



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No.: IT-95-17/1-PT
Date: 5 June 1998
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding
Judge Antonio Cassese
Judge Richard May

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Date: 5 June 1998

PROSECUTOR

v.

ANTO FURUNDŽIJA

**THE TRIAL CHAMBER'S FORMAL COMPLAINT TO THE PROSECUTOR
CONCERNING THE CONDUCT OF THE PROSECUTION**

The Office of the Prosecutor:

Mrs. Patricia Viseur-Sellers
Mr. Michael Blaxill

Counsel for the Accused:

Mr. Luka Misić
Mt. Sheldon Davidson

I. INTRODUCTION

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal") is seised of the matter of the *Prosecutor v. Anto Furundžija*. Trial is scheduled to commence on 8 June 1998.

2. This case, on the part of the Office of the Prosecutor ("Prosecution"), has been marked by a consistent pattern of non-compliance with the orders of the Trial Chamber, failure to comply with obligations imposed by the Rules of Procedure and Evidence of the International Tribunal ("Rules"), late and/or last minute filing of substantial motions and failure to provide the Trial Chamber with satisfactory reasons for such conduct. The Trial Chamber, in attempting to ensure equal rights for all parties appearing before it and pursuant to its obligation to protect the rights of the accused under Article 21 of the Statute of the International Tribunal ("Statute"), has, in a series of orders, expressed its increasing concern over the handling of this matter by the Prosecution.

3. Such concern has culminated in the Trial Chamber's oral decision of 29 May 1998, confirmed in a written decision issued on 2 June 1998 (Official Record at Registry Page ("RP") RP D902 - D904), expressing the Trial Chamber's dismay at what it considers to be conduct close to negligence in the Prosecution's preparation of this case. Recalling also that the Trial Chamber has undertaken to issue a separate written decision for these findings of misconduct on the part of the Prosecution, the Trial Chamber, *proprio motu*, **HEREBY ISSUES** the following formal complaint to the Prosecutor.

II. THE ROLE OF THE TRIAL CHAMBER

4. The Trial Chamber considers its role in protecting the rights of the accused, as enshrined in Article 21 of the Statute and supplemented in the Rules, to be of utmost importance.

In view of the gravity of the offences falling within the jurisdiction of the International Tribunal, all Trial Chambers have the right to expect the highest standards of professionalism from counsel who appear before them. Needless to say, the parties also have a right to be represented by counsel who conduct their respective cases with the utmost integrity, competence and professionalism at all times. These criteria are reflected in all professional codes of conduct which counsel appearing before the International Tribunal are bound by. The Trial Chamber notes that whilst Defence Counsel appearing before the International Tribunal are bound by *The Code of Conduct for Defence Counsel Appearing Before the International Tribunal* (IT/125, 12 June 1997), the Prosecution are not. This Trial Chamber has found in another case that it has no jurisdiction to consider the matter of a Code of Conduct for the Prosecution (Order on Defendant's Motion for a Prosecutorial Code of Conduct, 12 May 1998, *Prosecutor v. Milan Kovačević*, IT-97-24-PT, RP D5305 - D5306).

5. The Trial Chamber is of the view that it should not have to remind or prompt the Prosecution of its obligations, nor should it have to pursue the Prosecution in order to ensure that deadlines are kept and that orders or decisions are complied with in their entirety. Where an accused has been deprived of his liberty and is in the custody of the International Tribunal, it is reasonable for a Trial Chamber to expect a higher level of urgency and expediency in the handling of cases. An accused who is being held in detention is entitled to have his case dealt with as a priority: he remains an innocent man, accused of serious crimes, unless a finding of guilt is made. Being seised of the matter, the Trial Chamber's role is, *inter alia*, to ensure that the Prosecution handles its case in a manner which is both fair and expeditious and does not prejudice the rights of the accused under Article 21 of the Statute or the provisions in the Rules.

6. Whilst the Trial Chamber is aware of the constraints under which both parties operate, it cannot condone inaction, inefficiency, shoddiness and incompetence of any sort from the parties appearing before it. The Trial Chamber believes that professionalism requires the Prosecution to be particularly diligent, for example, in searching its evidence, records and databases for information relevant to the case in hand and locating witnesses as a matter of urgency.

7. In the interests of a healthy working environment, the Trial Chamber encourages fairness, honesty and professional courtesy between the parties who appear before it. This may, in certain circumstances, entail assistance to the other party that may not, on a rigid and narrow reading, be technically required by the Rules. The discovery process exists to enable the accused to examine, in advance of trial, the evidence against him and to build his defence to the allegations against him. In particular, it appears to the Trial Chamber that Defence Counsel can reasonably expect to be informed by the Prosecution if witnesses called to testify against his or her client have testified in other proceedings. Provision of the transcripts of such evidence, if the testimony was given to the International Tribunal, should be considered to be within the remit of the discovery process and treated as an obligation upon the Prosecution.

III. THE CONDUCT OF THE PROSECUTION

8. In this matter, the pre-trial phase is nearing completion. The date set for trial was discussed with the parties at a status conference on 9 March 1998 and it was tentatively agreed that trial should commence in the first week of June 1998. Trial was in fact set for 8 June 1998 in the Trial Chamber's Scheduling Order of 30 March 1998 (RP D239 - D240).

Despite the failings of the Prosecution, detailed below, the Defence has repeatedly confirmed to the Trial Chamber that it remains ready to commence trial on 8 June 1998. The Trial Chamber understands this to mean that the Defence, whilst highly inconvenienced by the actions of the Prosecution, is proceeding to trial with the defence of Anto Furundžija unprejudiced and that any harm that may have been suffered has been remedied.

