UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

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

Date: 01 July 2015

IN TRIAL CHAMBER III

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

Registrar: Mr John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

PROSECUTION RESPONSE TO ONE HUNDREDTH MOTION FOR FINDING OF DISCLOSURE VIOLATION AND FOR EVIDENTIARY HEARING

The Office of the Prosecutor:

Mr Alan Tieger
Ms Hildegard Uertz-Retzlaff

The Accused:

Mr Radovan Karadžić

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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

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I. INTRODUCTION

1. The Prosecution opposes the Accused's request for an evidentiary hearing in his 17 June 2015 Motion[1] for a finding of a disclosure violation based on its recent disclosure of an information report ("Report")[2] from a 1995 interview of Cyrus Vance and Herbert Okun by the Prosecution. The Prosecution acknowledges that the Report should have been disclosed earlier and regrets the late disclosure, which resulted from human error. However, the Accused fails to demonstrate that an evidentiary hearing is warranted. His allegations of bad faith are unfounded and contradicted by the fact that the Prosecution immediately disclosed the Report upon discovering its earlier error. Moreover, the Prosecution has already inquired into the origin of the error, the results of which are reported here. An evidentiary hearing would not produce additional information.

2. Furthermore, the Accused exaggerates the alleged prejudice arising from the late disclosure of the Report. In any event, any such prejudice would be easily remedied through the admission of the Report into evidence. The fact that the

[1] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, One Hundredth Motion for Finding of Disclosure Violation and for Evidentiary Hearing, 17 June 2015 ("Motion"). All further references to filings and decisions relate to this case unless otherwise stated.
[2] *See* Motion, Annex A.

Accused has failed to request such an obvious remedy undermines his claims regarding the import of the Report and the prejudice arising from its late disclosure.

II. DISCUSSION

A. *The Accused's request for an evidentiary hearing is unwarranted*

3. The Prosecution acknowledges that it erred in failing to timely disclose the Report, and apologizes for this error. As set out below, the Prosecution is not able to determine the source and reason for this error, which occurred in 2009. The Accused fails to show how an evidentiary hearing could produce information that the Prosecution does not have or resolve any outstanding disclosure issues in this case. Moreover, his request for an evidentiary hearing rests on groundless suggestions of bad faith and a mischaracterized description of the Prosecution's disclosure of material from related cases.

4. The Prosecution's records indicate that the Report was captured in the initial search for Rule 66(A)(ii) materials for Ambassador Okun in 2009, one of the very first searches for Rule 66(A)(ii) materials in this case. At that time, a member of the Prosecution team made an erroneous determination that this document was not subject to disclosure. This decision was communicated to trial support staff who then flagged the Report as an item that did not require disclosure. Neither the identity of the person who made the determination nor the reason for his or her decision was recorded at the time. No current member of the Prosecution team has any recollection of having been involved in this decision. The Prosecution has contacted the former staff member who was most likely to have been involved in this determination. However, he too has no recollection of the Report or the reasons for its non-disclosure at the time. The Prosecution has therefore been unable to determine the source or reason for this mistake. The Prosecution notes that this Rule 66(A)(ii) search for Ambassador Okun was one of a handful of early searches in this case for which records do not exist as to the identity of staff members making disclosure decisions or the rationale for those decisions. Within weeks of conducting these early searches, the Prosecution became aware of the need to record this information and began to do so as a general practice. As such, the lack of information as to the source and reason for the error in relation to the Report is an anomaly.

5. The Report was recently re-reviewed in the context of the Prosecution's ongoing review of Rule 68 materials in the *Mladić* case for disclosure to the Accused.

