



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: 8 April 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: 8 April 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S FORTY-THIRD TO FORTY-FIFTH DISCLOSURE
VIOLATION MOTIONS**

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-Third Motion for Finding of Disclosure Violation and for Remedial Measures (February 2011)”, filed publicly with confidential annexes on 2 March 2011 (“Forty-Third Motion”), “Forty-Fourth Motion for Finding of Disclosure Violation and for Admission of Statement of Rajko Koprivica pursuant to Rule 92 *quater*”, filed on 8 March 2011 (“Forty-Fourth Motion”), “Forty-Fifth Motion for Finding of Disclosure Violation and for Remedial Measures (Batch 576)”, filed on 16 March 2011 (“Forty-Fifth Motion”), and the “Prosecution’s Motion for Admission of Three Exhibits from the Bar Table in Relation to the Forty-Third Motion for Disclosure Violation”, filed by the Office of the Prosecutor (“Prosecution”) on 10 March 2011 (“Prosecution Bar Table Motion”) (together “Motions”) and hereby issues its decision thereon.

I. Submissions

A. Forty-Third Motion

1. In the Forty-Third Motion, the Accused submits that the Prosecution violated Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by failing to disclose to him, as soon as practicable, five documents.¹ The first of these documents is an UNPROFOR report dated 26 March 1993 (“UNPROFOR Report”), the second is an International Conference on the Former Yugoslavia memorandum dated 20 July 1993 (“ICFY Memorandum”), the third is an order issued by Stanislav Galić on 11 August 1993 (“First Galić Order”), the fourth is an order issued by Stanislav Galić on 22 May 1994 (“Second Galić Order”), and the fifth is the record of an intercepted conversation involving the Accused on 29 May 1995 (“Intercept”) (together “Documents”).² The Accused argues that the Documents were not disclosed “as soon as practicable” as they were not provided to him until late February 2011.³

2. The Accused submits that the Documents are exculpatory in nature given that: (1) the UNPROFOR Report refutes the allegation that he and the Bosnian Serb leadership failed to punish subordinates, (2) the ICFY Memorandum, First Galić Order, and Second Galić Order refute the allegation that he and the Bosnian Serbs unreasonably restricted utilities and humanitarian aid to Sarajevo, and (3) the Intercept supports his contention that “he believed that UN personnel could be detained as prisoners of war and therefore lacked the required *mens rea*

¹ Forty-Third Motion, para. 1.

² Forty-Third Motion, para. 1.

³ Forty-Third Motion, para. 2.

for hostage taking”.⁴ The Accused argues that he was prejudiced by this late disclosure as he could not assess the Documents in preparing for trial and developing his overall defence strategy, and he could not use them during his cross-examination of a number of witnesses who have already testified about “events during the time periods covered by these documents”.⁵ He thus requests the Chamber to make a finding that the Prosecution has violated Rule 68 by failing to disclose the Documents as soon as practicable.⁶ Finally, the Accused requests that the Documents be admitted from the bar table as a remedy and outlines how each one fits into his case.⁷

3. On 11 March 2011, the Prosecution filed the “Prosecution Response to Karadžić’s Forty-Third Motion for Finding of Disclosure Violation” (“Response to Forty-Third Motion”). It submits that the Forty-Third Motion should be dismissed as the Accused has failed to demonstrate how any of the Documents “suggests his innocence or mitigates his guilt or undermines the case presented by the Prosecution”.⁸ The Prosecution’s arguments with respect to each document are discussed separately below.

