



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-98-32/1-A

Date: 12 May 2011

Original: English

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. John Hocking

Decision of: 12 May 2011

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

CONFIDENTIAL

**DECISION ON MILAN LUKIĆ'S MOTION FOR
REMEDIES ARISING OUT OF DISCLOSURE
VIOLATIONS BY THE PROSECUTION**

The Office of the Prosecutor

Mr. Paul Rogers

Counsel for Milan Lukić

Mr. Tomislav Višnjić and Mr. Dragan Ivetić

Counsel for Sredoje Lukić

Mr. Đuro Čepić and Mr. Jens Dieckmann

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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 ("Appeals Chamber" and "Tribunal", respectively) is seised of "Milan Lukic's [*sic*] Motion for Remedies Arising out of Disclosure Violations by the Office of the Prosecutor Including Stay of Proceedings", filed publicly with confidential annexes on 5 April 2011 ("Motion") by Milan Lukić ("Lukić"). The Office of the Prosecutor ("Prosecution") responded on 15 April 2011,¹ and Lukić replied on 26 April 2011.²

I. BACKGROUND

2. On 20 July 2009, Trial Chamber III of the Tribunal ("Trial Chamber") rendered its judgement in the *Lukić and Lukić* case,³ finding Lukić guilty, pursuant to Article 7(1) of the Statute of the Tribunal ("Statute"), of extermination, persecutions, murder and inhumane acts as crimes against humanity under Article 5 of the Statute, and for murder and cruel treatment as violations of the laws or customs of war under Article 3 of the Statute. The Trial Chamber sentenced him to a term of imprisonment for the remainder of his life.⁴ Three appeals have been lodged against the Trial Judgement.⁵

3. Lukić's convictions for murder are based, *inter alia*, on the Trial Chamber's findings that: (i) on 7 June 1992, Lukić and other perpetrators killed five Bosnian Muslim civilian men in the vicinity of Višegrad by the Drina River, near Sase, including Meho Džafić, Ekrem Džafić, Hasan Kustura and Hasan Mutapčić;⁶ (ii) on or about 10 June 1992, Lukić killed seven Bosnian Muslim civilian men on the bank of the Drina River in front of the Varda Factory in Višegrad, including

¹ Response to "Milan Lukić's Motion for Remedies Arising out of Disclosure Violations", 15 April 2011 (confidential) ("Response"). See also Response to "Milan Lukić's Motion for Remedies Arising out of Disclosure Violations", 15 April 2011 (public redacted version).

² Reply Brief in Support of Milan Lukić's [*sic*] Motion for Remedies Arising out of Disclosure Violations by the Office of the Prosecutor Including Stay of Proceedings, 26 April 2011 ("Reply"). The Response was served on Lukić on 18 April 2011, and on 19 April 2011, Lukić requested an extension of the deadline to file his Reply (Milan Lukić's [*sic*] Motion Pursuant to Rule 127 to Enlarge Time for Filing [*sic*] of the Reply in Support of "Milan Lukić's [*sic*] Motion for Remedies Arising out of Disclosure Violations", 19 April 2011, paras 2-3, 15). Lukić withdrew this motion after being informed by the Registry via email that the deadline for the filing of his Reply ran from the date of the distribution of the Response in accordance with Article 25(4) of the Directive for the Court Management and Support Services Section, Judicial Support Services, Registry (IT/121/REV.2), 19 January 2011. See Milan Lukić's [*sic*] Withdrawal Motion Pursuant to Rule 127 to Enlarge Time for Filing [*sic*] of the Reply in Support of "Milan Lukić's [*sic*] Motion for Remedies Arising out of Disclosure Violations", 21 April 2011.

³ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case-No. IT-98-32/1-T, Judgement, 20 July 2009 ("Trial Judgement").

⁴ Trial Judgement, paras 1099-1101.

⁵ Prosecution Notice of Appeal, 19 August 2009; Notice of Appeal on Behalf of Sredoje Lukić, 19 August 2009; Milan Lukić's [*sic*] Amended Notice of Appeal, 26 November 2009 (filed by Counsel for Lukić as Annex 1 to Milan Lukić's [*sic*] Motion to Vary His Notice of Appeal, 26 November 2009). See also Decision on Milan Lukić's Motion to Amend his Notice of Appeal, 16 December 2009.

