



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-83-T
Date: 28 March 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr. Hans Holthuis

Decision of: 28 March 2008

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON URGENT DEFENCE MOTION
CONCERNING RULE 68 COMPLIANCE BY THE
PROSECUTION**

The Office of the Prosecutor

Mr. Daryl A. Mundis
Ms. Laurie Sartorio
Mr. Matthias Neuner
Mr. Kyle Wood
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Counsel for the Accused

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Mr. Nicholas David Robson

TRIAL CHAMBER I (“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 “Urgent Defence Motion Concerning Failure of Prosecution to Comply with Rule 68”, filed confidentially on 12 March 2008 with confidential Annexes A to I, re-filed publicly on 14 March 2008 with public Annexes A to G and I and confidential Annex H (“Motion”)¹ and hereby renders its Decision.

I. SUBMISSIONS OF THE PARTIES

A. Submissions of the Defence

1. The Defence requests that the Trial Chamber find the Prosecution to be in breach of its disclosure obligations under Rule 68 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), specifically as regards 1) disclosure of material pertaining to the Islamic Cultural Institute in Milan (“ICI Material”); 2) disclosure of material relating to the interview of Jasmin Brkić; and 3) disclosure of material relating to the presence of different Mujahedin groups on the territory of Bosnia and Herzegovina, with particular reference to a report from the Main Staff of Army the Republika Srpska, dated 4 October 1995 (Annex I of the Motion).

1. Material Relating to the Islamic Cultural Centre in Milan (ICI Material)

2. The Defence submits that the Prosecution made three disclosures of so-called “Rule 68 material” pertaining to the Islamic Cultural Institute of Milan (“ICI”). On 13 February 2008, it disclosed a Judgement issued by a Milan court and four dossiers relating to investigations carried out by the Italian authorities against Anwar Shaaban; on 22 February 2008, it disclosed a report of the Italian Prosecutor General’s investigation into the ICI in Milan (“ICI Report”); and on 26 February 2008, it disclosed a collection of intercepted faxes and other correspondence from Bosnia and Herzegovina to the ICI Milan (“Intercepts Collection”).²

3. The Defence submits that the said material contains “highly exculpatory documents that supported the Defence case”³ and that the Prosecution was in possession of the Intercepts Collection at some time between January and March 2006.⁴

4. The Defence argues that as a consequence of the delay in disclosure, the Defence has been materially prejudiced as it was deprived of the opportunity to use the ICI Material during cross-

¹ The Defence seeks leave to exceed the word limit. Motion, para. 2.

² Motion, paras 10, 14 and 17.

³ Motion, para. 10.

⁴ Motion, para 19; Motion, Annexes C and D. *See also* T. 7554-7555.

examination of Prosecution witnesses and that it did not have the chance to identify further defence witnesses to discuss the material with and have it admitted into evidence.⁵ The Defence therefore reserves the right to apply for leave to add one or more witness(es) to its 65 *ter* Witness List.⁶

5. Furthermore, the Defence complains that, because of the volume of documents, the Registry's Conference and Language Service Section ("CLSS") has rejected the aforementioned documents for translation.⁷

2. Material Relating to Jasmin Brkić

6. On 29 February 2008, the Prosecution disclosed additional Rule 68 Material, including documents related to an interview with one Jasmin Brkić and an internal memorandum authored by a Prosecution investigator referring to alleged improper practices on the part of government authorities in Republika Srpska in handling potential Tribunal witnesses.⁸ Among other things, the Defence claims that due to the Prosecution's late disclosure, it has been deprived of an opportunity to confront Prosecution witnesses with this material, to take this information into account when responding to a Prosecution motion and to conduct own investigations into these alleged improper practices.⁹

3. Material Relating to the Presence of Other Mujahedin Groups on the Territory of Bosnia and Herzegovina

7. On 21 February 2008, the Prosecution disclosed a report from the Main Staff of the Army of the Republika Srpska, dated 4 October 1995, on the presence of different Mujahedin groups on the territory of Bosnia and Herzegovina.¹⁰ The Defence argues that this report strongly supports the Defence case, that the Prosecution was aware of its importance and thus violated its Rule 68 obligations by failing to disclose the document in a timely manner.¹¹

4. Relief Sought

8. As a remedy, the Defence seeks leave to add any of the abovementioned materials to its Rule 65 *ter* Document List and use it with its Defence witnesses that have not yet testified. The Defence further requests that the Trial Chamber order the Prosecution to search for further

⁵ Motion, para. 24.