UNPROFOR Report

4. With respect to the UNPROFOR Report, the Prosecution concedes that it has been in possession of the document since before 25 May 2009 (the deadline set by the pre-trial Judge for disclosure of all Rule 65 *ter* material), and submits that it had intended to disclose it in full to the Accused as 65 *ter* number 08617 by that deadline.⁹ However, due to an error, only the first page was provided to the Accused and uploaded into e-court.¹⁰ It is not clear from the Response whether that one page was provided by the 25 May 2009 deadline, or was only provided on 24 February 2011.¹¹ Adding further confusion, the Response states that the UNPROFOR Report was disclosed pursuant to Rule 65 *ter*,¹² whereas the actual disclosure letter sent by the Prosecution to the Accused on 24 February 2011, which is related to, *inter alia*, that UNPROFOR Report, and is attached to the Forty-Third Motion in confidential Annex A, pertains only to a batch of Rule 68 disclosure and makes no mention of Rule 65 *ter*. In any event, it appears from the Response that the full Report was uploaded into e-court and the

⁴ Forty-Third Motion, para. 3.

⁵ Forty-Third Motion, paras. 5-6.

⁶ Forty-Third Motion, para. 8.

⁷ Forty-Third Motion, paras. 8-9.

⁸ Response to Forty-Third Motion, para. 1.

⁹ Response to Forty-Third Motion, para. 3.

¹⁰ Response to Forty-Third Motion, para. 3.

¹¹ Response to Forty-Third Motion, para. 3 and fn. 5.

¹² Response to Forty-Third Motion, fn. 5.

Accused notified accordingly on 28 February 2011. The Prosecution submits that it did not violate its Rule 68 obligations but simply “made an error in disclosing a 65^{ter} exhibit”.¹³

5. The Prosecution argues that contrary to the Accused’s submissions, the UNPROFOR Report “in no way demonstrates that the Accused punished his subordinates for any of the crimes charged in the Indictment”.¹⁴ It also submits that the Accused has not been prejudiced nor has the development of his overall defence strategy been impacted by its disclosure at this late stage. In support of this submission it contends that, for a substantial period of time, the Accused has possessed the very same information contained in the UNPROFOR Report, he did not use that information with other witnesses and that, in any event, the source of the information in the Report is a Prosecution witness who is yet to testify.¹⁵

ICFY Memorandum

6. The Prosecution concedes that the ICFY Memorandum has been in its possession since 2001, but states that it had been identified in response to a Rule 66(B) request made by the Accused in October 2010 for “all documents which tend to show that Bosnian Serbs assisted in maintaining the flow of utilities in Sarajevo” (“Rule 66(B) Request”) and that it had acted in good faith to promptly disclose the document in accordance with that Request.¹⁶ It also challenges the Accused’s contention that the ICFY Memorandum is exculpatory by arguing that he has mischaracterised the Prosecution’s case with respect to restrictions on the flow of humanitarian aid or utilities to Sarajevo.¹⁷ The Prosecution clarifies that it does not seek to establish that the Accused never permitted the flow of humanitarian aid or utilities to Sarajevo, but rather that he controlled and modulated the flow of these supplies for various purposes, including securing concessions and to prevent international intervention.¹⁸

7. The Prosecution also submits that the Accused has not been prejudiced nor has the development of his overall defence strategy been impacted by the disclosure of the ICFY Memorandum at this stage. In support of this submission, it contends that the ICFY Memorandum “is entirely consistent with an alleged defence developed by the Accused in the absence of this document” and that the Accused was in possession of other documents which

¹³ Response to Forty-Third Motion, para. 3.

¹⁴ Response to Forty-Third Motion, para. 4.

¹⁵ Response to Forty-Third Motion, paras. 5-6.

¹⁶ Response to Forty-Third Motion, para. 8.

¹⁷ Response to Forty-Third Motion, para. 9.

¹⁸ Response to Forty-Third Motion, para. 9.

discussed the subject-matter of the ICFY Memorandum and yet he did not use them during his cross-examination of David Harland.¹⁹

First Galić Order

8. The Prosecution also concedes that it has been in possession of the First Galić Order since 2001, but again states that it was provided to the Accused in response to his Rule 66(B) Request and that, therefore, there has been no violation of Rule 68.²⁰ It also challenges the Accused's contention that the First Galić Order is exculpatory on the basis that he has misrepresented the Prosecution's case with respect to restrictions on the flow of humanitarian aid or utilities to Sarajevo.²¹ As with respect to the ICFY Memorandum, the Prosecution maintains that its case is that the Accused controlled and modulated the flow of these supplies to Sarajevo to suit his own objectives, and that he had the power to control access to the city and the provision of humanitarian aid, which it maintains is consistent with the First Galić Order.²²