⁶ Trial Judgement, paras 200, 906-911, 1099.

Mušan Čančar;⁷ and (iii) on a day between 28 June 1992 and 5 July 1992, Lukić killed Hajra Korić, a Bosnian Muslim civilian woman, in Potok, a settlement of Višegrad.⁸

4. Lukić has appealed his conviction for killing Meho Džafić, Ekrem Džafić, Hasan Kustura, and Hasan Mutapčić by the Drina River, arguing that the Prosecution did not prove their deaths.⁹ In particular, Lukić argues that the Trial Chamber ignored the reasonable possibility that some of these victims were still alive or that the circumstances of their deaths were inconsistent with the Prosecution case.¹⁰ Similarly, Lukić argues that the death of Mušan Čančar by the Drina River in front of the Varda Factory was not proven, stating that no body was found and no death certificate issued.¹¹ As to Hajra Korić, Lukić submits on appeal that her death was not proven beyond a reasonable doubt.¹²

II. ARGUMENTS OF THE PARTIES

5. Lukić submits that the Prosecution violated Rule 68 of the Tribunal's Rules of Procedure and Evidence ("Rules") by failing to disclose documents of an exculpatory nature, namely three reports from the International Commission on Missing Persons ("ICMP") regarding bodies identified by way of DNA analysis ("ICMP Reports") as well as an autopsy report on the bodily remains of Hajra Korić ("Autopsy Report") (collectively, "Subject Material").¹³

6. According to Lukić, the ICMP Reports are exculpatory in that they show that the bodies of Meho Džafić, Ekrem Džafić, Hasan Kustura, Hasan Mutapčić, Mušan Čančar and Hajra Korić ("Murder Victims") were exhumed in various locations outside Višegrad and at a significant distance from the places where the Trial Chamber found they were killed.¹⁴ Lukić argues that the location of these exhumation sites is important, not only as evidence in its own right but also as it would play an important role in uncovering other evidence, aiding the preparation of witnesses, corroborating testimony, or "assisting impeachment or rebuttal".¹⁵

7. Lukić contends that the Prosecution has been in possession of the ICMP Reports for several years¹⁶ and that they were only disclosed to him after he had requested from the Prosecution any

⁷ Trial Judgement, paras 913-914, 1099.

⁸ Trial Judgement, paras 742, 925-927, 1099.

⁹ Milan Lukić's [sic] Appeal Brief, 17 December 2009 (confidential) ("Milan Lukić Appeal Brief"), paras 27-29.

¹⁰ Milan Lukić Appeal Brief, para. 28.

¹¹ Milan Lukić Appeal Brief, paras 76-78.

¹² Milan Lukić Appeal Brief, paras 299-300.

¹³ Motion, para. 10 and Annex A, para. 21. See also Motion, Annexes B-3, B-4, B-5, B-6 and Reply, para. 12.

¹⁴ Motion, Annex A, paras 21-22 and Annexes B-3, B-4 and B-5.

¹⁵ Motion, Annex A, para. 22.

¹⁶ Motion, Annex A, para. 25 and Annex C. Reply, para. 6.

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material related to the exhumation and identification of another victim, Ismeta Kurspahić.¹⁷ He argues that the Prosecution's failure to disclose the ICMP Reports earlier prejudiced his right to prepare for and answer the Prosecution case, thus rendering the conviction and the sentence unsafe.¹⁸

8. Lukić claims that the Autopsy Report contains information regarding the injuries found on Hajra Korić's body as well as the personal belongings found at the site, which do not correspond "with the testimony of the Prosecution's alleged eyewitnesses as to the manner in which she died."¹⁹ While the only witness who was brought to testify stated that Hajra Korić was shot twice, the Autopsy Report indicates that she was shot only once and identifies an entry wound inconsistent with the fatal shot as described by the witness.²⁰

9. As a remedy to the alleged disclosure violation, Lukić requests that the Appeals Chamber issue an order: (i) ruling that the delay in disclosure constitutes a violation of the discovery rules, and misconduct pursuant to Rule 46 of the Rules; (ii) entering an acquittal or alternatively reversing the convictions and ordering a re-trial in relation to the Murder Victims; (iii) granting a stay of proceedings of at least 60 days to permit Lukić to conduct additional investigations in relation to the Subject Material; and (iv) delaying the appeal hearing until he has had sufficient time to perform this investigation and to seek the admission of the Subject Material and other documents pursuant to Rule 115 of the Rules.²¹