⁶ Motion, para. 26.

⁷ Motion, Annex B. The Registry Policy Governing Translation Services Provided by the Registry, Dated 16 November 2006, states that "unless required by an order of a Chamber, CLSS does not translate books or other voluminous written compendia.", p. 2.

⁸ Motion, Annex G.

⁹ Prosecution Fifth Motion for Leave to Amend its Exhibit List, 7 November 2007; Motion, para. 37.

¹⁰ Motion, paras 40 and Annex I.

exculpatory material falling in the three categories discussed in the Motion and to disclose it to the Defence within seven days, or confirm that it is not in possession of such material.¹²

9. In addition and with regard to the ICI Material only, the Defence requests the Trial Chamber to order the Registry to urgently translate all the ICI Material identified as relevant and exculpatory.¹³

B. Submissions of the Prosecution

10. On 20 March 2008, the Prosecution publicly filed its “Response to Urgent Defence Motion Concerning Failure of Prosecution to Comply with Rule 68” with Annexes A and B (“Response”).

1. Material Relating to the Islamic Cultural Institute in Milan

11. With the exception of the ICI Report, which became available to the Prosecution on or about 15 February 2008 and was disclosed on 22 February 2008, the Prosecution admits that the ICI Material has been in its possession since 2006 and should have been disclosed at an earlier stage.¹⁴ It further submits that to avert any prejudice it would raise no objections should the Defence move to recall witnesses who have already testified or call new Defence witnesses.¹⁵

12. The Prosecution stresses that it is already performing a complete search of its records to identify and disclose any additional Rule 68 Material pertaining to Anwar Shaaban and the ICI in Milan.¹⁶

2. Material Relating to Jasmin Brkić

13. The Prosecution acknowledges that part of this material constitutes exculpatory material under Rule 68.¹⁷ It contests, however, that the Defence suffered any prejudice as a result of the delayed disclosure, specifically, that the information disclosed was irrelevant for the Defence’s ability to respond to the said Prosecution motion and that claims about “improper practices” regarding witnesses are vague and non-recurring.¹⁸ The Prosecution takes no position on the Defence request to add the Jasmin Brkić material to its Rule 65 *ter* List.

¹¹ Motion, paras 41 and 42.

¹² Motion, paras 25, 38 and 43.

¹³ Motion, para. 25.

¹⁴ Response, para. 4.

¹⁵ Response, para. 4.

¹⁶ Response, para 5.

¹⁷ Response, para. 7.

¹⁸ Response, paras 7, 9-12.

3. Material Relating to the Presence of Other Mujahedin Groups on the Territory of Bosnia and Herzegovina

14. The Prosecution submits that the report from the Main Staff of the Army of the Republika Srpska was seized by another Prosecution team after 10 January 2008 and was timely disclosed to the Defence on 21 February 2008, pursuant to Rule 68.¹⁹ The Prosecution does not object to the Defence request for leave to add such document to its Rule 65 *ter* List.

15. Finally, the Prosecution states it is already taking steps to identify any further Rule 68 material relating to the presence of different Mujahedin groups in Bosnia and Herzegovina at the relevant time and has asked the Defence to identify requisite search terms that will facilitate an electronic search.²⁰

II. APPLICABLE LAW

16. 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[.]

17. The jurisprudence of the Tribunal is clear on the importance of the disclosure of exculpatory material to ensure the fairness of the proceedings before the Tribunal²¹ and that it is the responsibility of the Prosecutor alone to ensure that such exculpatory material is disclosed to the Defence.²²

18. Furthermore, as discussed in *Prosecutor v. Radoslav Brđanin*:

the meaning of Rule 68 must also be placed in the broader context of securing the fair trial rights of the accused as enshrined in Articles 20 and 21 of the Statute of the Tribunal. The fair trial concept demands not only that the Prosecution, pursuant to the plain language of the Rule, disclose to the Defence in sufficient time “the existence of evidence”, but also, [...], that it actually provide the Defence with all of the exculpatory evidence in question “as soon as practicable”.²³

¹⁹ Response, para. 13.

