



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-03-68-T
Date: 27 October 2005
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Hans Henrik Brydesholt
Judge Albin Eser

Registrar: Mr. Hans Holthuis

Decision of: 27 October 2005

PROSECUTOR

v.

NASER ORIĆ

**DECISION ON URGENT DEFENCE MOTION REGARDING
PROSECUTORIAL NON-COMPLIANCE WITH RULE 68**

The Office of the Prosecutor:

Mr. Jan Wubben
Ms. Patricia Sellers Viseur
Mr. Gramsci di Fazio
Ms. JoAnne Richardson

Counsel for the Accused:

Ms. Vasvija Vidović
Mr. John Jones

TRIAL CHAMBER II (“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”):

BEING SEISED OF the “*Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68*” (“Motion”), filed on 17 October 2005 by counsel for Naser Orić (“Defence” and “Accused” respectively);

NOTING that in the Motion, the Defence requests the Trial Chamber to sanction the Office of the Prosecutor (“Prosecution”) for continual violations of Rule 68 of the Rules of Procedure and Evidence of the Tribunal (“Rules”)¹ and to order the Prosecution to disclose all material relating to a certain Serb volunteer, Slobodan Mišić, as well as material concerning Serbian ethnic cleansing in the locations covered by the Indictment (“Relevant Material”);

NOTING the Prosecution’s submissions during the proceedings of 18, 19 and 26 October 2005, conceding that in not disclosing the Relevant Material there had been a violation of Rule 68, but that this was a consequence of an isolated human error rather than of any malicious intent (“Prosecution Submissions”);²

NOTING FURTHER the Prosecution’s final submissions, filed on 21 October 2005, in which it submits that the additional Prosecution documents disclosed relating to the attempt by the Prosecution to interview Slobodan Mišić (specifically P585 and P586), clearly neutralise the evidentiary value of the Relevant Material (“Final Prosecution Submissions”);³

NOTING FURTHER the Defence’s oral submission during the proceedings of 25 October 2005, demanding that the Prosecution disclose more material pertaining to the killing of Muslims in the Podrinje area in 1992, which according to the Defence must be in the possession of the Prosecution;⁴

NOTING ALSO the Prosecution’s oral response denying that there is further material to be disclosed, and its affirmation that a thorough search has been conducted;⁵

¹ Rule 68(i) of the Rules provides: “[t]he Prosecutor shall, as soon as practicable, 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”.

² T. 12589, 12771.

³ Final Prosecution Submissions, para. 7.

⁴ T. 12894-12895.

⁵ T. 12896-12898.

CONSIDERING the Defence's clarification during the proceedings of 26 October 2005 that after following the proceedings on its Motion, no specific sanction or remedy is being proposed and that, in fact, its main concern lies with the Prosecution's apparent inability to determine the parameters of applicability of Rule 68(i), hence asking the Trial Chamber to give the Prosecution some guidance on this matter;⁶

CONSIDERING that as stated by the Prosecution, since receipt of the Motion, a thorough search has been conducted of its database which resulted in a further disclosure of fresh documents also containing Rule 68 information on the same Mišić and therefore pertinent to the Defence case ("New Material");

CONSIDERING that it is established in the jurisprudence of the Tribunal that if the Defence satisfies a Chamber that the Prosecution has failed to comply with Rule 68(i), the Chamber in addressing what is the appropriate remedy, has to examine whether or not the Defence has been prejudiced by a breach of Rule 68(i), and rule accordingly pursuant to Rule 68bis;⁷

NOTING the Prosecution's renewed acknowledgement that the New Material contains Rule 68(i) passages, which however according to the Prosecution, are strikingly insignificant and would not have been particularly useful for the Defence in its cross-examination of Prosecution witnesses, thus not resulting in any prejudice to the Accused;⁸

CONSIDERING FURTHER the Prosecution's submission that any prejudice to the Accused is mitigated by the fact that both the Relevant Material and the New Material is now available to the Defence;

CONSIDERING FURTHER that in the practice of this Tribunal the possible violation of Rule 68(i) is governed less by a system of "sanctions" than by the Judges' definitive evaluation of the evidence presented by either of the parties, and the possibility which the opposing party will have had to contest it;⁹

⁶ T. 12899, 12901.

⁷ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be imposed pursuant to Rule 68bis and Motion for Adjournment while Matter Affecting Justice and a Fair Trial Can be Resolved", 30 October 2002 ("*Brđanin* Decision on 30 October 2002"), para. 23.

⁸ T. 12986- 12897.

⁹ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Decision on the Defence Motion for Sanctions for the Prosecutor's Continuing Violation of Rule 68, 28 September 1998, p. 3; see also *Brđanin* Decision on 30 October 2002, para. 23.

