

**UNITED
NATIONS**

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: 11 November 2008

IN TRIAL CHAMBER III

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

Registrar: Mr. Hans Holthuis

Date: 11 November 2008

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION'S RESPONSE TO KARADŽIĆ'S
MOTION FOR FULL DISCLOSURE OF SUPPORTING
MATERIAL**

AND

**PROSECUTION'S REQUEST FOR RECONSIDERATION
OR CLARIFICATION OF THE CHAMBER'S 25
SEPTEMBER 2008 DECISION**

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark B. Harmon
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The Accused:

Radovan Karadžić

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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A. *Introduction*

1. The Prosecution completed disclosure of all the material supporting the Proposed Second Amended Indictment in B/C/S by 29 October 2008 in accordance with its representation.¹

2. The Prosecution requests the Trial Chamber to reconsider its 25 September 2008 Decision ("Decision")² and conclude that the Accused need not be provided with transcriptions of B/C/S audio files disclosed pursuant to Rule 66(A) on the basis that (1) it has since become clear that the Accused understands English and can participate in these proceedings in English; and

¹ Notice of Provision of Supporting Material for the Proposed Second Amended Indictment, 29-10-2008.

² Decision on the Accused's Request that all Materials, Including Transcripts, be Disclosed to him in Serbian and Cyrillic Script, 25-09-2008.

(2) the Decision is inconsistent with the case law of the Tribunal, and would be practically infeasible to implement.

3. Alternatively, the Prosecution requests the Pre-Trial Chamber to clarify its Decision in relation to who has the obligation to provide the Accused with B/C/S transcripts of these audio files, and whether the commencement of the time period for the Accused to respond to the Prosecution's motion to amend the indictment³ depends upon his receipt of these transcripts.

B. All Supporting Material has been Disclosed in B/C/S

4. The disclosure of all the material supporting the Proposed Second Amended Indictment in B/C/S was completed by 29 October 2008. In his Motion,⁴ the Accused asserts that there are five categories of material covered by Rule 66(A)(i) that have not been disclosed to him. With respect to two of these categories – three witness statements and the transcript relating to a protected witness – the Accused is mistaken; this material has in fact been disclosed. With respect to two further categories – supporting material for inoperative indictments and other representations by the Prosecution – this material is not subject to disclosure under Rule 66(A)(i). Finally, in relation to B/C/S transcripts of audio files of testimony, as discussed below, it is the Prosecution's position that the disclosure of B/C/S audio files satisfies the Prosecution's obligation to provide the Accused with supporting material in a language he understands.

The Three B/C/S Statements have been Disclosed

5. The Prosecution has disclosed the three B/C/S statements that the Accused asserts⁵ have not been disclosed.
 - The B/C/S statement of the item the Accused refers to as #135 in Appendix C is contained within the entry listed *directly* above #135 as

³ Motion to Amend the First Amended Indictment, 22-09-2008 ("Motion to Amend the Indictment").

⁴ Motion for Full Disclosure of Supporting Material, 7-11-2008 ("Motion").

⁵ Motion, para.6.

part of the Rule 92 *bis* statement package for the witness in question (at 0213-2906-0213-2909).

- The B/C/S statements of the items the Accused refers to as #171 and #172 in Appendix C are both contained in the entry listed *directly* above #171 as part of the Rule 92 *bis* statement package for the witness in question (at 0216-6574-0216-6584 and 0216-6590-0216-6596).

The Material Covered by a Delayed Disclosure Order has been Disclosed

6. Five transcript pages relating to a witness who is the subject of a delayed disclosure order formed part of material supporting the Proposed Second Amended Indictment and were disclosed to the Accused on 23 September 2008. These pages were redacted to protect the identity of the witness. The correspondingly redacted B/C/S audio file was disclosed on 29 October 2008.
7. The Chamber was provided with the same five redacted transcript pages and the Prosecution relies only on these five redacted pages in respect of this witness to support the Proposed Second Amended Indictment. Therefore, contrary to the assertion of the Accused,⁶ none of the supporting material in relation to this witness is being “withheld from him.” Further, the Prosecution is *not* obligated to disclose any further material in relation to this witness pursuant to Rule 75(F)(ii) simply because these five pages have been submitted as supporting material. It is open to the Accused to seek to vary the existing protective measures order in relation to this witness under Rule 75(G).

