



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-95-5/18-T

Date: 30 May 2011

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 30 May 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S FORTY-EIGHTH DISCLOSURE VIOLATION MOTION

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 (“Tribunal”) is seized of the Accused’s “Forty-Eighth Motion for Finding of Disclosure Violation and for Sanctions (April 2011)”, filed publicly with confidential annexes on 2 May 2011 (“Forty-Eighth Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Forty-Eighth Motion, the Accused argues that there have been violations of Rules 66(A)(ii) and 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by the Office of the Prosecutor (“Prosecution”) in relation to the disclosure of four documents to him in April 2011.¹ Three of the documents are interview reports with three Prosecution witnesses (“Reports of Interview”) and the fourth document is a UN note dated 20 October 1994 (“UN Note”) (together “Documents”).² He submits that the Documents have been in the Prosecution’s possession for a number of years but were only disclosed to him in April 2011.³

2. The Accused asserts that the delay in disclosure of the Reports of Interview violated “not only the original 7 May 2009 disclosure deadline, but the 1 October 2010 deadline for disclosure of all remaining Rule 66(A)(ii) material”.⁴ He requests an express finding by the Chamber that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of the Reports of Interview and that the testimony of the affected witnesses be excluded as a sanction for the Prosecution’s repeated violations of its disclosure obligations.⁵ In support of this submission he notes that including the Reports of Interview, 399 witness statements have been disclosed in violation of Rule 66(A)(ii) and twenty witness statements have been disclosed in violation of the final 1 October 2010 deadline set by the Chamber.⁶

3. The Accused further submits that the UN Note is of an exculpatory nature as it shows the selective enforcement of demilitarisation agreements by the UN in favour of Bosnian Muslims, which in turn supports his case that the “UN had become combatants, or could be reasonably perceived to have become combatants, at the time their personnel were detained after the NATO air strikes”.⁷ He requests that the Chamber make an express finding that the Prosecution

¹ Forty-Eighth Motion, para. 1.

² Forty-Eighth Motion, para. 1.

³ Forty-Eighth Motion, para. 2.

⁴ Forty-Eighth Motion, para. 3.

⁵ Forty-Eighth Motion, para. 4.

⁶ Forty-Eighth Motion, para. 3.

⁷ Forty-Eighth Motion, para. 6.

violated Rule 68 of the Rules by failing to disclose the UN Note as soon as practicable.⁸ He further notes that this late disclosure also violated the Chamber's order that all Rule 68 disclosure be completed by 31 March 2011.⁹ While he acknowledges that the UN Note appears to have been "obtained pursuant to Rule 70 and required consent of the provider for disclosure, such consent should and could have been obtained well in advance of the 31 March deadline".¹⁰ The Accused suggests that given the late disclosure of the UN Note, the Chamber should draw an adverse inference against the Prosecution's contention that he had the required *mens rea* for Count 11 of the Third Amended Indictment.¹¹ In addition he suggests that the cumulative effect of the disclosure violations in these proceedings demonstrates that the Prosecution is "unable to manage a case of this scope and that the appropriate remedy is to reduce the scope of the case".¹²

4. On 16 May 2011, the Prosecution filed the "Prosecution's Response to Karadžić's Forty-Eighth Motion for Finding of Disclosure Violation and for Sanctions" ("Response to Forty-Eighth Motion"). The Prosecution acknowledges that the Reports of Interview should have been identified and disclosed previously, but claims that its previous searches had overlooked Rule 66(A)(ii) material which were stored in "secure" drives in the Prosecution's internal computer network, and that once searches of those "secure" drives were completed, the Reports of Interview were identified and disclosed "without delay".¹³ It submits that the late disclosure of the Reports of Interview has caused no prejudice to the Accused.¹⁴ In support of this submission, the Prosecution highlights that (i) the information contained in the Reports of Interview could be found in prior statements or documents which were already in the Accused's possession, (ii) the new information was minimal and was of "limited, if any, relevance to the Prosecution's case against the Accused", and (iii) two of the affected witnesses are not scheduled to testify until well after the summer recess.¹⁵

5. With respect to the UN Note, the Prosecution notes that it was identified prior to 31 March 2011 when conducting its "witness-related searches for exculpatory and relevant material" but the further delay in disclosure was due to the required Rule 70 clearance from the provider of the document.¹⁶ It further submits that the Accused has failed to establish a *prima*

⁸ Forty-Eighth Motion, paras. 5, 9.

