



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: 5 October 2010

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: 5 October 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S SIXTEENTH MOTION FOR FINDING OF DISCLOSURE
VIOLATION AND FOR REMEDIAL MEASURES**

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 seised of the Accused’s “Sixteenth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly on 7 September 2010 (“Sixteenth Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Sixteenth Motion, the Accused argues that the Office of the Prosecutor (“Prosecution”) “has violated its disclosure obligations by failing to disclose *inter partes* transcripts from other cases as ordered by the Trial Chamber”.¹ The Accused refers to the Trial Chamber’s “Decision on Motion for Access to Confidential Materials in Completed Cases”, of 5 June 2009 (“Access Decision”), whereby the Prosecution was ordered to identify, within 14 days of the decision, what *inter partes* confidential material in completed cases could immediately be disclosed to the Accused and those materials which could not be disclosed due to existing protective measures or would be subject to a request for additional protective measures.²

2. The Accused makes reference to his discovery, in August 2010, that the Prosecution had directed the Registry to withhold disclosure of the closed session transcript pages of the portion of a hearing in which the protective measures for witness KDZ088 were discussed (“Transcript Pages”), as well as to his previous motion requesting disclosure of this material, and the Trial Chamber’s subsequent oral decision that the Prosecution should have disclosed the transcript in unredacted form.³ The Accused requests a finding that the withholding of the Transcript Pages violated the disclosure requirements set out in the Access Decision, and that the Prosecution be ordered to “provide a list of all *inter partes* material which it has redacted or withheld access based upon its erroneous interpretation” of that Decision and to disclose such material forthwith.⁴

3. On 21 September 2010, the Prosecution publicly filed the “Prosecution’s Response to Karadžić’s Sixteenth Motion for Finding of Disclosure Violation and for Remedial Measures” (“Response to the Sixteenth Motion”), arguing that the requests made by the Accused are “based

¹ Sixteenth Motion, para. 1.

² Sixteenth Motion, para. 1 citing Access Decision, para. 33.

³ Sixteenth Motion, paras. 5-6. The Accused refers to his Motion for Access to Redacted Portions of Closed Session Transcript: Witness KDZ088 Protective Measures, 2 September 2010 (“Motion for Access to Transcript”), and the Trial Chamber’s oral decision on 6 September 2010, T. 6235-6237 (private session) (“Oral Decision”).

⁴ Sixteenth Motion, paras. 8-10.

on an incorrect premise and have no basis”, and that the Sixteenth Motion should therefore be dismissed.⁵ The Prosecution also argues that the failure of the Accused to demonstrate any prejudice with respect to the late disclosure of the Transcript Pages precludes the granting of any remedy by the Trial Chamber.⁶

4. The Prosecution submits that it did not erroneously interpret the Access Decision. In support of this submission, it outlines the steps it took to ensure identification and disclosure of confidential material from other cases to the Accused.⁷ It argues that the Transcript Pages had been missed due to an error in the review of the materials and not as a result of an erroneous interpretation of the Access Decision and therefore that the Accused’s request for “an order to provide a list of all *inter partes* material to which access was withheld, as well as an order for the disclosure of such material, is based on an erroneous premise and should be dismissed”.⁸

II. Applicable Law

5. The Access Decision granted the Accused conditional access to all *inter partes* confidential material, including confidential closed and private session testimony transcripts, closed session hearing transcripts, confidential exhibits, confidential *inter partes* filings and submissions, and confidential Trial Chamber and Appeals Chamber decisions, in a number of other cases heard by the Tribunal.⁹ The Trial Chamber outlined the circumstances in which a party can be granted access to confidential material from another case to assist in the preparation of its case.¹⁰ That discussion will not be repeated here.

6. The Prosecution was ordered to identify within 14 days of the Access Decision, what *inter partes* confidential material in the identified cases could be immediately disclosed to the Accused and which material could not be immediately disclosed due to existing or pending protective measures.¹¹ The Trial Chamber distinguished between the Prosecution’s disclosure obligations under Rules 66 and 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and the obligations imposed by the Access Decision.¹²

⁵ Response to the Sixteenth Motion, para. 1.

⁶ Response to the Sixteenth Motion, paras. 1, 6. The Prosecution notes that the Transcript Pages were disclosed on the same day of the Trial Chamber’s Oral Decision.

⁷ Response to the Sixteenth Motion, para. 2.

⁸ Response to the Sixteenth Motion, paras. 3-4.

⁹ Access Decision, para. 32.

¹⁰ Access Decision, paras. 8-11.

¹¹ Access Decision, para. 33.

¹² Access Decision, para. 39.

III. Discussion

7. The Trial Chamber notes that the Access Decision is independent of and has no connection with the Prosecution's disclosure obligations under Rules 66, 67 and 68 of the Rules. It follows that the failure of the Prosecution to provide access to the Transcript Pages has been incorrectly characterised in the Sixteenth Motion as a disclosure violation. Such failure rather amounts to a breach by the Prosecution of an order of the Chamber. That breach was cured when the Transcript Pages were provided to the Accused.

8. The Trial Chamber finds that the failure to provide access to the Transcript Pages was not the product of an erroneous interpretation by the Prosecution of the Access Decision.¹³ It follows that the Accused's request for an additional order requiring the Prosecution to list and disclose "all *inter partes* material which it has redacted or withheld access" is unwarranted given the clear obligations set out in the Access Decision. The Chamber urges the Prosecution to double-check to ensure that the Accused has indeed been given access to all material which he is entitled to under the Access Decision.

IV. Disposition

9. For the foregoing reasons, pursuant to Rule 54 of the Rules, the Trial Chamber hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this fifth day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

¹³ While the Prosecution submits that the failure to comply with the Access Decision in this case was due to an inadvertent error, the Chamber notes that it was not until the Accused filed his Motion for Access to Transcript and the Trial Chamber's Oral Decision that the Accused was given access to the Transcript Pages.