Supporting Material for Inoperative Indictments and Submissions in Relation to Earlier Indictments

8. The supporting material for the First Amended Indictment, the currently-operative indictment in this case, has been disclosed to the Accused in accordance with Rule 66(A)(i). The Prosecution has submitted additional material supporting amendments contained in the Proposed Second Amended

⁶ Motion, para. 8.

Indictment in accordance with Rule 50(A)(ii). Contrary to the assertion of the Accused,⁷ the Prosecution does not rely on any other material in support of the Proposed Second Amended Indictment. The Accused is not entitled to disclosure of material supporting the earlier inoperative indictment against him, or representations by the Prosecution in relation to previous indictments, under Rules 66(A)(i) or 50(A)(ii).

9. In the very decision the Accused cites as support for such disclosure, Judge Hunt confirmed the Trial Chamber's ruling that submissions made by the Prosecutor before the confirming judge did not constitute supporting material falling within Rule 66(A)(i).⁸
10. The Accused has all the supporting material for the Proposed Second Amended Indictment. The Accused's claim that he will not be "in a position" to respond to the Motion to Amend the Indictment without material supporting inoperative indictments or submissions made by the Prosecution before a confirming judge⁹ is misplaced.

C. *Request for Reconsideration or Clarification of the 25 September 2008 Decision*

Request for Reconsideration

11. Since the Chamber's Decision, it has become clear that the Accused understands English, including in relation to legal matters, and is assisted by an English-speaking "Legal Associate" who is a fully-qualified defence attorney. Therefore, the Prosecution requests the Chamber to reconsider the part of its Decision requiring the Accused to be provided with transcripts of B/C/S audio files disclosed to him under Rule 66(A).
12. In addition to the relevant change in circumstances, reconsideration is warranted in light of consistent holdings by other Trial Chambers that

⁷ Motion, paras.19-22.

⁸ *Milutinović et al.*, Decision on Application by Dragoljub Ojdanić for Disclosure of Ex Parte Submissions, 8-11-2002, para.16.

disclosure of audio files in a language the accused understands satisfies the requirements of Rule 66(A), coupled with the practical infeasibility of providing the Accused with transcripts of audio files.

13. For the purposes of the Decision, the Chamber proceeded on the basis that English did not constitute a language the Accused understood within the meaning of the Statute and the Rules.¹⁰ However, the Chamber noted that there was material indicating that the Accused had a good understanding of the English language.¹¹
14. Since then, the Accused has demonstrated his ability to participate in these proceedings in English. The Accused has signed and filed a number of legal submissions, including his Motion, in English.¹² He has also applied in English for certification to appeal a decision before he was provided with that decision in B/C/S.¹³
15. Moreover, when the Accused testified in the Krajišnik appeal, he was asked to read, and then comment upon, a passage from an English document. Not only was the Accused able to do so,¹⁴ neither he nor his legal counsel raised any

⁹ Motion, para.23.

¹⁰ Decision, para.10.

¹¹ *Id.*

¹² In addition to the Motion, *see, e.g.*, Application for Certification to Appeal Decision on Protective Measures, 5-11-2008; Motion to Reject the Prosecution's Motion to Amend the First Amended Indictment, 29-10-2008; Motion for Clarification of Prosecution Notification of Delayed Disclosure, 22-10-2008. This is in contrast to his earlier practice of filing submissions in B/C/S, such as the 19 August 2008 motion upon which the Chamber rendered its Decision.

¹³ On 6 November 2008 the Accused filed – in English – an application for certification to appeal the 30 October 2008 decision on protective measures. As of 10 November 2008, he had still not been served with a B/C/S translation of that decision.

¹⁴ *Krajišnik*, Appeal hearing, 5-11-2008 at T.71-72:

Q. Mr. Karadzic, you can read it to yourself or read it out.

A. [In English] "Against genocide at the hand of the Muslim Croat forces. The protection of the property and cultural heritage of the Serbian people, the liberation of the territories which are ours and which belong to us by historical birth right -- birthright, the in-Nick shun of the greatest Muslim forces we have opted for destroying their personal and combat ordnance. The neutralising of all facilities in enemy territory or their destruction. The spreading of the enemy forces over a broad area on all battlefields of former Bosnia and Herzegovina. The gradual cross erosion of the enemy's offensive power. Yes. That means the shattering of his forces and the seizing -- seizing of the initiative and creating conditions for resolute offensive operations in order to defeat his forces and expel them from areas that have always belonged to us while at the same time preventing masses losses in our own ranks."

