



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-PT
Date: 9 October 2008
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Iain Bonomy, Pre-Trial Judge
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 9 October 2008

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED MOTION FOR INSPECTION AND DISCLOSURE

Office of the Prosecutor

Mr. Alan Tieger
Mr. Mark B. Harmon

The Accused

Mr. Radovan Karadžić

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 a “Motion for Inspection and Disclosure: Immunity Issue”, filed on 6 October 2008¹ (“Motion”) by the Accused Radovan Karadžić (“Accused”), and hereby renders its decision thereon.

I. Submissions

1. In the Motion, the Accused, pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), seeks an order requiring the Prosecution to allow inspection and disclosure of certain information it may have in its possession, and which the Accused submits is material to his defence.

2. In the Motion, the Accused describes the information sought as follows:

- a. “all information in the possession of the Prosecution concerning the agreement made with Radovan Karadzic on or about 18-19 July 1996 by Richard Holbrooke”;
- b. “all information in the possession of the Prosecution between July 1996 and the present concerning requests that the prosecution of the Accused not be pursued”;
- c. “all information in the possession of the Prosecution concerning the failure to arrest Radovan Karadzic after 18 July 1996 and/or the reasons therefore”;
- d. “all information in the possession of the Prosecution concerning the relationship between United States negotiating efforts in Bosnia in 1995 through 1997 and the United Nations and its subsidiary bodies including the Security Council, General Assembly, ICTY, IFOR, SFOR, and UNPROFOR”; and
- e. “all information in the possession of the Prosecution concerning the relationship between the United States negotiating efforts in Bosnia in 1997 through 1997 and the member States of the United Nations, including the Contact Group”.²

3. The Prosecution has not yet responded to the Motion; however, the Chamber does not find it necessary to hear from the Prosecution prior to disposing of the Motion.

¹ The Trial Chamber notes that, although it is dated 23 September 2008, the Motion was filed on 6 October 2008.

² Motion, para. 1(A)–(E).

II. Applicable law

4. Rule 66(B) of the Rules states:

The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained for or belonged to the accused.

In accordance with the language of this Rule, it is usual Tribunal procedure that the Accused should first direct his request for inspection to the Prosecution. If the Prosecution declines to comply with that request, the Accused may then file a motion requesting the Trial Chamber to order the Prosecution to allow inspection.

5. Rule 68(i) of the Rules, subject to the provisions of Rule 70, places an independent obligation upon the Prosecution to disclose to the defence, "as soon as practicable ... 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".

6. As the Accused has pointed out in the Motion,³ the Prosecution's obligation under Rule 68 is one of its most onerous responsibilities, and has been considered as important as the obligation to prosecute.⁴ The Prosecution must, within its own discretion, make a fact-based assessment as to whether any materials in its possession are exculpatory as to the accused, and must expeditiously disclose any such materials.⁵ The general practice of the Tribunal has been to respect the Prosecution's execution of this function in good faith.⁶

7. Nevertheless, if the defence believes that the Prosecution has not complied with Rule 68, it may make a submission to the Trial Chamber alleging a breach of Rule 68 by the Prosecution, and

³ Motion, para. 8.

⁴ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 264; *Prosecutor v. Kordić and Čerkez*, Case No. IT-65-14/2-A, Appeal Judgement, 17 December 2004 ("*Kordić* Appeal Judgement"), para. 183; *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, 7 December 2004 ("*Brđanin* Decision"), p. 3.

⁵ *Blaškić* Appeal Judgement, para. 264; *Kordić* Appeal Judgement, para. 183; *Brđanin* Decision, p. 3; *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 34; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion, 14 May 2008 ("*Karemera* Decision"), para. 9.

⁶ *Kordić* Appeal Judgement, para. 183; *Prosecutor v. Blaškić*, IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 ("*Blaškić* Decision"), para. 45.

requesting an order compelling disclosure thereunder. An order of this type should only be contemplated where the defence can satisfy the Trial Chamber that the Prosecution has failed to meet its obligations under Rule 68.⁷

8. The Appeals Chamber has held that, to warrant such an order, the defence must:
 - a. identify specifically the materials sought;
 - b. provide *prima facie* proof of the likelihood that the materials are in the custody or control of the Prosecution; and
 - c. provide *prima facie* proof of the likelihood that the materials are exculpatory in respect of the accused.⁸

III. Discussion

9. Insofar as the Motion pertains to Rule 66(B), the Trial Chamber considers that it would be premature to assume jurisdiction, and is not satisfied that a decision from the Trial Chamber is needed in order to dispose of the matter, as it is adequately dealt with under the Rules. The Trial Chamber will on this basis dismiss the Accused's request under Rule 66(B).

10. With respect to the Accused's request under Rule 68, the Trial Chamber infers from the representations in the Motion that the Accused is of the view that the Prosecution has failed to meet its Rule 68 obligation in relation to the materials sought. However, the Accused, at this point in time, has not met the required criteria outlined for the issuance of an order under Rule 68.⁹ For these reasons, the Trial Chamber will deny the Accused's request in this regard.

IV. Disposition

11. Accordingly, the Trial Chamber, pursuant to Rules 54, 66, and 68 of the Rules of Procedure and Evidence of the Tribunal, hereby:

- a. DISMISSES the Motion insofar as it relates to Rule 66(B); and


⁷ *Blaškić* Decision, para. 50.2; *Brđanin* Decision, p. 3.

⁸ *Blaškić* Appeal Judgement, para. 268; *Kordić* Appeal Judgement, para. 179; *Brđanin* Decision, p. 3; *Karemera* Decision, para. 9.

⁹ Motion, para. 10.

- b. DENIES the Motion insofar as it relates to Rule 68; and
- c. INFORMS the Accused that he may submit his request to the Prosecution.

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



Judge Patrick Robinson
Presiding

Dated this ninth day of October 2008
At The Hague
The Netherlands

[Seal of the Tribunal]