

UNITED
NATIONS

IT-97-24-A
A 4027 - A 4023
20 JULY 2004

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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: IT-97-24-A

Date: 20 July 2004

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Theodor Meron, Presiding Judge
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca**

Registrar:

Mr. Hans Holthuis

Decision of:

20 July 2004

THE PROSECUTOR

v.

MILOMIR STAKIĆ

**DECISION ON PROSECUTION'S MOTION TO DISALLOW A GROUND OF APPEAL
AND TO FILE A FURTHER RESPONSE**

Counsel for the Prosecutor:

Mr. Norman Farrell

Counsel for the Defence:

Mr. Branko D. Lukić

Mr. John R. Ostojic

Case No. IT-97-24-A

20 July 2004

1. Counsel for the Prosecution filed the “Prosecution’s Motion to Disallow a New Ground of Appeal in ‘Milomir Stakić’s Brief in Reply’ and to File a Further Response to the Brief in Reply” on 8 June 2004 (“Motion”). The Appellant, Milomir Stakić (“Appellant”), filed “Milomir Stakić’s Appellant’s Response in Opposition to the Prosecution’s Motion to Disallow a New Ground of Appeal” (“Response”) and “Milomir Stakić’s Appellant’s Motion for Leave to File His Response in Opposition to the Prosecution’s Motion to Disallow a New Ground of Appeal, *Instante*” (“Request for Leave to File Response”) on 6 July 2004.

2. The Response was due ten days after the filing of the Motion, thus on 18 June 2004.¹ The filing on 6 July was therefore 18 days out of time. The Request for Leave to File Response contends that the Appellant could not file his Response on time because one of the Appellant’s counsel did not receive the Motion until 17 June, due to the absence of counsel from The Hague and “communications technical difficulties between defense counsels’ respective offices.”² Problems of communication among the Appellant’s counsel do not constitute good cause for an extension of time. Even accepting that counsel only received the Motion on 17 June, the Request for Leave to File Response does not explain why the Response was not filed within ten days of that date, on or before 28 June 2004. Consequently, the Request for Leave to File Response is dismissed.

3. The Motion first contends that the Appellant’s Brief in Reply (“Reply Brief”) improperly expands one of his grounds of appeal. The Motion seeks disallowance of the expanded ground or, in the alternative, leave to respond to it.

4. Ground II.B of the Appellant’s Notice of Appeal (“Notice of Appeal”) asserts that the Trial Chamber erred in dismissing his motion for a mistrial following certain alleged discovery violations by the Prosecution.³ The Appellant’s Brief on the merits (“Appellant’s Brief”) set forth the factual predicate of this ground of appeal:

161. Essentially, after the conclusion of the Prosecution’s case in chief, the Prosecution disclosed over thirty witness statement excerpts from crucial witnesses pursuant to Rule 68, including significant exculpatory material, which had been in the possession of the Prosecution, before the commencement of trial, and which had not been previously identified, or disclosed, despite requests from the Defense. These statements were exculpatory and contradicted the evidence and arguments advanced by the Prosecution.

...

¹ “The opposite party shall file a response within ten days of the filing of the motion.” Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, 7 March 2002, para. 11.

² Request for Leave to File Response,

³ Appellant, Milomir Stakić’s Notice of Appeal, 1 September 2003, p. 5.

166. This violation on the part of the Prosecution resulted in the inability of the defense to properly prepare for trial. While the Prosecution had in excess of two years to analyze the statements and evidence which formed the backdrop of its case, the defense was not given an opportunity to have prompt and full access to the same, and thus was denied the opportunity to confront witnesses and cross examine them based on the non-disclosed material. These violations of the Tribunal's statute and rules by the Prosecution both separately and collectively warrant that Stakic be granted a new, and fair trial.⁴

5. The Appellant's Brief therefore focused on the discovery of matters that were subject to his mistrial motion, i.e. the statements that were disclosed following the close of the Prosecution's case in chief.

6. In the Reply Brief, however, the Appellant raised a new objection, namely that the Prosecution improperly failed to disclose any materials relating to his co-perpetrators. The Appellant contends not that the Prosecution disclosed such materials belatedly, but that no such materials were disclosed at all:

63. It is respectfully submitted inasmuch as the trial chamber found Milomir Stakić guilty as an "indirect co-perpetrator" the Prosecution to this day has not produced any Rule 68 materials in its possession of these alleged co-perpetrators such as Simo Drljaca, Milan Kovačević, Colonel Vladimir Arsić, and Major Radmilo Željaja.

