 21(4)(a), “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”.
5. There is a presumption in the Statute that any curtailment of the above rights is unlawful. Exculpatory or potentially exculpatory information which is known to the Prosecution but withheld from an accused is prima facie in breach of the Tribunal’s Statute. A trial under those circumstances can be neither fair nor public; the presumption of innocence is rendered meaningless; and the right of an accused to be

informed of the nature and cause of the charges cannot be honoured.¹ The situation may be rectified in one of only three ways: full disclosure to the accused; dismissal of the corresponding factual allegations; or dismissal of the corresponding charges.

6. The Statute (Article 15) authorizes the judges to formulate rules of procedure and evidence: “The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.” The “other appropriate matters” cannot conceivably include a diminution of the Article 21 rights. Indeed, the grant of the rule-making power, which represents an unsupervised and unreviewable power of Tribunal judges, must be interpreted with the utmost caution. The primary principle of interpretation of any rule made pursuant to this power undoubtedly is that the meaning given to the rule must be consistent with the Statute.

7. The relief sought by Dr Karadžić proceeds on the argument that the Tribunal’s Rules of Procedure and Evidence, and in particular Rule 70(B) in combination with Rule 68, do not properly protect or otherwise compensate for his statutory right of access to exculpatory or potentially exculpatory information in the possession of the Prosecution. It is necessary to consider first the wording of Rule 70(B):

If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

8. This regime is limited to “information ... used solely for the purpose of generating new evidence”. This suggests that Rule 70(B) protection is to be claimed sparingly and for very limited purposes. As was stated by the Appeals Chamber of the International Criminal Court in reference to Article 54(3)(e) of the ICC Statute, which is similar in effect to Rule 70(B) of the ICTY Statute, “the investigatory activities of the Prosecutor

¹ *Prosecutor v. Naser Orić*, Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules, Trial Chamber, 13 December 2005, par. 20 (and sources cited therein). The same view was expressed by a Trial Chamber of the International Criminal Court in *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Consequences of Non-Disclosure of Exculpatory Materials, 13 June 2008 (henceforth *Lubanga Trial Chamber Decision*), par. 77-80, and approved by the ICC’s Appeals Chamber in *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of the Prosecutor, 21 October 2008 (henceforth *Lubanga Appeals Chamber Decision*), par. 42.

must be directed towards the identification of evidence that can eventually be presented in open court, in order to establish the truth and to assess whether there is criminal responsibility under the Statute”.²

9. Rule 70(B) distinguishes “initial information” from “new evidence”; but it does not follow that the initial information is not, in itself, potentially evidence. Any doubt that the initial information might take the form of evidence is dispelled at the end of the quoted provision (“shall in any event not be given in evidence”).³ Where the original information is in the form of evidence, it follows by definition that it may be exculpatory or potentially exculpatory. The question then arises how to regulate the Rule 70(B) regime consistently with the Statute where the information (or evidence) withheld from the accused pursuant to the rule is exculpatory or potentially exculpatory.

10. Rule 70(B) only partially explains what should happen in those cases where the provider’s consent is not given. What should happen, according to the rule, is that the “initial information and its origin shall not be disclosed” to the accused. This does not explain what further action the Prosecution must take in the case of such an impasse where the information in question is exculpatory or potentially exculpatory. With Rule 70 being incomplete in this sense, one looks for guidance to Rule 68.

11. The Tribunal judges have made Rule 68 “subject to the provisions of Rule 70”, yet as is clear from the discussion above, neither Rule 68 nor Rule 70 can derogate from the rights of the accused guaranteed in the Statute. Therefore, the subjection of Rule 68 to Rule 70 is effective only to the extent that it does not attenuate statutory rights. The relevant provisions of Rule 68 are as follows:

- (i) 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;
- (ii) without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically;
- (iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains

² *Lubanga Appeals Chamber Decision*, par. 41.

³ See further *Prosecutor v. Slobodan Milošević*, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, Appeals Chamber, 23 October 2002, par. 23.

material referred to in paragraph (i) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused; [...]

12. Rule 68(ii) is concerned with “relevant material”. The Prosecution has the same obligation to provide the accused with relevant material as it has for material described in Rule 68(i). Only the format of delivery is different. If “initial information” protected by Rule 70 may take the form of exculpatory or potentially exculpatory evidence, it is self-evident that it will far more often qualify as relevant material. Without in any way abandoning arguments that could be made for access to “initial information” under Rule 68(ii) as “relevant material”, Dr Karadžić wishes to focus the present motion on his entitlements in relation to Rule 68(i).

13. Rule 70(B) puts a brake on action under Rule 68(i). As mentioned above, the operation of Rule 70(B) gives rise to a need to regulate its consequences. A partial regulation is provided by Rule 68(iii), which urges the Prosecution to take steps to obtain the provider’s consent in cases where exculpatory or potentially exculpatory evidence is withheld from the accused pursuant to Rule 70(B). However, Rule 68(iii) does not explain what should happen if that consent is not obtained. Indeed, Rule 68(iii) is radically and dangerously incomplete, for it seems to suggest that the Prosecution is relieved of its obligations under Rule 68(i) merely by taking “reasonable steps” to obtain consent, irrespective of the ultimate outcome.

14. In order that the demonstrated incompleteness of the regime set out in Rules 68 and 70 does not have the effect of compromising the accused’s rights under Article 21 of the Statute, Dr Karadžić moves the Chamber to issue orders to ensure as much as possible the safe operation of the regime. For this purpose, every document in the possession of the Prosecution which is relevant to the present case, and for which Rule 70(B) non-disclosure is claimed, must be reviewed by the Prosecution for content that is exculpatory or potentially exculpatory. Dr Karadžić additionally requests that the Prosecution be ordered to inform him and the Chamber of the number of documents in this class that are considered exculpatory or potentially exculpatory and about the action being taken by the Prosecution to have them disclosed with the consent of the Rule 70(B) provider.

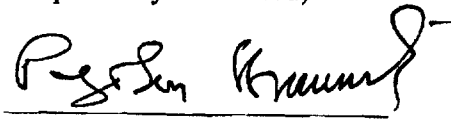
15. In the *Lubanga* case at the International Criminal Court, the Trial Chamber stayed the proceedings where it could not be certain that exculpatory material obtained by the

Prosecution pursuant to agreements such as that allowed by Rule 70(B) could be accessible to the Chamber and ultimately the accused. It reasoned that, under those circumstances, a fair trial was not possible. The Appeals Chamber agreed.⁴

16. By this motion, Dr. Karadžić wishes the Chamber to identify the existence and scope of any similar problem that may exist in his case.

Word count: 1901

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadžić', written over a horizontal line.

Radovan Karadžić⁵

⁴ *Lubanga Trial Chamber Decision*, par. 94, and *Lubanga Appeals Chamber Decision*, par. 97.

⁵ Dr. Karadžić wishes to acknowledge with gratitude the contribution of Dr. Alexander Zahar of Griffith Law School, Australia, to the preparation of this motion.