



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-98-30/1-R.2
Date: 25 August 2006
Original English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, President
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision: 25 August 2006

PROSECUTOR

v.

ZORAN ŽIGIĆ a/k/a "ZIGA"

**DECISION ON ZORAN ŽIGIĆ'S REQUEST FOR REVIEW
UNDER RULE 119**

The Office of the Prosecutor:

Carla Del Ponte

Defence:

Zoran Žigić

1. The Appeals 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 ("Tribunal") is seized of Zoran Žigić's "Request for Review Under Rule 119" ("Request"), filed by Zoran Žigić ("Žigić") on 23 May 2006. The Prosecution filed its Response to the Request on 13 July 2006.¹

2. On 5 August 2006, Žigić filed his Reply to the Prosecution Response, with the assertion that the Appeals Chamber should accept it as validly filed because "prescribed time-limit for response does not comprehend court recess and holiday time of Defence counsel".² The Appeals Chamber does not agree. The recess of the Tribunal does not mean that time-limits prescribed under the Rules and the relevant Practice Directions stop running, and this ground does not constitute good cause within the meaning of Rule 127 of the Rules of Evidence and Procedure ("Rules").³ As Žigić has not presented any arguments to establish good cause for his reply to be validly received, the Appeals Chamber will not consider it further. Accordingly, the Appeals Chamber need not consider the "Prosecution Request to File a Further Response, and the Further Response", filed by the Prosecution in response to the Reply.⁴

3. Žigić claims that his Request "deals with clear and intentional concealment of exculpatory material",⁵ which the Prosecution was obligated to disclose to him under Rule 68 of the Rules.⁶ He annexes to his Request, "excerpts from a 502-page document, PROSECUTION'S SUBMISSION OF SUMMARIES OF WITNESS TESTIMONY PURSUANT TO RULE 73bis (B) (iv)/ in English /compiled on 17 September 1999" ("Prosecution Summary"), which he claims to be relevant to his Request.⁷

4. Žigić alleges that he was first made aware of the Prosecution Summary, created and signed on 17 September 1999, by a co-accused.⁸ He says that in January 2000, he alerted his Defence Counsel to the existence of the document and the exculpatory nature of it with respect to charges alleged against him. He asked his Defence Counsel to obtain the Prosecution Summary in full from the Prosecution. He claims that his Defence Counsel filed several requests seeking access to it during trial, but the Prosecution failed to disclose it. He claims that the Trial Chamber did nothing

¹ Prosecution Response to Zoran Žigić's "Request for Review Under Rule 119", 13 July 2006 ("Response").

² Reply to "Prosecution's Response to Zoran Žigić's 'Request for Review Under Rule 119'", 5 August 2006 ("Reply").

³ *Prosecutor v Radoslav Brđanin*, Case No: IT-99-36-A, Decision on Motion for Extension of Time for the Filing of Prosecution Response, 20 July 1995; *Momir Nikolić v Prosecutor*, Case No: IT-02-60/1-A, Decision on Second Defence Motion to Enlarge Time for Filing of Appellant's Reply Brief, 2 August 2004.

⁴ 14 August 2006.

⁵ Request, para. 2.

⁶ *Ibid.*

⁷ *Ibid.*, para. 3.

⁸ *Ibid.*, paras 4-5.

to sanction the Prosecution's failure to disclose pursuant to Rule 68*bis* of the Rules.⁹ He argues that this failure on the part of the Trial Chamber resulted in a legal error to his detriment because the Prosecution had an obligation to disclose the Prosecution Summary to him pursuant to Rule 68 of the Rules. Further, he argues that a factual error also occurred because the Prosecution Summary contained exculpatory evidence with respect to charges alleged in the indictment against him.¹⁰

5. Žigić claims that his Defence Counsel continued to request the document during his appeal proceedings, but the Prosecution did not disclose it and despite bringing this to the attention of the Pre-Appeal Judge, the Pre-Appeal Judge did not sanction the Prosecution for this failure pursuant to Rule 68*bis* of the Rules.¹¹ Žigić claims that at his appeal hearing, his Defence Counsel addressed the issue of the Prosecution's failure to disclose the Prosecution Summary pursuant to Rule 68 of the Rules. He claims that Counsel for the Prosecution claimed to be unaware of the Prosecution Summary and said that it was not mentioned in Žigić's Appeal Brief when it was in fact mentioned at paragraph 141 of that brief.¹² Žigić claims that the Appeals Chamber failed to react to the non-disclosure by the Prosecution at the appeal hearing or during sentencing and that its failure is unacceptable in light of the importance of the Prosecution Summary to the issues in his Appeal.¹³ Žigić alleges that the Appeal Judgement was rendered on 28 February 2005, without the issue of the Prosecution's failure to disclose the Prosecution Summary being resolved. Following the appeal hearing, he claims he continued to send requests to the Prosecution and the Registrar for disclosure of the Prosecution Summary and that he finally received the document in October 2005.¹⁴ Žigić alleges that the above makes it obvious "that the Prosecution intentionally obstructed and concealed the controversial document"¹⁵ and that had it been disclosed to him the Prosecution would have had to withdraw the charges against him for the killing of Bećir Medunjanin.¹⁶

6. Žigić asks the Appeals Chamber to consider the excerpts from the Prosecution Summary in his Request for Review arguing that the material shows that while he was accused of killing Bećir Medunjanin in 1998, the document was created after the indictment was brought, which is "unacceptable and a gross violation of the law".¹⁷ He says that the Prosecution Summary reveals

⁹ *Ibid.*, para. 5.

¹⁰ *Ibid.*, para. 6.