64. The Prosecution's narrow interpretation of the requirements of Rule 68, in a case of co-perpetratorship, only to provide materials relating to Milomir Stakic reveals and demonstrates the realization that a fair trial was denied and the Prosecution's streamlined tactic of self-governance is flawed. Recently the Appeals Chamber in *Krstić* stated that it "... will not tolerate anything short of strict compliance with disclosure obligations..."

65. It is respectfully submitted that the Prosecution's dilatory tactics and refusal to disclose any Rule 68 materials relating to alleged co-perpetrators denied Appellant a right to a fair trial, which constitutes a miscarriage of justice, thereby invalidating the judgement of 31 July 2003.⁵

The Appellant also mentions the non-disclosure of materials relating to co-perpetrators in paragraphs 127 and 148 of the Reply Brief.

7. The Prosecution's Motion contends that these paragraphs in the Reply Brief improperly introduce a new argument, namely that the trial was unfair because the Prosecution has never disclosed any exculpatory information with regard to the Appellant's alleged co-perpetrators.

8. The Prosecution appears to be correct that the Appellant did not raise any argument regarding disclosure of information regarding co-perpetrators in his Notice of Appeal or in the

⁴ Milomir Stakić's Re-Filed Appellant's Brief in Support of His Notice of Appeal, 9 March 2004, paras. 161, 166 (footnote omitted).

⁵ Milomir Stakić's Brief in Reply, 20 May 2004, paras. 63-65 (footnote omitted).

Appellant's Brief. The Appeals Chamber has not located any such argument in any submission prior to the Reply Brief.

9. In the circumstances, the Appeals Chamber concludes that the Prosecution's request for disallowance is well-founded. The Appellant's arguments regarding non-disclosure of materials relating to co-perpetrators are therefore disallowed and will not be considered on appeal.

10. The Motion also raises a second matter. In the Appellant's Brief, the Appellant contended that the Trial Chamber erred in relying on certain facts that were not pleaded in the indictment, including "7 June 1992 Serbian Assembly."⁶ The Prosecution responded that "the 7 June 1992 Assembly is sufficiently outlined in paragraph 7 of the Indictment."⁷ In the Reply Brief, the Appellant states that his reference to the "7 June 1992 assembly" was a typographical error and that the correct date is 7 January 1992. The Appellant then appears to argue that the Prosecution's decision to discuss the 7 June assembly, rather than the 7 January assembly, "plainly supports the conclusion that [the Prosecution] had no reasonable response."⁸ The Prosecution disputes this latter point and seeks leave to respond to the Appellant's argument regarding the 7 January assembly.

11. The Chamber notes the Appellant's clarification of the typographical error in the Appellant's Brief. However, there is no reason to penalize the Prosecution for having responded to the Appellant's Brief as it was written or to deny the Prosecution the right to respond now that the error has been corrected. The Prosecution will therefore be given an opportunity to file an addendum to its Response Brief addressing the Appellant's argument with regard to the 7 June assembly. The Appellant will then have the opportunity to file an addendum to his Reply Brief.

12. The Motion is therefore **GRANTED**. The Request for Leave to File Response is **DISMISSED**. It is **ORDERED** that:

- (a) the Appellant's arguments regarding non-disclosure of materials relating to co-perpetrators, including the statements to that effect in paragraphs 63 through 65, 127 and 148 of the Reply Brief, are disallowed and will not be considered on appeal;
- (b) the Prosecution may file, not later than 10 days following the date of this decision, an addendum to the Prosecution Response Brief not exceeding 5 pages in length relating to the "7 January 1992 Serbian Assembly";

⁶ Appellant's Brief, para. 37(c).


⁷ Prosecution's Response Brief, 8 April 2004, para. 2.4.

⁸ Reply Brief, para. 14.

- (c) the Appellant may file, not later than 10 days following the date of filing of the Prosecution's addendum, an addendum to his Reply Brief not exceeding 2 pages in length relating only to points raised in the Prosecution's addendum.

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

Dated this 20th day of July 2004,
At The Hague,
The Netherlands.


Judge Theodor Meron
Presiding Judge

[Seal of the International Tribunal]