[Interpretation] This has absolutely nothing to do --

concerns about the Accused's ability to read and understand an English document or provide sworn testimony in relation to it.

16. These facts directly contradict the Accused's assertion that his "knowledge of English is, in fact, inadequate for [him] to understand legal matters."¹⁵
17. Based on these developments, the Chamber should conclude that English is a language the Accused understands within the meaning of the Statue and the Rules and reconsider its Decision in light of this conclusion. Alternatively, even if the Chamber is unable to conclude that English constitutes a language the Accused understands, it is now clear that the Accused need not rely solely on B/C/S audio files of testimony. The English transcripts would assist him in understanding this material. The Chamber should therefore reconsider whether, in addition, the Accused should also be provided with B/C/S transcripts of this material.

The Accused is Assisted by a Fully-Qualified English-Speaking Attorney

18. In its Decision, the Chamber did not hold that the Rules required that the Accused be provided with transcripts of B/C/S audio files in relation to Rule 66(A) material. On the contrary, this aspect of the Chamber's Decision was based explicitly on the particular circumstances, namely, "the importance of this material *and the current self-represented status of the Accused*".¹⁶ Although the Accused officially remains self-represented in these proceedings, it is clear from the Accused's Motion¹⁷ that he is now being assisted by a legal associate who is a fully-qualified English-speaking defence attorney.¹⁸

Q. Mr. Karadzic, just a short question. Does this -- was there any possibility of linking up those strategic goals with the six strategic goals?

A. No. This has nothing to do with the six strategic goals.

¹⁵ Appeal against Registry Decision, 19-08-2008, p.1.

¹⁶ Decision, para.11 (emphasis added).

¹⁷ The Motion cover page indicates distribution to Mr. Robinson whose name appears in the "Defence Counsel" box in which "Defence Counsel" has been crossed out and replaced with "Legal Associate". This is consistent with other recent filings. *See*, Motion for Inspection and Disclosure: Holbrooke Agreement, 6-11-2008 and Application for Certification to Appeal Decision on Protective Measures, 6-11-2008.

19. In its Decision, the Chamber suggested that “[t]he Accused might also reconsider whether to engage counsel of his choice who is proficient in one of the working languages of the Tribunal.”¹⁹ The Accused has since engaged a fully-qualified legal associate who is proficient in English. As such, the Chamber should reconsider its decision requiring the Accused to be furnished with Rule 66(A) material in a form beyond that required by the Rules.

The Decision is Inconsistent with the Jurisprudence of the Tribunal and is Practically Infeasible

20. Trial Chambers have consistently held that the disclosure of testimony in audio format in a language the accused understands satisfies the Prosecution’s disclosure obligations under Rule 66(A).²⁰ As noted below, the Pre-Trial Judge in this case concurred with this holding.
21. Not only is the provision of transcriptions of B/C/S audio files not required by the Rules, this would be practically infeasible in light of the Tribunal’s limited resources. In the *Šešelj* case, the Prosecution was required to transcribe B/C/S audio files following that Chamber’s ruling that the Accused should be provided with disclosure material in hard copy. Even with a team of nine transcribers, this resulted in months of transcription work and risked delaying the start of trial.²¹ The Registry has taken a similar position in this case, namely that “a requirement to translate transcripts into BCS would impose such an onerous obligation upon the Conference and Language Services that it would significantly impact the fair trial rights of all accused” and “could result in significant delays on the trial process for the Accused.”²²

¹⁸ As of 11-11-2008, Peter Robinson is identified on the website of the ICTY Association of Defence Counsel as a “full member” meaning that he is “eligible to act as counsel to represent persons accused before the international Tribunal.”

¹⁹ Decision, para.14.

²⁰ *Perišić*, Order for the Prosecution to Provide Documents to the Defence in a Language the Accused Understands, 8-7-2008; *Šešelj*, Decision on Provision of Previous Testimony in Audio Format, 22-11-2006 para.15; *Krajišnik*, Oral Ruling, T.4993-4999 (and Oral Ruling denying certification at T.4993-4999); *Popović et al.*, Decision on Joint Defence Motion, 6-03-2006 (and decision denying certification on 23-03-2006); *Prlić et al.*, Order for the Translation of Documents, 17-01-2006; *Ljubičić*, Decision on the Defence Counsel’s Request for Translation of all Documents, 20-11-2002.

²¹ *Šešelj*, Prosecution’s Report Concerning Disclosure of Statements of Witnesses and Transcripts of Testimony, 2-11-2007.