²⁰ Response, para. 14; Response Annex A.

²¹ *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Appellant’s Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to The Registrar to Disclose Certain Materials (*Brđanin* Appeal Decision), 7 December 2004, p. 3.

²² *Prosecutor v. Blaskić*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, para. 47.

²³ *Brđanin* Appeal Decision, p. 3.

III. DISCUSSION

19. The Trial Chamber notes that the Prosecution concedes that, with the exception of the ICI Report, the ICI Material referred to above should have been disclosed to the Defence at an earlier stage during the proceedings. Consequently, the Trial Chamber finds that the Prosecution has violated its disclosure obligations under Rule 68 with regard to the ICI Material disclosed on 13 February 2008 and on 26 February 2008. The Trial Chamber is also satisfied that the Defence has suffered prejudice by being deprived of the opportunity to use the ICI Material with prior witnesses. Therefore, the Defence should be allowed to identify other witnesses for this purpose and to amend its Rule 65 *ter* Document and Witness List in this regard.

20. The Trial Chamber is of the view that the Prosecution's late disclosure of the material relating to Jasmin Brkić constitutes only a minor breach of its disclosure obligations and that in any event, it has not resulted in material prejudice to the Defence.

21. The Trial Chamber cannot find that the Prosecution is in breach of its Rule 68 obligations regarding the material on the presence of different Mujahedin groups on the territory of Bosnia and Herzegovina, due to the fact that this material was only recently discovered.

22. On the whole, it appears that the Prosecution has been responsive to the Defence grievances and is acting diligently in conducting further searches for documents falling under the scope of Rule 68, in concert and with the assistance of the Defence.

IV. DISPOSITION

23. **FOR THE FOREGOING REASONS** and **PURSUANT** to Rules 54, 68 and 126 *bis* of the Rules, **THE TRIAL CHAMBER**

GRANTS leave to the Defence to exceed the word limit of the Motion;

FINDS that the Prosecution is in breach of its obligation to disclose exculpatory material to the Defence under Rule 68 of the Rules;

ENJOINS the Prosecution to take the necessary steps to ensure that all the material falling within the scope of Rule 68 of the Rules in its possession is identified and disclosed to the Defence on an ongoing basis;

INVITES the Defence to indicate by way of Motion, as soon as possible, the names of any witnesses it intends to add to its Rule 65 *ter* Witness List and/or recall for examination-in-chief or cross-examination in light of the exculpatory material that has emerged;

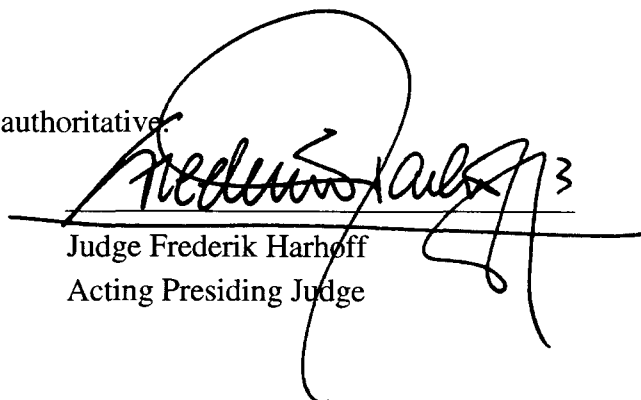
GRANTS leave to the Defence to add to its 65 *ter* Document List the report of the Main Staff of the Army of the Republika Srpska dated 4 October 1995 (Annex I of the Motion);

INVITES the Defence to indicate any other documents that it wishes to add to its Rule 65 *ter* Document List;

ORDERS the Registry Conference and Language Service Section to translate into English and B/C/S those documents from the Islamic Cultural Institute Material which the Defence identifies as exculpatory and relevant;

DENIES the remainder of the Defence Motion.

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



Judge Frederik Harhoff
Acting Presiding Judge

Dated this twenty-eighth day of March 2008

At The Hague

The Netherlands

[Seal of the Tribunal]