10. The Prosecution opposes the Motion, arguing that: (i) Lukić fails to show that any alleged late disclosure caused him prejudice;²² (ii) any prejudice that he did sustain may be fully remedied by admitting the Subject Material pursuant to Rule 115 of the Rules;²³ and (iii) the alternative remedies - including stay of proceedings, re-trial, reversal of convictions, suspension of the appeals schedule, and Rule 46 sanctions - are inappropriate and should not be granted.²⁴

11. The Prosecution responds that it discovered the Subject Material incidentally after Lukić made his request for disclosure in relation to Ismeta Kurspahić and disclosed it as soon as

¹⁷ Motion, para. 28 and Annex A, para. 28. Lukić argues that he had requested from the Prosecution all material in relation to Ismeta Kurspahić, a Bosnian Muslim woman whom the Trial Chamber found had died in the fire at Adem Omeragić's house during the Pionirska Street Incident (Trial Judgement, para. 567), in order to prepare a motion pursuant to Rule 115 of the Rules. See Motion, Annex A, para. 28.

¹⁸ Motion, para. 10.

¹⁹ Motion, Annex A, para. 23 and Annex B-6. See also Reply, para. 19.

²⁰ Motion, Annex A, paras 30-31.

²¹ Motion, para. 42. See also *ibid.*, para. 11.

²² Response, paras 1, 11-13.

²³ Response, paras 1, 14, 20-21.

²⁴ Response, paras 1, 23-26.

practicable, that is, within a month of the request.²⁵ The Prosecution argues that the primary issue at trial was whether the victims were dead, not where their bodies were found, and that “[t]his new position [that all evidence regarding exhumation sites was relevant] represent[s] the end-point of a subtle evolution of Lukić’s arguments”.²⁶

12. The Prosecution accepts that the Autopsy Report could have been put to Prosecution witnesses in cross-examination but contends that no witness could have commented on the forensic examination of Hajra Korić’s body after it had been buried for many years.²⁷ Further, it argues that the evidence of one gunshot wound in the Autopsy Report is not inconsistent with the account of a further gunshot wound to her chest.²⁸ In support of this argument, the Prosecution refers to expert witness John Clark, who signed the Autopsy Report and considered that “conclusions had to be based entirely on examination of the skeleton [and] it was not possible to take into account potentially fatal injuries to soft tissues alone.”²⁹

III. APPLICABLE LAW

13. Rule 68 of the Rules imposes an obligation on the Prosecution to disclose to the Defence, as soon as practicable, any material in the actual knowledge of the Prosecution which may suggest the innocence or mitigate the guilt of an accused or affect the credibility of the evidence led by the Prosecution in that particular case.³⁰ The Appeals Chamber recalls that the Prosecution’s obligation to disclose exculpatory material is essential to a fair trial,³¹ and notes that this obligation has always been interpreted broadly.³²

14. The determination of which materials are subject to disclosure under this provision is a fact-based enquiry undertaken by the Prosecution.³³ The standard for assessing whether material is considered to be exculpatory within the meaning of Rule 68(A) of the Rules is whether there is any possibility, in light of the submissions of the parties, that the given information *could* be relevant to the defence of the accused.³⁴ Rule 68 of the Rules *prima facie* obliges the Prosecution to monitor

²⁵ Response, paras 3-4.

²⁶ Response, para. 6. *See also ibid.*, paras 7, 15-16.

²⁷ Response, para. 17.

²⁸ Response, para. 18.

²⁹ Exh. P122, p. 4. *See also* John Clark, T. 2102 (22 September 2008).

³⁰ *See Ephrem Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako’s Motion to Amend his Notice of Appeal and Motion to Admit Evidence, 23 March 2011 (confidential) (“*Setako Decision*”), para. 12, with further references. The Appeals Chamber notes that Rule 68 of the International Criminal Tribunal for Rwanda’s Rules of Procedure and Evidence is identical to Rule 68 of the Rules.