9. The Trial Chamber draws the attention of the Prosecutor to the following instances which demonstrate the conduct causing grave concern to the Trial Chamber, which has led to repeated warnings by the Trial Chamber culminating in this formal complaint:

(a) Failure of the Prosecution to comply with the Trial Chamber's Order for Filing issued on 19 December 1997 (RP D21 - D22) when filing its Response to the Defence Motion of 6 April 1998 (RP D244 - D256, D257 - D259) and failure to seek the leave of the Trial Chamber before doing so. The Prosecution furthermore failed to satisfy the Trial Chamber of a justifiable reason for its conduct.

(b) Failure of the Prosecution to comply with the Trial Chamber's Order of 13 February 1998 (RP D80 - D82), to, *inter alia*, supply the Trial Chamber with the statements of witnesses and other documentary material which the Prosecution intends to rely on at trial "as expeditiously as possible". This Order was only complied with to the satisfaction of the Trial Chamber on 2 June 1998.

(c) Failure of the Prosecution to comply with oral undertakings given to the Trial Chamber on 9 March 1998 whereby it promised that certain Witness Statements arising out

of the Prosecution's investigations in the field would be filed "at the end of March 1998". These undertakings were finally met to the satisfaction of the Trial Chamber on 2 June 1998.

(d) Failure of the Prosecution to address satisfactorily issues specifically requested by the Trial Chamber in its order of 13 March 1998 (RP D230 - D232); that is, details of how Anto Furundžija is alleged to have violated Article 7(1) of the Statute. This failure to address properly the order of the Trial Chamber required a further order on 29 April 1998 (RP D340 - D342), which was finally complied with by way of two documents filed by the Prosecution on 1 May 1998 (RP D344 - D346) and 4 May 1998 (RP D348 - D350).

(e) Failure of the Prosecution to comply with its Rule 66 disclosure obligations. The Prosecution failed in its obligation to provide, "not later than sixty days before the date set for trial", copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial. On 29 April 1998, the failure of the Prosecution was already the subject of grave criticism by the Trial Chamber in its various orders issued on that date. The Trial Chamber's Scheduling Order of 29 April 1998 (RP D340- D342) specifically required the Prosecution to provide full disclosure by 1 May 1998 at the very latest. At the Status Conference on 29 May 1998, it emerged that the order had not been complied with and discovery had yet to be completed.

The Trial Chamber is particularly concerned that on 29 May 1998, on the day of a Status Conference and ten days before the commencement of trial, the Prosecution filed a motion seeking the guidance of the Trial Chamber on disclosure to the Defence of transcripts from other proceedings before the International Tribunal (Prosecutor's Motion to Determine Protective Measures of Redacted Transcripts of Prosecution Witnesses Testimony, RP D826 - D862). The testimony of the relevant witnesses had been given either before or shortly after the accused had come into the custody of the International Tribunal. It is also deeply disturbing for the Trial Chamber to discover that a Witness Statement from the main witness against Anto Furundžija was only disclosed to the Defence on 22 May 1998, having been received in the office of the Prosecution on 1 November 1997. Furthermore, although the Defence had been able to locate and interview an important witness, Victim B, the Prosecution only discovered his/her whereabouts at the end of April 1998 and interviewed the

witness on 19 and 20 May 1998. As at 29 May 1998, the Prosecution had yet to decide whether it would call this material witness to testify for the Prosecution.

As a result of these failings on the part of the Prosecution, the Trial Chamber again issued a decision on 29 May 1998 (RP D902 - D904) ordering the Prosecution to deal with these unresolved matters. It appears from the filings of the Prosecution on 2 June 1998 (D907 - D1381, D1382 - D1385) that the discovery process is now completed.

10. In addition, the Trial Chamber draws the attention of the Prosecutor to the following decisions and orders, wherein the Trial Chamber expresses its increasing concerns about the handling of this case by the Prosecution:


- (a) Scheduling Order of 29 April 1998 (RP D340 -D342);
- (b) "Decision on Motion of Defendant Anto Furundžija to Preclude Testimony of Certain Prosecution Witnesses" of 29 April 1998 (RP D333 - D334);
- (c) Scheduling Order of 8 May 1998 (RP D363 - D364); and
- (d) Decision of 2 June 1998 (RP D902 - D904).

IV. CONCLUDING REMARKS OF THE TRIAL CHAMBER

11. This Trial Chamber is of the view that a Trial Chamber's powers of contempt are to be sparingly used in the most extreme of cases where there has been interference with the course and administration of justice. Rule 77 of the Rules, which deals with contempt, does not cover situations such as have arisen in this instance. Furthermore, whilst it is most concerned at the handling of this case, the Trial Chamber believes that the misconduct of the Prosecution falls short of knowing and wilful interference with the administration of justice, and therefore also falls outside the inherent contempt powers of the Trial Chamber recognised in Rule 77 (F).

12. The Trial Chamber is aware that under the Statute and Rules, it has no express powers of discipline over members of the Prosecution. Mindful also of its overriding obligation to ensure fairness and equity in the proceedings, and a fair and expeditious trial for the accused, and having expressed its dismay at the conduct of the Prosecution, the Trial Chamber hereby refers this formal complaint to the Prosecutor to be dealt with as she determines fit, in the hope that no Trial Chamber of the International Tribunal will again be faced with a similar situation.

Done in both English and French, the English text being authoritative.



Florence Ndepele Mwachande Mumba
Presiding Judge

Dated this 5th day of June 1998
At The Hague,
The Netherlands.

[Seal of the Tribunal]