¹¹ *Ibid.*, paras 7-8.

¹² *Ibid.*, para. 13.

¹³ *Ibid.*, para. 15.

¹⁴ *Ibid.*, para. 16.

¹⁵ *Ibid.*, para. 17.

¹⁶ *Ibid.*, para. 18.

¹⁷ *Ibid.*, para. 9.

that the Prosecution team did not know how to accuse him of killing Bećir Medunjanin.¹⁸ In the Prosecution Summary, the following note precedes the summaries of witness statements:

In none of these statements is ŽIGIĆ mentioned as being a participant (as far as I can see). As ŽIGIĆ is not accused of being a “superior”, I do not see how we can accuse him of this death without some evidence of his participation. Unless the investigators can come up with something more, I do not think we have any option but to omit this from this part of the schedule, as it applies to ŽIGIĆ, we can put it in the general persecution against Kvočka et al., because it happened at Omaska [sic] but without more it will have to go from this part.

7. In its Response, the Prosecution asks the Appeals Chamber to dismiss the Request as it does not meet the requirements of Rule 119 of the Rules.¹⁹ The Prosecution claims that the Prosecution Summary does not constitute a “new fact” because it was available and known to Žigić during the trial and appeal proceedings. It says that the document was filed with the Registry prior to the commencement of the trial and referred to repeatedly throughout the trial and appeal proceedings by Žigić’s Defence Counsel.²⁰ The Prosecution points out that the submissions made by Žigić in his Request, concerning the exculpatory nature of the Prosecution Summary, were previously made during trial and appeal.²¹ In any event, the Prosecution claims that the Prosecution Summary does not contain exculpatory material pursuant to Rule 68, and that it has no relevance to Žigić’s conviction for the murder of Bećir Medunjanin, such that to ignore it would lead to a miscarriage of justice.²²

Analysis

8. To establish circumstances warranting a review pursuant to Rule 119, the moving party must demonstrate that there is a new fact, that that new fact was not known to the moving party at the time of the original proceedings, that lack of discovery of that new fact was not the result of lack of due diligence by the moving party and that the new fact could have been a decisive factor in reaching the original decision.²³ In this case, the new fact that Žigić purports to bring is the Prosecution Summary and, in particular, the note contained in that Summary. However, neither the

¹⁸ *Ibid.*, paras 9-10.

¹⁹ Response, para. 3.

²⁰ *Ibid.*, para. 4.

²¹ *Ibid.*, para. 5.

²² *Ibid.*, para. 6.

²³ *Prosecutor v. Josipović*, Case No. IT-95-16-R2, Decision on Motion for Review, 7 March 2003, para. 12; *Prosecutor v. Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, para. 8; *Prosecutor v. Tadić*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, para. 20; *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision on Prosecutor’s Request for Review or Reconsideration, 31 March 2000, para. 41; *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006.

Prosecution Summary nor the note contained within it constitute a new fact because it was available and known to Žigić at trial and on appeal.

9. The Prosecution Summary was filed by the Prosecution with the Registry on 17 September 1999 and a copy was supplied to Žigić's Counsel at that time.²⁴ It was specifically referred to by Counsel for Žigić during the closing submissions of his trial on 18 July 2001,²⁵ and Counsel for Žigić told the Appeals Chamber during the appeals hearing on 26 March 2004, that the Prosecution Summary had been disclosed to Žigić following its filing by the Prosecution on 17 September 1999.²⁶ It is abundantly clear from the Appellant's Brief of Argument filed by Žigić during his appeal that he was aware of the Prosecution Summary from the time of his trial and sought to rely upon it during his trial and appeal to exculpate himself for the murder of Bećir Medunjanin.²⁷ In these circumstances, there is no basis at all for Žigić's allegation that the Prosecution concealed the Prosecution Summary from him and that both the Trial Chamber and Appeals Chamber failed to force the Prosecution to disclose the material, or to sanction the Prosecution for its failure to disclose pursuant to Rule 68*bis* of the Rules.

10. This is the third motion that Žigić has filed before the Appeals Chamber making baseless and frivolous claims with respect to the integrity of the Appeals Chamber Judgement against him. The first, a request for reconsideration of the Appeals Chamber's judgement, was found frivolous,²⁸ and the second, an application for a finding that he was denied a fair trial due to mistakes made by his assigned Counsel, was dismissed as being without merit.²⁹ Likewise, this Request for review of the Appeals Chamber Judgement is completely without merit. Further, the blatantly untruthful allegations made by Žigić regarding his ignorance of the Prosecution Summary, and attempts by the Prosecution to conceal it from him, go beyond being frivolous but constitute an abuse of the Appeals Chamber's proceedings. Žigić should take this as a stern warning from the Appeals Chamber that any further attempts to seize the Appeals Chamber with similarly unfounded motions will result in the Appeals Chamber imposing strict sanctions.

11. On the basis of the foregoing, the Request is **DISMISSED**.

²⁴ Prosecution Response, para. 9; Registry pp. D4954-D4453.

²⁵ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30-T, 18 July 2001, Transcript pp. 12626-12627.

²⁶ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, 13 June 2003, Transcript pp. 531-532.

²⁷ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appellant's Brief of Argument, 21 May 2002, para. 141.

²⁸ *Prosecutor v. Zoran Žigić a/k/a "Ziga"*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 8.

²⁹ *Prosecutor v. Zoran Žigić a/k/a "Ziga"*, Case No. IT-98-30/1-A, Decision on Complaint Against Defence Counsel Slobodan Stojanović, 4 July 2006.

Done in English and French, the English version being authoritative.

Done this 25th day of August 2006,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]