9. The Prosecution also submits that the Accused has not been prejudiced nor has the development of his overall defence strategy been impacted by the disclosure of the First Galić Order at this time. In support of this submission, it contends that the information contained therein "was consistent with evidence the Prosecution intends to lead, which has been in the Accused's possession for a substantial period of time" and that the "alleged exculpatory aspect of the First Galić Order was available to the Accused in other forms, and yet he elected not to cross-examine on this issue".²³

Second Galić Order

10. The Prosecution also notes that it has been in possession of the Second Galić Order since 2001, it was provided to the Accused in response to his Rule 66(B) Request, and submits that there was no violation of Rule 68 with respect to it.²⁴ The Prosecution disputes the Accused's contention that the Second Galić Order is exculpatory and argues that it is in fact inculpatory and consistent with the Prosecution's case as it "contemplates the modulation of the utility supplies to Sarajevo in furtherance of the interests of the Bosnian Serbs, at the Accused's command".²⁵ In addition, it argues that the Second Galić Order "is not of such significance to

¹⁹ Response to Forty-Third Motion, para. 10.

²⁰ Response to Forty-Third Motion, para. 11.

²¹ Response to Forty-Third Motion, para. 11.

²² Response to Forty-Third Motion, paras. 11, 13.

²³ Response to Forty-Third Motion, para. 14.

²⁴ Response to Forty-Third Motion, para. 15.

²⁵ Response to Forty-Third Motion, para. 16.

have any impact on the Accused's development of his overall defence strategy, nor has he demonstrated that he has been prejudiced by its recent disclosure".²⁶

Intercept

11. With respect to the Intercept, the Prosecution submits that the Accused has failed to present "a *prima facie* case making out the *probable* exculpatory or mitigating nature of the material" in light of the Tribunal's jurisprudence on the taking of hostages.²⁷ It also claims that once it was alerted to the Accused's legal arguments with respect to the allegations of taking hostage UN personnel, it disclosed the Intercept as being "relevant to the defence case".²⁸ It disputes the Accused's contention that he was prejudiced by this late disclosure on the basis that there had been extensive litigation over the issue and that he had not used other documents which contained the same information during his cross-examination of witnesses who have already testified.²⁹

Admission of Documents from the bar table

12. The Prosecution accepts that the Documents are relevant and have probative value, and does not oppose their admission from the bar table if the Chamber "is satisfied that the Documents are properly contextualised".³⁰ It also contends, with respect to the Intercept, that it should be admitted and not simply marked for identification, arguing that the Accused "cannot maintain his inconsistent positions with respect to the admission of intercepts".³¹

13. In the Prosecution Bar Table Motion, the Prosecution tenders three further intercepts for admission from the bar table in order to "provide additional context to documents tendered by the Accused in the Forty-Third Motion".³² On 15 March 2011, the Accused filed the "Response to Prosecution Motion for Admission of Three Intercepts" ("Response to Bar Table Motion"). He does not oppose the admission of these intercepts with the caveat that they should be "marked for identification pending the Chamber's determination on the reliability of the intercept procedures".³³

²⁶ Response to Forty-Third Motion, para. 17.

²⁷ Response to Forty-Third Motion, para. 18.

²⁸ Response to Forty-Third Motion, para. 19.

²⁹ Response to Forty-Third Motion, para. 19, refers to Rule 65 *ter* number 31739.

³⁰ Response to Forty-Third Motion, paras. 20, 24.

³¹ Response to Forty-Third Motion, para. 21.

³² Prosecution Bar Table Motion, paras. 1-4.

³³ Response to Bar Table Motion, paras. 1, 3.