At that point, the Prosecution discovered it had not previously disclosed the Report to the Accused, and immediately did so.[3]

6. In his effort to obtain an evidentiary hearing, the Accused repeatedly mischaracterizes the Prosecution's practices in its disclosure from related cases. Contrary to his assertion,[4] the comparison of disclosure logs between this case and the *Mladić* case was not "pursuant to Mr. Robinson's request," but has been an ongoing process since the *Mladić* trial began in 2012, and is part of a broader practice of the Prosecution, that it commenced in 2008, to review material that has been disclosed pursuant to Rule 68 in related cases. Since 2012, the Prosecution in this case has periodically run updated reviews of materials disclosed pursuant to Rule 68 in the *Mladić* case. Moreover, the Accused's assertion that the Prosecution "has yet to even fully complete its comparison with the disclosure in the *Mladić* case"[5] is misleading. As *Mladić* is an ongoing trial in which evidence is being generated and disclosure is ongoing, the comparison process is also continuing. It is thus premature to talk of "completing" a comparison with the disclosure in the *Mladić* case. The Accused further misleads by claiming that the Prosecution "has yet to compare the disclosure logs from other overlapping cases,"[6] thereby erroneously implying that the Prosecution has only carried out this comparison process for the *Mladić* case. As noted above, from the very outset of these proceedings in 2008, the Prosecution commenced a practice of reviewing material that has been disclosed in related cases, and has disclosed thousands of items to the Accused as a result of this process.

7. The Prosecution's practice of reviewing and disclosing material from related cases to the Accused is one of the safeguards in place aimed at capturing the maximum amount of material subject to disclosure, minimizing error and ensuring the consistent treatment of material across related cases. Indeed, it was this very safeguard that brought the Report again to the Prosecution's attention in this case and led to its disclosure.

8. The Accused's suggestions of bad faith[7] are unfounded and wrong. They are also contradicted by the fact that the Prosecution disclosed the Report of its own

[3] *See* Motion, Annex B (16 June 2015 letter from the Prosecution to the Accused).
[4] Motion, para.13.
[5] Motion, para.23.
[6] Motion, para.23.
[7] *See* Motion, para.24 (claiming the failure to timely disclose the Report was the product of "a deliberate decision" rather than human error).

accord as soon as it realized its previous error and the fact that the Prosecution has disclosed this document to the Defence in other cases, including *Hadžić*, where it was disclosed pursuant to Rule 65 *ter* and Rule 68(ii), and *Mladić*, where it was disclosed pursuant to Rule 66(A)(ii) and Rule 68(i).

B. *The Accused's claims of prejudice are exaggerated*

9. The Accused's claims of prejudice rest on exaggerations. In light of the nature of the comments in the Report itself, as well as the information the Accused already had at his disposal, any prejudice arising from the late disclosure of the Report is minimal at best. Moreover, any such prejudice could have been remedied by the admission into evidence of the Report, an obvious remedy that the Accused has nevertheless failed to request.

10. Two of the comments in the Report that the Accused relies upon[8] are vague, general remarks about command and control that do not contradict or undermine Ambassador Okun's evidence in this case. As the Accused points out, Ambassador Okun testified that the Accused told Ambassador Okun that he was in control of the Bosnian Serb armed forces.[9] However, contrary to the Accused's suggestion,[10] Ambassador Okun's account of the Accused's own admission is neither contradicted nor undermined by the statements in the Report that the period where it was "most difficult to establish" command and control was February to May 1992,[11] and that "it was hard to say" when asked for examples of the Accused asserting control and subsequent action being taken.[12]

11. The Accused claims that Ambassador Okun's alleged "failure to recall or recount" the Accused's admission of control in Geneva would have "been important fodder for cross-examination,"[13] thus indicating that the Accused would have suggested to Ambassador Okun that he had invented this evidence. However, the Accused fails to explain how he could have made any headway with such an approach given that the Accused's admission of control over his forces is clearly recorded in

[8] Motion, paras.6,8,16.
[9] Motion, para.9.
[10] Motion, paras.9-10,16.
[11] Report, p.2.
[12] Report, p.4.
[13] Motion, para.16.

Ambassador Okun's contemporaneous notes.[14] This fact also accounts for any failure by Ambassador Okun to independently recall this conversation in 1995.