RECALLING its Decision of 29 September 2005 in which the Trial Chamber enjoined the Prosecution to do its utmost in the future to comply with all obligations imposed on it pursuant to Rule 66(B) and Rule 68(i);¹⁰

MINDFUL of the Accused's right to a fair trial as enshrined in Articles 20 and 21 of the Statute of the Tribunal ("Statute") the concept of which demands not only that the Prosecution disclose to the Defence in sufficient time "the existence of evidence", but also that it actually provides the Defence with all of the Rule 68(i) material available "as soon as practicable";¹¹

MINDFUL of the Trial Chamber's responsibility to ensure that this special obligation of the Prosecution is fully observed at all times because it goes to the heart of the Accused's right to a fair trial, and in addition because the Trial Chamber also has the overall responsibility to preserve the integrity of these proceedings;

FINDING that the Relevant Material as well as the New Material in this case contains information which, as now conceded by the Prosecution itself, undoubtedly falls within the *ratio* of Rule 68(i) and that accordingly should have been disclosed in a timely fashion by the Prosecution pursuant to the same sub-rule;

FINDING FURTHER that there is nothing to show that the Defence was in any case aware of the existence of the Relevant Material until the time the Prosecution rested its case and that consequently, the Prosecution's failure to comply with Rule 68(i) has materially prejudiced the right of the Accused to have the Relevant Material available for potential cross-examination of Prosecution witnesses during the Prosecution's case-in-chief;

FINDING FURTHER that, however unintentional, this fresh violation of Rule 68(i) marks the fifth occasion in which it has been necessary for the Trial Chamber to address a failure by the Prosecution to comply with its disclosure obligations,¹² and that this fact coupled with the manner in which the proceedings taken upon the Motion progressed, revealing the existence of New Material, is of great concern and troubles the Trial Chamber;

¹⁰ *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Decision on Alleged Prosecution Non-Compliance with Disclosure Obligations under Rules 66(B) and 68(i), 29 September 2005, p. 3.

¹¹ *Brđanin* Decision on 30 October 2002, para. 24.

¹² *Prosecutor v. Naser Orić*, Case No. IT-03-68-(P)T, Oral Decision on "Confidential Defence Motion to Request an Order for Measures to Ensure that the Prosecution Complies with Rule 68", 28 September 2004; Decision on "Urgent Defence Motion Regarding Late Disclosure of Evidence and to Recall a Witness", 30 November 2004; Decision on "Motion Regarding Authenticity of Documents and Non-Compliance with Rule 68", 17 March 2005; Decision on Defence Complaints raised orally during the proceedings, 29 September 2005.

FINDING that in view of this and in fulfilment of its responsibilities, the Trial Chambers seeks to ensure as much as possible a complete observance on the part of the Prosecution of its disclosure obligations under Rule 68(i) and at the same time give the Defence the possibility to even out any prejudice it may have suffered before it completes its case;

FOR THE FOREGOING REASONS,

PURSUANT TO Rule 68(i) and Rule 68*bis* of the Rules

HEREBY GRANTS THE MOTION AND

ORDERS the Prosecution to conduct a thorough and complete search for Rule 68(i) material relevant to the Defence and to provide the Trial Chamber not later than 11 November 2005 with a declaration stating what searches have been made, where they have been made and the results of such searches;

ORDERS the immediate disclosure by the Prosecution to the Defence of any further Rule 68(i) material in its possession, which has not already been disclosed, relating to Slobodan Mišić and ethnic cleansing by Serbs in the locations referred to in the Indictment or which is in any other manner material to the Defence under Rule 68(i);

INVITES the Defence to indicate by no later than 18 November 2005 the names of any witnesses of the Prosecution that the Defence may wish to call for further cross-examination in light of the discovery of the Relevant Material and the New Material, as well as of any other Rule 68(i) material, which may be further disclosed by the Prosecution as a result of this Decision. In addition, the Defence within the same time limit is invited to indicate if it wishes to add to its proposed witnesses any further witnesses that it might wish to produce to testify on matters related to the above-mentioned Rule 68(i) material; and

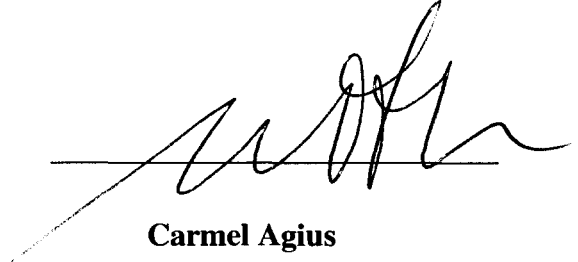
HEREBY AGAIN ENJOINS the Prosecution to make all efforts in the future to comply with all obligations imposed on it pursuant to Rule 66(B) and Rule 68(i).

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

Dated this twenty-seventh day of October 2005,

At The Hague

The Netherlands

A handwritten signature in black ink, appearing to be 'Carmel Agius', written over a horizontal line.

Carmel Agius

Presiding Judge

[Seal of the Tribunal]