

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

IN TRIAL CHAMBER No. 3

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 2 May 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public w/ Public and Confidential Annexes

FORTY-EIGHTH MOTION FOR FINDING OF DISCLOSURE
VIOLATION AND FOR SANCTIONS
(APRIL 2011)

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves for a finding that the prosecution has once again violated Rules 66(A)(ii) and Rule 68, by failing to disclose, as soon as practicable, the following documents which were received during the month of April 2011:

- (A) Report of interview with prosecution witness Ivo Atlija.¹
- (B) Report of interview with prosecution witness Amor Masovic²
- (C) Report of interview with prosecution witness KDZ026³
- (D) UN Note to Mr. Gharekhan dated 30 October 1994 re Mt. Igman⁴

2. Although these documents appear to have been in the possession of the prosecution for a number of years, they were not disclosed until April 2011, more than 18 months after the trial began and even after Witness KDZ026 had completed his testimony.

3. The delay in disclosure of the three reports of interview violates not only the original 7 May 2009 disclosure deadline, but the 1 October 2010 deadline for disclosure of all remaining Rule 66(A)(ii) material. It represents the 397th through 399th witness statements disclosed in violation of this Rule and the 18th to 20th statements disclosed in violation of the Trial Chamber's final deadline.

4. Dr. Karadzic requests that the Trial Chamber make a specific finding that the prosecution has violated Rule 66(A)(ii) with respect to these three statements. He further requests that the Trial Chamber exclude the testimony of these three prosecution witnesses as a sanction for its repeated violations of the Rule and the Chamber's order.

5. Dr. Karadzic further requests that the Trial Chamber make a specific finding that the prosecution has violated Rule 68 with respect to the document listed in item (D) above. The exculpatory nature of the document is apparent from the evaluation of the UN that the Bosnian Muslims had violated the 14 August 1993 agreement and had refused to withdraw its forces from Mt. Igman. It was the alleged breach of this very same type of agreement that was used as a pretext for NATO air strikes in May 1995 and caused the detention of UN personnel charged in Count 11.

¹ A copy of this document is attached as Confidential Annex "B".

² A copy of this document is attached as Confidential Annex "C".

³ A copy of this document is attached as Confidential Annex "D".

⁴ A copy of this document is attached as Annex "A"

6. Had this document been disclosed to Dr. Karadzic, he could have used it in his cross examination of Generals Michael Rose and Rupert Smith, whose testimony concerned the Serb violations of a similar agreement. The selective enforcement of these agreements against the Serbs in the face of the facts exposed in the 30 October 1994 memo supports Dr. Karadzic's case that the UN had become combatants, or could be reasonably perceived to have become combatants, at the time their personnel were detained after the NATO air strikes, since they were intervening against one party when circumstances showed that both parties were in violation of the same agreements.

7. Dr. Karadzic notes that in disclosing the memorandum pursuant to Rule 68 in April 2011, the prosecution expressly recognized that it may contain exculpatory material.

8. Dr. Karadzic has also been prejudiced by the late disclosure because he was unable to assess the documents in preparing for trial as part of the development of his overall defence strategy.

9. Dr. Karadzic respectfully requests that the Trial Chamber make an express finding that the prosecution has violated Rule 68 by failing to disclose this document as soon as practicable.

10. The disclosure of this Rule 68 document on 11 April 2011 also violated the Trial Chamber's order that all Rule 68 disclosure be completed by 31 March. During April, the prosecution has disclosed 100 documents pursuant to Rule 68. While it appears that these documents were obtained pursuant to Rule 70 and required consent of the provider for disclosure, such consent should and could have been obtained well in advance of the 31 March deadline.

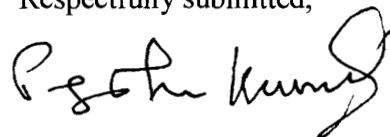
11. The Trial Chamber is also requested to impose a sanction on the Office of the Prosecutor for continuing to violate its Rule 68 orders. Dr. Karadzic suggests that the Trial Chamber draw an adverse inference from the late disclosure against the prosecution's contention that Dr. Karadzic had the required *mens rea* for Count 11.

12. The Trial Chamber may also wish to consider whether the cumulative effect of these disclosure violations has demonstrated that the prosecution is unable to manage a case of this scope and that the appropriate remedy is to reduce the scope of the case. This

will reduce not only the time that the prosecution will take to complete its case, but the time the defence will take to complete its case.

Word count: 881

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', with a large, stylized flourish at the end.

Radovan Karadzic

ANNEX “A”

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Note to Mr. Gharekhan
20 October 1994
Mt. Igman

UNPROFOR and the Secretariat would like to share their concern with the members of the Security Council in regard to developments in the demilitarized zone at Mt. Igman.