B. Forty-Fourth Motion

14. In the Forty-Fourth Motion, the Accused submits that the Prosecution has violated Rule 68 of the Rules by the late disclosure of one document, which was provided to him on 22 February 2011.³⁴ The document is the transcript of an interview conducted with the late Rajko Koprivica who was the former President of Vogošća Municipality (“Transcript”), which the Accused submits is exculpatory as it contains information which: (i) suggests the Accused “did everything that he could to avoid the war” and that the erection of barricades in Vogošća in March 1992 was spontaneous and not ordered, (ii) contradicts the evidence of Eset Muračević regarding events in Svrake and the reason for his detention and the detention of others from his village, and (iii) suggests that the Vogošća authorities were not involved in the mistreatment of these prisoners.³⁵

15. In addition, the Accused argues that he was prejudiced by this late disclosure as he could not review and use the Transcript during his cross-examination of witnesses who testified about events in Vogošća or in developing his overall defence strategy.³⁶ He requests the Chamber to make a finding that the Prosecution has violated Rule 68 by failing to disclose the Transcript as soon as practicable.³⁷ He also requests that the Transcript be admitted into evidence pursuant to Rule 92 *quater* “as a remedy for the late disclosure as well as on its own merit”.³⁸ In support of this request the Accused contends that there is no question about the reliability of the statement which is a verbatim transcript of an interview taken by the Prosecution, and notes that it had been admitted pursuant to Rule 92 *quater* in another case before the Tribunal.³⁹

16. On 21 March 2011, the Prosecution filed the “Prosecution Response to Karadžić’s Forty-Fourth Motion for Finding of Disclosure Violation” (“Response to Forty-Fourth Motion”), arguing that the Forty-Fourth Motion should be dismissed as the recent disclosure of the Transcript did not result in prejudice to the Accused even though it may contain some material of “marginal exculpatory value”.⁴⁰ The Prosecution presents distinct arguments as to why several of the examples of exculpatory material in the Transcript referred to by the Accused are not in fact exculpatory, while acknowledging that some of the material in the Transcript may

³⁴ Forty-Fourth Motion, paras. 1–2.

³⁵ Forty-Fourth Motion, para. 11.

³⁶ Forty-Fourth Motion, paras. 13-14.

³⁷ Forty-Fourth Motion, para. 16.

³⁸ Forty-Fourth Motion, para. 17.

³⁹ Forty-Fourth Motion, paras. 17-20, citing *Prosecutor v. Popović et al*, Case No. IT-05-88-T, Decision on Gvero’s Motion for the Admission of Evidence Pursuant to Rule 92 *quater*, 3 February 2009.

⁴⁰ Response to Forty-Fourth Motion, para. 1.

have “some exculpatory value”.⁴¹ However, it states that the Accused has suffered no prejudice by the late disclosure of that material.⁴²

17. The Prosecution submits that given the absence of prejudice, the Accused’s request that the Transcript be admitted pursuant to Rule 92 *quater*, as a remedy, is unwarranted.⁴³ In addition, it argues that the Accused should, if necessary, introduce the Transcript pursuant to Rule 92 *quater* during his case-in-chief and not at this stage in the proceedings.⁴⁴ It also notes that the “Accused has ignored the Chamber’s guidance to file consolidated disclosure violation motions” given that the Forty-Fourth Motion does not seek an urgent remedy.⁴⁵

C. Forty-Fifth Motion

18. In the Forty-Fifth Motion, the Accused submits that the Prosecution has violated Rule 68 of the Rules by the late disclosure of three transcripts.⁴⁶ The first is the transcript of an interview conducted by the Prosecution on 11 December 2006 with a police officer from Pale municipality; the second is the transcript of an interview conducted by the Prosecution on 22 November 2003 with a VRS officer from Pale; and the final transcript is of an interview conducted by the Prosecution on 13 July 2009 with a police official from Vogošća (together “Interviews”).⁴⁷ He argues that the Interviews are exculpatory in nature as they contradict the testimony of two witnesses who have already testified in this case, and that he has been prejudiced by the inability to refer to the Interviews during their cross-examination.⁴⁸ He also submits that he was prejudiced by this late disclosure as he could not assess the documents in preparing for trial and developing his overall defence strategy.⁴⁹

19. The Accused thus requests the Chamber to make a finding that the Prosecution has violated Rule 68 by failing to disclose the Interviews as soon as practicable.⁵⁰ He seeks no further remedy on the basis that the documents in question formed part of Batch 576 which was the subject of his “Motion for Fifth Suspension of Proceedings” filed on 8 March 2011.⁵¹

⁴¹ Response to Forty-Fourth Motion, paras. 3-13.