³¹ *Setako Decision*, para. 12; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 (“*Krstić Appeal Judgement*”), para. 180.

³² *Setako Decision*, para. 12, with further references.

³³ *Setako Decision*, para. 13, with further references.

³⁴ *Setako Decision*, para. 13, with further references.

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the testimony of witnesses and to disclose material relevant to their impeachment, during or after testimony.³⁵

15. If the Defence wishes to show that the Prosecution is in breach of its disclosure obligation, it must: (i) identify specifically the material sought; (ii) present a *prima facie* showing of its probable exculpatory nature; and (iii) prove that the material requested is in the custody or under the control of the Prosecution.³⁶ If the Defence satisfies the Chamber that the Prosecution has failed to comply with its Rule 68 obligations, the Chamber must examine whether the Defence has been prejudiced by that failure before considering whether a remedy is appropriate.³⁷

16. The Appeals Chamber recalls that the Prosecution may be relieved of its obligations under Rule 68 of the Rules "if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant, as the appellant would not be prejudiced materially by this violation."³⁸

17. The Appeals Chamber recalls that, where it is found at the appeal stage of the proceedings that an accused has been prejudiced by a breach of Rule 68 of the Rules, that prejudice may be remedied, where appropriate, through the application of Rule 115 of the Rules to establish whether the material is admissible as additional evidence on appeal.³⁹

IV. ANALYSIS

18. The Appeals Chamber recalls the Trial Chamber's findings that Meho Džafić, Ekrem Džafić, Hasan Kustura and Hasan Mutapčić were killed by Lukić and other perpetrators by the Drina River in the vicinity of Višegrad; Mušan Čančar was killed by Lukić by the Drina River in front of the Varda Factory in Višegrad; and Hajra Korić was killed by Lukić in Potok, a settlement of Višegrad.⁴⁰

19. The Appeals Chamber considers that the ICMP Reports and the Autopsy Report could be relevant to Lukić's defence. According to the ICMP Reports, the bodies of Hasan Kustura, Hasan Mutapčić, Mušan Čančar and Hajra Korić were exhumed at Slap.⁴¹ Similarly, the ICMP Reports

³⁵ *Setako* Decision, para. 13, with further references; *Krstić* Appeal Judgement, para. 206.

³⁶ *Setako* Decision, para. 14, with further references.

³⁷ *Setako* Decision, para. 14, with further references.

³⁸ *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 30, quoting *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006, para. 51; *Setako* Decision, para. 15.

³⁹ *Krstić* Appeal Judgement, para. 187; *Setako* Decision, para. 16.

⁴⁰ Trial Judgement, paras 906-911, 913-914, 925-927. See also *supra*, para. 3.

⁴¹ Motion, Annex B-3.

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state that the bodies of Meho Džafić and Ekrem Džafić were exhumed from a grave marked "Srebrenica NN-1" at Klotjevaca, Prohici.⁴² The ICMP Reports may therefore cast doubt on the credibility of the Prosecution witnesses who testified that the victims were killed at locations different from those where the bodies were found.⁴³ Further, the Autopsy Report may undermine the credibility of Prosecution evidence which indicates that Hajra Korić was shot twice.⁴⁴

20. Thus, the ICMP Reports and the Autopsy Report are *prima facie* exculpatory within the meaning of Rule 68 of the Rules. As such, the evidence should have been disclosed by the Prosecution as soon as practicable. Accordingly, the Appeals Chamber finds that the Prosecution violated its Rule 68 obligations by failing to disclose the ICMP Reports and the Autopsy Report to Lukić in a timely manner. The Appeals Chamber will therefore turn to the question of whether Lukić suffered prejudice as a result of the violation.

21. With respect to Hasan Mutapčić, Hasan Kustura and Mušan Čančar, the Appeals Chamber notes that evidence was tendered at trial which indicated that their remains were exhumed near Slap.⁴⁵ Hence, Lukić has not shown that he suffered prejudice from the delayed disclosure of the Subject Material in relation to these victims. However, no forensic evidence was presented at trial with respect to Ekrem Džafić, Meho Džafić and Hajra Korić.⁴⁶ This information is directly relevant to core issues at trial, namely, whether or not those alleged victims were in fact dead and where the bodies were recovered. Accordingly, the Appeals Chamber considers that the Prosecution's violation of its disclosure obligations prevented Lukić from using this information to prepare his defence. Consequently, the Prosecution's violation of its obligations under Rule 68 of the Rules was prejudicial to Lukić.