The agreement on the DMZ was signed on 14 August 1993 by the authorized military representatives of the BiH and the BSA forces, the Deputy Commander in Chief Stjepan Siber on behalf of General Delic, and by General Milovanovic on behalf of General Mladic. It may be recalled that at the time negotiations were taking place in Geneva under the auspices of the ICFY, and that the Bosnian Government had made its further participation in these talks contingent upon a withdrawal of BSA forces which had occupied the Mt. Igman area in an offensive at the end of July that year. In the agreement, the BSA undertook to withdraw to a line of confrontation as it existed before 30 July 1993, in return for an undertaking by the BiH not to move into the areas vacated by the Bosnian Serbs. UNPROFOR subsequently established observation posts in the area in order to monitor compliance with the agreement.

As orally reported to the Security Council, on 6 October, President Izetbegovic promised to the Special Representative of the Secretary-General that instructions would be given to withdraw BiH elements from the Mt. Igman demilitarized zone. Although UNPROFOR as a result of its increased monitoring activity has been able to escort some 600 BiH soldiers out of the DMZ, a considerable BiH presence persists in the area of Krupac with some 500 soldiers, and in an area at the south-western edge of the DMZ with some 30 - 40 soldiers. Furthermore, on 17 October, UNPROFOR obtained indications that heavy weapons may have been brought into the southern part of the DMZ. UNPROFOR is still trying to verify these reports.

While it had earlier been assumed that a local commander, Brigadier Fikret, was ignoring orders from his authorities and was refusing to remove his soldiers from the DMZ, it would now appear that the Government does not consider the 14 August agreement as binding any longer. In a meeting with the Force Commander of UNPROFOR in New York on 18 October, the Permanent Representative of Bosnia and Herzegovina, acting on instructions of his Government, pointed out that his authorities considered the 14 August Agreement not relevant, since the forces of the Republic of Bosnia and Herzegovina according to Security Council Resolution 836 (1993) had been specifically exempted from the requirement to withdraw from the "safe areas". A similar position he appears to be taking in his letter of 16 October to the President of the Security Council. In meetings with UNPROFOR over the past few days, the Government in Sarajevo has made its willingness to withdraw from the Mt. Igman DMZ

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contingent upon a number of guarantees UNPROFOR is neither equipped nor mandated to provide. In this context, the members of the Council will recall that on 14 October the President of the Security Council had been authorized to make a statement to the media according to which the Council strongly supported the efforts by UNPROFOR to assure respect by both sides to the demilitarized zone at Mt. Igman.

The Commander of UNPROFOR in Bosnia and Herzegovina, on 16 October, has advised the Government in a letter that UNPROFOR may have to reconsider its monitoring role at Mt. Igman if the Government did not withdraw its forces and, hence, did not respect the 14 August Agreement. He reiterated that point in subsequent meetings with the Bosnian Vice President, Mr. Ejup Ganic.

These violations of a bilateral agreement have consistently overshadowed negotiations with the BSA on other issues, such as the demilitarization of Sarajevo under UNPROFOR auspices. The BSA is now questioning UNPROFOR's ability to implement agreements concerning the disengagement of forces and considers any further talks on this matter as fruitless. As orally reported earlier, the BSA has also issued an ultimatum according to which it would use force against the DMZ if its integrity was not restored by 21 October.

UNPROFOR cannot be expected to continue implementing responsibilities deriving from a a bilateral agreement which one of the parties apparently does no longer consider as valid. Mr. Akashi will seek to resolve the issue in negotiations with the Government scheduled on 21 October.

It should also be noted that UNPROFOR does not have a specific Security Council mandate concerning Mt. Igman. The area concerned falls within the 20 Km heavy weapons exclusion zone declared by the North Atlantic Council on 9 February. In negotiations with UNPROFOR, the two sides have subsequently accepted the provisions and deadlines of that NAC decision. Except for a number of violations, some of which have become the cause for the use of air power, these provisions have been generally adhered to by the parties. As a result, the threat of shelling against the civilian population of Sarajevo has been effectively eliminated.

The 20 km exclusion zone is a military concept for the implementation of Security Council resolutions 824 (1993) and 836 (1993). As such, it does not define the boundaries of the "safe area" Sarajevo. The Secretary-General has outlined his interpretation of the relevant "safe area" resolutions in his report S/1994/555. In that report, it has been pointed out that the objective is the protection of the civilian population in and around the "safe areas" through UNPROFOR's presence. The Council should be aware that since Mt. Igman is not a populated area, it does not fall within the delimitation of "safe areas" as envisaged in that report. UNPROFOR, therefore, does not have

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any obligation to be deployed in the Mt. Igman area other than that emanating from the 14 August Agreement.

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