²² *Karadžić*, Submission of the Deputy Registrar Pursuant to Rule 33(B) Regarding Appeal by Mr. Karadžić of 19 August 2008, 27-08-2008, para.7.

22. The Prosecution estimates that a team of ten transcribers would require a minimum of forty working days (approximately two months) to transcribe the B/C/S audio files of testimony contained in the material supporting the Proposed Second Amended Indictment. Many more months would be required to transcribe B/C/S audio files for testimony contained in the anticipated Rule 66(A)(ii) material.

Request for Clarification

23. In the event the Chamber declines to reconsider and alter its Decision in relation to the provision of transcriptions of B/C/S audio files, the Prosecution requests the Chamber to clarify (1) who is obliged to provide these transcriptions and (2) whether the commencement of the 14-day period for the Accused to respond to the Motion to Amend the Indictment depends on the provision of these transcriptions.
24. In his Motion, the Accused requested the Trial Chamber to order the *Prosecution* to provide him with transcripts of B/C/S audio files, referring to paragraph 11 of the Decision:

... given the importance of this material and the current self-represented status of the Accused, the Trial Chamber considers that any transcripts disclosed pursuant to Rule 66(A) should be transcribed into a language the Accused understands rather than provided to him in audio format.

25. However, this was a ruling on the Accused's motion to require the *Registry* to provide him with "all materials, including transcripts of the sessions in [his] case, as well as other transcripts which might be required for [him] to prepare [his] defence, in the Serbian language, and in the Cyrillic script."²³ The disposition of the Decision simply reminded the Prosecution "of its obligations to make available to the Accused material in a language he understands, where mandated by the Statue and the Rules" without specifically ordering the

²³ Appeal against Registry Decision, 19-08-2008, p.1.

Prosecution to provide transcriptions of audio files. Moreover, at the 28 October 2008 status conference, the Pre-Trial Judge concluded that the Prosecution had satisfied its disclosure obligations under the Rules by providing B/C/S audio files of supporting material:²⁴

Mr. Tieger, can you explain to me what supporting material for the motion and the proposed amended indictment, if any, remains unserved or unintimated to the accused.

...

B/C/S audios are material in his language. If they have been disclosed in that form, then they've been disclosed in terms of the Rules. I'm more concerned about documents you say are untranslated. Can you clarify the position in regard to them.

...

MR. TIEGER: Yes, Your Honour. Four documents, comprising a total of 60 pages, and those can be provided, I'm told, by Thursday and -- well, Thursday is what I was told so I would say by Friday.

...

JUDGE BONOMOY: All right. Thank you. Now, Mr. Karadzic, you've got the motion; you've got the proposed indictment. *By the end of this week, you will have all the supporting material, which is the basis for the indictment, according to the Prosecution. The next issue is the time for you to respond to this motion, and the normal period to response for a motion of this kind is 14 days.*

26. It is unclear from the Chamber's Decision and the 28 October 2008 remarks of the Pre-Trial Judge whether the Decision obliges the Prosecution, as opposed to the Registry, to provide the Accused with transcripts of B/C/S audio files of testimony disclosed pursuant to Rule 66(A). The Prosecution requests the Chamber to clarify the Prosecution's obligations in this regard.
27. In addition, the Prosecution understands the remarks of the Pre-Trial Judge to mean that the disclosure of B/C/S audio files satisfies the Prosecution's obligation to provide the Accused with the material supporting the Proposed Second Amended Indictment "in a language which the accused understands" and that, although the Accused may be entitled to receive transcripts of these

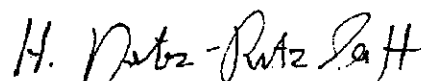
²⁴ 28-10-2008 status conference, T.70-72 (emphasis added).

audio files, the commencement of the 14-day period to respond to the Motion to Amend the Indictment does not depend upon his receipt of these transcripts. However, as the Accused takes a contrary position in his Motion, the Prosecution also requests clarification from the Chamber on this matter.

D. Relief Requested

28. For the above reasons, the Chamber should conclude that the Prosecution has completed its Rule 66(A)(i) disclosure and should reconsider its Decision and conclude that the Accused is not entitled to B/C/S transcripts of audio files disclosed pursuant to Rule 66(A). Alternatively, the Chamber should clarify its Decision with respect to the obligations of the Prosecution to provide such transcripts and in relation to the commencement of the time period for the Accused to respond to the Motion to Amend the Indictment.

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