22. The Appeals Chamber recalls that where an accused has been prejudiced by a breach of Rule 68 of the Rules, that prejudice may be remedied, where appropriate, through the application of Rule 115 of the Rules.⁴⁷ Lukić has not yet filed a motion requesting that the Subject Material be admitted on appeal. In the absence of an application under Rule 115 of the Rules, the Appeals Chamber is not in a position to determine whether the requirements of this rule have been satisfied.

⁴² Motion, Annexes B-4 and B-5.

⁴³ See *inter alia* Trial Judgement, paras 299-319 (Mušan Čančar), 906-909 (Meho Džafić, Ekrem Džafić, Hasan Mutapčić and Hasan Kustura).

⁴⁴ Trial Judgement, paras 745, 754-756, 758 (Hajra Korić).

⁴⁵ See Trial Judgement, para. 124, fn. 459: "Furthermore, there is information that the remains of Hasan Mutapčić were exhumed on 14 November 2002 at Kameničko Tocilo-Srebrenica, which is located near the Slap 1 exhumation site". Evidence was also adduced showing that Kameničko Tocilo is about two kilometres away from Slap 1. See Exh. P172, p. 938 (Hasan Mutapčić). See Trial Judgement, para. 125 and fn. 461, referring to Exh. P184, Table B, p. 4 (Hasan Kustura). See Exh. P119, p. 9 (Mušan Čančar).

⁴⁶ See Trial Judgement, paras 124-125, fns 459-460 with reference to Exhs P119, pp. 1, 9 and P184, Table A, p. 4 (Ekrem Džafić and Meho Džafić); Trial Judgement, para. 754: "the Prosecution has not presented any forensic evidence regarding the death of Hajra Korić".

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Moreover, the Appeals Chamber notes that the Subject Material was disclosed to Lukić on 16 March 2011 and that he has been in a position to conduct further investigations from that date onward. In these circumstances, the Appeals Chamber considers that a stay of proceedings is not an appropriate remedy in this case. The Appeals Chamber further considers the requested remedies of acquittal or retrial on the convictions in question to be disproportionate, and consequently declines to grant them.

23. The Appeals Chamber emphasises its concern at the failure of the Prosecution to meet its fundamental duty to disclose *prima facie* exculpatory material.⁴⁸ It strongly disagrees with the Prosecution's statement that "[m]aterial further indicating that the victims were dead would not assist Lukić in this regard."⁴⁹ Furthermore, the Subject Material has been in the possession of the Prosecution for several years, some of it even prior to trial.⁵⁰ No satisfactory reason has been provided to explain the Prosecution's failure to review the Subject Material earlier and disclose the documents to Lukić in a timely manner. The Appeals Chamber reminds the Prosecution of the paramount importance of its disclosure obligations and expects the Prosecution to undertake the necessary steps to prevent such disclosure violations from occurring in the future.

V. DISPOSITION

24. In light of the foregoing, pursuant to Rules 54, 68 and 107 of the Rules, the Appeals Chamber

GRANTS the Motion **in part**;

FINDS that the Prosecution violated its Rule 68 disclosure obligations with respect to the Subject Material;

ORDERS Lukić to file any Rule 115 motion in relation to the Subject Material by 26 May 2011; and

DISMISSES the remainder of the Motion.

⁴⁷ *Krstić* Appeal Judgement, para. 187.

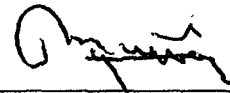
⁴⁸ Cf. *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, para. 14.

⁴⁹ Response, para. 6.

⁵⁰ The ICMP Reports have been in the possession of the Prosecution since 2 August 2005, 27 March 2009 and 14 May 2009, respectively. See Motion, Annex C. The Autopsy Report has been in the possession of the Prosecution since 7 December 2007. See *ibid.*

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

Dated this twelfth day of May 2011
At The Hague,
The Netherlands.



Judge Mehmet Güney
Presiding

[Seal of the Tribunal]