⁹ Forty-Eighth Motion, para. 10.

¹⁰ Forty-Eighth Motion, para. 10.

¹¹ Forty-Eighth Motion, para. 11.

¹² Forty-Eighth Motion, para. 12.

¹³ Response to Forty-Eighth Motion, para. 1.

¹⁴ Response to Forty-Eighth Motion, paras. 4-8.

¹⁵ Response to Forty-Eighth Motion, paras. 4-8, confidential appendix A.

¹⁶ Response to Forty-Eighth Motion, para. 9.

facie case making out the probably exculpatory or mitigating nature of the UN Note and that the document does not support the Accused's case that "UN personnel detained after the NATO air strikes were, or were considered to be, combatants".¹⁷ It presents distinct arguments as to why the UN Note is not potentially exculpatory, before concluding that even if it were considered to be potentially exculpatory, "it adds nothing to information the Accused already possesses" and therefore its late disclosure caused him no prejudice.¹⁸ In support of this submission the Prosecution refers to a number of exhibits already in evidence which contain information about the Bosnian Government's failure to comply with the August 1993 agreement relating to withdrawal of troops from the demilitarised zone and the Accused's cross-examination of General Michael Rose on this material.¹⁹ The Prosecution also submits that the Accused did not cross-examine General Rupert Smith on this issue, which undermines his claim that he was prejudiced by being unable to use the UN Note during his cross-examination.²⁰

6. The Prosecution emphasises that given the absence of demonstrated prejudice the remedies sought by the Accused are not available.²¹ In support of this submission the Prosecution reiterates the decisions of the Chamber which have held that there is no justification to exclude relevant evidence in the absence of demonstrated prejudice and that the exclusion of relevant evidence is an "extreme" measure.²² It submits that the Accused's other requests, namely that the Chamber find that the Accused did not have the requisite *mens rea* for Count 11 and that the Chamber order the reduction of the scope of the Prosecution's case, were even more extreme measures, which are also unwarranted.²³

II. Applicable Law

7. Rule 66(A)(ii) of the Rules requires the Prosecution (within a time-limit prescribed by the Trial Chamber or pre-trial Judge) to make available to the Defence "copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*". The applicable deadline in this case was 7 May 2009.²⁴

¹⁷ Response to Forty-Eighth Motion, para. 10.

¹⁸ Response to Forty-Eighth Motion, para. 15.

¹⁹ Response to Forty-Eighth Motion, paras. 16–17.

²⁰ Response to Forty-Eighth Motion, para. 17.

²¹ Response to Forty-Eighth Motion, paras. 18–21.

²² Response to Forty-Eighth Motion, para. 19.

²³ Response to Forty-Eighth Motion, paras. 20–21.

²⁴ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

8. Rule 68 of the Rules imposes a continuing obligation on the Prosecution to “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”.²⁵ In order to establish a violation of this obligation by the Prosecution, the Accused must “present a *prima facie* case making out the probable exculpatory or mitigating nature” of the materials in question.²⁶

9. The Chamber reiterates that regardless of the Prosecution’s internal practices, there is a clear obligation to disclose potentially exculpatory material “as soon as practicable” and that the “ongoing nature of the obligation relates only to the fact that as new material comes into the possession of the Prosecution it should be assessed as to its potentially exculpatory nature and disclosed accordingly”.²⁷