⁴² Response to Forty-Fourth Motion, paras. 7-8, 11-13.

⁴³ Response to Forty-Fourth Motion, para. 14.

⁴⁴ Response to Forty-Fourth Motion, para. 15.

⁴⁵ Response to Forty-Fourth Motion, para. 16.

⁴⁶ Forty-Fifth Motion, para. 1.

⁴⁷ Forty-Fifth Motion, paras. 1, 4.

⁴⁸ Forty-Fifth Motion, para. 7. The witnesses identified are Sulejman Crnčalo and Eset Muračević.

⁴⁹ Forty-Fifth Motion, para. 9.

⁵⁰ Forty-Fifth Motion, para. 11.

⁵¹ Forty-Fifth Motion, para. 11. The Chamber granted a two week extension of the suspension of proceedings to allow the Accused to review this batch of disclosure: Decision on Accused’s Motion for Fifth Suspension of Proceedings, 17 March 2011, para. 10.

20. On 18 March 2011, the Prosecution filed the “Prosecution’s Response to Karadžić’s Forty-Fifth Motion for Finding of Disclosure Violation (Batch 576)” (“Response to Forty-Fifth Motion”). It submits that the Forty-Fifth Motion should be dismissed as the Accused has failed to demonstrate any prejudice and that the value of the allegedly exculpatory information is minimal.⁵² The Prosecution also argues that the Forty-Fifth Motion is untimely given that it does not seek any remedy other than a finding that the Prosecution has violated its disclosure obligations, despite the direction by the Chamber that consolidated disclosure violation motions should be filed unless an urgent remedy is sought.⁵³ In support of this submission, the Prosecution observes that the Chamber has already granted a two-week suspension to allow the Accused to review this batch of material and that in the absence of demonstrable prejudice, remedial measures are unwarranted.⁵⁴

II. Applicable Law

21. 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”.⁵⁵ 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.⁵⁶ The Trial Chamber has previously outlined the Appeals Chamber’s jurisprudence on the scope and application of the obligation to disclose “as soon as practicable” exculpatory material under Rule 68.⁵⁷ That discussion will not be repeated here.

22. 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.⁵⁸

23. The Chamber also recalls that Rule 89(C) of the Rules provides that “[a] Chamber may admit any relevant evidence which it deems to have probative value” and thus allows for

⁵² Response to Forty-Fifth Motion, para. 1.

⁵³ Response to Forty-Fifth Motion, paras. 1, 7.

⁵⁴ Response to Forty-Fifth Motion, para. 7.

⁵⁵ Decision on the Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009 (“Decision on Deadlines for Disclosure”), para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgement, 29 July 2004 (“*Blaškić* Appeals Judgement”), para. 267.

⁵⁶ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeals Judgement”), para. 179.

⁵⁷ Decision on Accused’s Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 29 September 2010, paras. 14-17.

⁵⁸ *Kordić and Čerkez* Appeals Judgement, para. 179; *Blaškić* Appeals Judgement, para. 268.

admission of evidence from the bar table, without the need to introduce it through a witness.⁵⁹ Once the requirements of Rule 89(C) are satisfied, the Chamber maintains its discretionary power over the admission of evidence, which includes the ability to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial pursuant to Rule 89(D).⁶⁰ In accordance with the Chamber's "Order on Procedure for Conduct of Trial", issued on 8 October 2009 ("Order"), the party requesting admission of evidence from the bar table is required to:

- (i) provide a short description of the document of which it seeks admission; (ii) clearly specify the relevance and probative value of each document; (iii) explain how it fits into the party's case, and (iv) provide the indicators of the document's authenticity.⁶¹