12. In the same vein, Ambassador Okun's evidence that members of the Bosnian Serb leadership indicated to him and other negotiators that the use of force would cease as soon as the Bosnian Serbs got what they wanted[15] is not contradicted by the Report and is also corroborated by Karadžić's comments as contemporaneously recorded by Ambassador Okun in his diaries.[16]

13. The third comment from the Report that the Accused relies upon as a claimed "example of a situation where Dr. Karadžić did not have control" over military forces[17] is more ambiguous than is described by the Accused. In this instance, as recounted in the Report, under international pressure to ground his warplanes based in Banja Luka, the Accused called Banka Luka air base from a cellular phone and ordered the planes grounded, which was apparently done.[18] According to the Report, the Accused had also said "We'll take all our aircraft" out of Bosnia and put them in Serbia, which did not happen the following day due to a "hard line airforce commander in Banja Luka" blocking the airport to prevent the airplanes' departure to Serbia.[19] The Report does not detail the ultimate outcome of this incident.

14. Moreover, the Accused had information at his disposal that he could have used to elicit such information from Ambassador Okun. Ambassador Okun's diaries describe aspects of this issue regarding Bosnian Serb warplanes in Banja Luka.[20] In particular, they record the Accused as stating that he would have to check with his assembly in response to the idea of Panić's "to fly ground-attack planes from B. Luka out to FRY"[21] and later record the Accused wanting "to go to BL to resolve" the issue of the "plane removal from B. Luka to FRY," in the context of an expressed concern by Koljević that "BL Pilots may fly & destroy Sarajevo; against orders."[22] The

[14] P785, p.25 (recording a 17 September 1992 meeting in Geneva, at which Karadžić told Vance he controlled all but 5% of his "irregulars" and asserted "we can do anything" in light of the army's "unified command" and claiming "I have full power"), discussed at T.1510.
[15] P776 at T.4192 *cited at* Motion, para.10.
[16] *See* P780, p.37 (recording Karadžić stating "We won't fight after map is decided") discussed in P776 at T.4177-4178)
[17] Motion, paras.7,16.
[18] *See* Report, p.4 stating that the Banja Luka airport was then "blocked" in order to prevent the planes from flying to Serbia, thus indicating that the planes were then on the ground at the airport.
[19] *See* Report, p.4.
[20] *See* P786, pp.40-41,48-49,54.
[21] P786, p.40.
[22] P786, p.54.

Accused has also long been in possession of a 2 November 1992 report authored by Cyrus Vance, which largely replicates the information in the Report on this issue.[23] In describing a 28 October 1992 meeting, the document states that, when asked "why Dr. Karadžić's agreement to fly his military aircraft to the FRY had not been implemented," Dobrica Ćosić explained that he could not keep his promise "as a result of Karadžić's failure to deliver."[24] Later in the meeting, General Panić and Prime Minister Panić "stressed the difficulties Karadžić had in delivering a deal" on the claimed basis that "Bosnian Serb hardliners simply refused to implement his decisions."[25] While this document was disclosed to the Accused prior to Okun's testimony[26] and the Accused placed it on his exhibit list, he did not use the document in his cross-examination or ever seek to tender it. In addition to such material, the Accused was also directly involved in this incident and could have relied on his own knowledge of events in his cross-examination of Ambassador Okun.

15. In any event, any prejudice the Accused may have suffered by the late disclosure of the Report would be virtually entirely remedied by the admission of the Report itself, as the Accused could then directly rely upon the aspects of the Report that he claims are beneficial to his case. The Accused fails to explain why, instead of seeking this obvious remedy, he has requested an evidentiary hearing that could not conceivably alleviate the prejudice he claims to have suffered in this instance.

III. CONCLUSION

16. For the foregoing reasons, the Trial Chamber should deny the Accused's request for an evidentiary hearing.

Word Count: 2149

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Dated this 1st day of July 2015
At The Hague
The Netherlands

[23] *See* 65*ter* 1D00648.
[24] 65*ter* 1D00648, p.3.
[25] 65*ter* 1D00648, p.5.
[26] This document was disclosed to the Accused on 9 April 2010.