10. Rule 68 *bis* provides that a Trial Chamber may, *proprio motu* or at the request of either party, decide on sanctions to be imposed on a party which fails to comply with its disclosure obligations under the Rules. In determining the appropriate remedy (if any), the Chamber has to examine whether or not the accused has been prejudiced by the relevant breach.²⁸

III. Discussion

11. Given that the Reports of Interview were created in 1995, 1997, and 2004, they should have been disclosed in accordance with the 7 May 2009 deadline set by the pre-trial Judge. Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of the three Reports of Interview referred to in the Forty-Eighth Motion. While some mistakes by the Prosecution in ensuring full compliance with its disclosure obligations may be inevitable, particularly in a case of this size, the Chamber is not convinced that the reasons offered by the Prosecution justify the failure to identify these statements earlier and stresses that, with the exception of newly created material, or material which has recently come into the Prosecution’s possession, there should be no further disclosure of Rule 66(A)(ii) material. This latest example demonstrates yet again the failure by the Prosecution to maintain an efficient system for the disclosure of documents in this case.

²⁵ Decision on the Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009, para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgement, 29 July 2004 (“*Blaškić Appeals Judgement*”), para. 267.

²⁶ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez Appeals Judgement*”), para. 179.

²⁷ Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010 (“*Reconsideration Decision*”), para. 11.

²⁸ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgement, 29 July 2004, para. 268.

12. While the Prosecution has violated Rule 66(A)(ii) of the Rules with respect to the late disclosure of the Reports of Interview, the Chamber finds that the Accused has suffered no prejudice as a result of these violations. In reaching this conclusion, the Chamber reviewed the Reports of Interview and is not convinced that the information contained therein is of such significance that their late disclosure has had a detrimental impact on the Accused's preparation for trial. In addition, the Chamber considered the short length of the statements and the fact that two of the affected witnesses will not be called to testify before the summer recess, which gives the Accused and his team sufficient time to review the disclosed material, and incorporate it, if necessary, into his ongoing preparations. The Accused also failed to provide any substantive arguments as to how the late disclosure of the Reports of Interview has caused him prejudice. Given the absence of prejudice to the Accused, there is no basis to order the exclusion of these witnesses' evidence or to order the Prosecution to reduce the scope of its case.

13. Having reviewed the UN Note, the Chamber does not accept the Accused's contention that this document demonstrates a selective enforcement by the UN of agreements against Bosnian Serbs or that it supports his case that the UN had become combatants or could be reasonably perceived to have become combatants. It is simply a report which expresses UNPROFOR's concerns in October 1994 about violations by the Bosnian Government of the August 1993 agreement pertaining to the DMZ around Sarajevo and does not purport to comprehensively cover steps taken to enforce the agreement *vis à vis* the Bosnian Government. The Chamber is not satisfied that the Accused has presented a "a *prima facie* case making out the probable exculpatory or mitigating nature" of the UN Note and therefore finds that the Prosecution has not violated Rule 68 of the Rules with respect to its disclosure in April 2011.

IV. Disposition

14. For the foregoing reasons, the Trial Chamber, pursuant to Rules 54, 66(A)(ii), 68, and 68 *bis* of the Rules, hereby:

- a) **GRANTS**, by majority, Judge Kwon dissenting²⁹, the Forty-Eighth Motion in part, and finds that the Prosecution has violated Rule 66(A)(ii) of the Rules with respect to the late disclosure of the Reports of Interview; and

²⁹ Judge Kwon refers to his Partially Dissenting Opinion in the Decision on Accused's Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon, 29 March 2011. While Judge Kwon agrees with the majority that there has been a violation of Rule 66(A)(ii) of the Rules, in the absence of prejudice to the Accused, he considers that the motion should be dismissed in its entirety.

b) **DENIES** the Forty-Eighth Motion in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this thirtieth day of May 2011
At The Hague
The Netherlands

[Seal of the Tribunal]