III. Discussion

A. Forty-Third Motion

24. The UNPROFOR Report refers to indications given by Ratko Mladić in March 1993 that a Colonel Ilić would be arrested and that an investigation into a specific shelling incident had been ordered. Therefore, the Chamber finds that the UNPROFOR Report is potentially exculpatory as it suggests that steps may have been taken by the Bosnian Serb military leadership to punish subordinates for misconduct. If the Report had been disclosed on time, pursuant to Rule 65 *ter*, the question of its disclosure pursuant to Rule 68 and the timing thereof would be moot. However, it appears that either only one page, or possibly no pages, of the document were actually provided to the Accused in May 2009. Thus, the disclosure of the document in late February 2011 does constitute a breach of Rule 68. While the submissions of the parties concerning the circumstances of the provision of the UNPROFOR Report to the Accused are not sufficiently clear as to which Rule it was ultimately disclosed under, the Chamber expresses some concern, yet again, that the Prosecution's system for disclosure appears so inefficient and plagued by errors.

25. The ICFY Memorandum does suggest that Sarajevo was without electricity and water until 13 July 1993 "as a result of a deliberate political choice made by the Bosnian Government. The Bosnian authorities were unwilling to accept the Bosnian Serb proposals regarding sharing

⁵⁹ Decision on Deadlines for Disclosure, para. 10; Decision on Second Prosecution Bar Table Motion for the Admission of Bosnian Serb Assembly Records, 5 October 2010 ("Decision on Second Bar Table Motion"), paras. 5-7.

⁶⁰ Decision on Second Bar Table Motion, para. 6.

⁶¹ Order, Appendix A, Part VII, para. R.

of power”.⁶² While the Chamber is not convinced by the Accused’s argument that this statement in and of itself refutes the allegation that the Bosnian Serbs “unreasonably restricted utilities and humanitarian aid to the citizens of Sarajevo”,⁶³ the suggestion that political decisions by the Bosnian Government influenced the supply of utilities to Sarajevo is potentially exculpatory. The Chamber therefore finds that there has been a violation of Rule 68 with respect to its disclosure.

26. The First Galić Order contains orders from the Bosnian Serb leadership which relate to (1) securing the movement of UNPROFOR teams and humanitarian aid convoys, (2) prohibiting hindering or blocking the movement of UNPROFOR teams and humanitarian aid convoys, and (3) requiring the Sarajevo Romanija Corps to offer assistance “to the civilian organs of authority for ensuring the flow of electric power and gas to the Sarajevo area”.⁶⁴ To the extent that this information tends to refute the allegation that the Bosnian Serbs unreasonably restricted utilities and humanitarian aid to the citizens of Sarajevo, the Chamber finds that the First Galić Order is potentially exculpatory. While the First Galić Order may have been located by the Prosecution only as a result of a Rule 66(B) request from the Accused, that does not excuse its failure to identify and disclose potentially exculpatory material as soon as practicable. Given that the First Galić Order has been in the Prosecution’s possession since 2001, the Chamber finds that it has violated its obligation under Rule 68 of the Rules to disclose potentially exculpatory material as soon as practicable with respect to it.

27. The Second Galić Order does contain an instruction not to “obstruct the flow of water, electricity and gas without my permission because on the contrary it could turn against us”.⁶⁵ While this order *may* constitute evidence of Galić’s, and potentially the Accused’s, ability to control the flow of utilities to Sarajevo, and thus be inculpatory, other evidence may be adduced which demonstrates that Galić never did permit the obstruction referred to and that there were other reasons for such obstruction, beyond the control of the Accused. The Chamber therefore finds that the Second Galić Order is potentially exculpatory as it demonstrates efforts by Galić (and potentially the Accused, ultimately) to control the Bosnian Serb forces in order to prevent the obstruction of utilities. Given that the Second Galić Order has been in the Prosecution’s possession since 2001, the Chamber finds that it has violated its obligation under Rule 68 of the Rules to disclose potentially exculpatory material as soon as practicable with respect to it.

⁶² Forty-Third Motion, Annex B.

⁶³ Forty-Third Motion, para. 3.

⁶⁴ Forty-Third Motion, Annex C.

⁶⁵ Forty-Third Motion, Annex D.

28. The Intercept does suggest that the Accused regarded UN personnel captured by the Bosnian Serbs in May 1995 to be prisoners of war.⁶⁶ The Chamber has stated that the question of the status of the detained UN personnel might be a live issue in this case, and that the Accused has a right to build his defence in a way he sees fit.⁶⁷ The Prosecution has been aware, since the matter was first raised by the Accused in the pre-trial phase, that he would be arguing that the status of the detained UN personnel, and by implication that his own belief at the time with respect to that status, are exculpatory with respect to the hostage-taking charges.⁶⁸ The Prosecution has also been aware since at least May 2010 of the Chamber's position that the Accused's state of mind concerning the status of the detained UN personnel might be of relevance to the elements of the hostage-taking charges.⁶⁹ Thus, any documents in the possession of the Prosecution that go to the Accused's state of mind with respect to the status of the detained UN personnel should have been disclosed to the Accused as potentially exculpatory. The Chamber therefore finds that the Prosecution violated Rule 68 of the Rules by the disclosure of the Intercept in late February 2011.

Assessment of Prejudice

29. While the Prosecution violated its disclosure obligations under Rule 68 of the Rules by the late disclosure of the Documents referred to in the Forty-Third Motion, the Chamber finds that the Accused has suffered no prejudice as a result of these violations. In reaching this conclusion, the Chamber reviewed these documents and observed that their content is consistent with a number of documents referred to by the Prosecution which were already available to the Accused.⁷⁰ If a newly disclosed document adds nothing new to the material already available to the Accused, even if that document is potentially exculpatory, it is hard to conclude that his approach to the cross-examination of witnesses who have already testified or the development of his overall defence strategy have been negatively affected.

⁶⁶ Forty-Third Motion, Annex E.

⁶⁷ Decision on Accused's Motion to Compel Interview: General Sir Rupert Smith, 25 January 2011, para. 10; Decision on Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany), 19 May 2010, para. 26 ("Germany Binding Order Decision").

⁶⁸ Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction, 18 March 2009, paras. 24-26; Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction, 13 May 2009, paras. 15, 17-18, 30, 33.

⁶⁹ Germany Binding Order Decision, para. 26.

⁷⁰ Response to Forty-Third Motion, paras. 3-19, referring to Rule 65 *ter* number 11054, which is consistent with the content of the UNPROFOR Report. In addition the source of the information in this report is a witness who has yet to testify; Rule 65 *ter* numbers 21088 and 1D1030, which are consistent with the content of the ICFY Memorandum; Rule 65 *ter* numbers 06882, 176060 and 31691, which are consistent with the content of the First Galić Order, and Rule 65 *ter* number 31739 which is consistent with the content of the Intercept. This document also contains a statement by the Accused that UN personnel were being treated as prisoners of war and not hostages.

Admission of Documents from the Bar Table

30. Given the Chamber's conclusion that the Accused was not prejudiced with respect to the late disclosure of the Documents referred to in the Forty-Third Motion, there is no basis on which to grant the Accused's request that the Documents be admitted from the bar table as a remedy for those violations. If the Accused still believes there is value in seeking the admission of these documents into evidence, he can tender them through an appropriate witness in court during his defence case or in a future bar table motion which clearly addresses the specific requirements for the admission of evidence from the bar table.

Prosecution Bar Table Motion

31. Given that the Chamber has decided not to admit the Documents referred to in the Forty-Third Motion from the bar table, the Prosecution Bar Table Motion, which seeks to tender three further intercepts for admission from the bar table in order to "provide additional context to documents tendered by the Accused"⁷¹ is rendered moot, and is hereby dismissed.

B. Forty-Fourth Motion

32. The Prosecution has acknowledged that parts of the Transcript contain some material of marginal exculpatory value, and, having reviewed that Transcript, the Chamber concludes that some parts of it are potentially exculpatory. It follows that the Transcript should have been disclosed by the Prosecution as soon as practicable. In light of the fact that the Transcript is dated 21 April 2004, but it was only disclosed to the Accused on 22 February 2011, the Chamber finds that the Prosecution has violated its obligation under Rule 68 to disclose this document as soon as practicable.

33. Having reviewed the portions of the Transcript referred to by the Accused, the Chamber is not convinced that it is of such importance that its late disclosure has prejudiced the Accused in his preparation for trial or in the conduct of his cross-examination. In reaching this conclusion, the Chamber was mindful of the Prosecution's submission that pages 84 to 101 of the Transcript had already been disclosed to the Accused in March 2010.⁷² The Chamber was also satisfied that the examples cited by the Prosecution demonstrated that the Accused conducted his cross-examination of witnesses in a manner consistent with the allegedly

⁷¹ Prosecution Bar Table Motion, paras. 1-4.

⁷² Response to Forty-Fourth Motion, para. 4.

exculpatory information contained in the Transcript.⁷³ Moreover, the Accused will have sufficient opportunity during his presentation of evidence to introduce the Transcript pursuant to Rule 92 *quater* and therefore his request for its admission at this stage of proceedings is denied without prejudice.

C. Forty-Fifth Motion

34. The Prosecution has acknowledged that the Interviews contain some potentially exculpatory information. On this basis, and having conducted its own review of the Interviews, the Chamber concludes that they are potentially exculpatory, and should have been disclosed to the Accused by the Prosecution as soon as practicable. Given that the Interviews date back to July 2009, December 2006, and November 2003 respectively, the Chamber finds that the Prosecution has violated its obligation under Rule 68 to disclose these documents as soon as practicable.

35. However, having reviewed the Interviews the Chamber is not convinced that the Interviews are of such significance that the Accused's approach to cross-examination of witnesses or the development of his overall defence strategy has been prejudiced by their late disclosure. In reaching this conclusion, the Chamber was satisfied that the examples cited by the Prosecution demonstrated that the Accused conducted his cross-examination of witnesses in a manner consistent with the allegedly exculpatory information contained in the Interviews.⁷⁴

36. The Chamber reiterates its request that unless a motion seeks an urgent remedy, the Accused should conserve the resources of all parties by filing consolidated disclosure violation motions on a monthly basis. Since the Accused did not request an urgent remedy in the Forty-Fifth Motion, it would have been more appropriate for its substance to have been included as part of a consolidated disclosure violation motion.

⁷³ Response to Forty-Fourth Motion, paras. 8, 11-13, reference to T.12710, 12718, 12720, 12708-12713 (1 March 2011); 12745-12747 (2 March 2011); T. 11948-11950 (16 February 2011), T. 5190 (15 July 2010); T. 6446-6447 (10 September 2010).

⁷⁴ Response to Forty-Fifth Motion, paras. 7-8, reference to T. 1254, 1245, 1225-1226, 1264-1266, 1262 (15 April 2010); T.5086-5087 (14 July 2010).

IV. Disposition

37. For the foregoing reasons, the Trial Chamber, pursuant to Rules 54, 68, and 68 *bis* of the Rules, hereby:

- a) **GRANTS**, by Majority, Judge Kwon dissenting⁷⁵, the Forty-Fifth Motion, and finds that the Prosecution has violated Rule 68 of the Rules with respect to this motion;
- b) **GRANTS**, by Majority, Judge Kwon dissenting⁷⁶, the Forty-Third Motion and Forty-Fourth Motion in part, and finds that the Prosecution has violated Rule 68 of the Rules with respect to the delayed disclosure of the Documents referred to in the Forty Third Motion and Transcript referred to in the Forty-Fourth Motion;
- c) **DENIES** the Prosecution Bar Table Motion as moot;
- d) **DENIES** the remainder of the Motions.

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



Judge O-Gon Kwon
Presiding

Dated this eighth day of April 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

⁷⁵ 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.

⁷⁶ *Ibid.*