

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-PT

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Registrar: Mr John Hocking, Acting Registrar

Date Filed: 20 March 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

Public

RESPONSE TO PROSECUTION MOTION SEEKING DETERMINATION
THAT THE ACCUSED UNDERSTANDS ENGLISH

The Office of the Prosecutor:

Mr Alan Tieger
Mr Mark Harmon
Ms Hildegard Uertz-Retzlaff

The Accused:

Dr Radovan Karadžić

Introduction

1. Dr Karadžić hereby responds to the Prosecution's *Motion Seeking a Determination that the Accused Understands English for the Purposes of the Statute and the Rules of Procedure and Evidence* (17 February 2009). The motion was served upon him in Serbian and English on 6 March 2009.

Procedural History

2. This is the third time the prosecution has sought to evade its responsibility to meet its disclosure requirements under Rule 66(A). The Chamber has already made a finding on the question of the language he understands in its 25 September Decision,¹ which it reaffirmed by its 25 November Decision.²

3. The prosecution's effort to pretend that this is not a motion for re-consideration is belied by the direct language of the Trial Chamber's decisions.

4. In its 25 September Decision, the Chamber recognized that documents disclosed pursuant to Rules 66(A)(i) and **Rule 66(A)(ii)** must be in a language the accused understands.³ It directed that "statements of all witnesses whom the Prosecutor intends to call to testify at trial must also be provided in a language the accused understands within a time-limit prescribed by the Trial Chamber, in accordance with **Rule 66(A)(ii)**."⁴ (emphasis added)

5. The Trial Chamber also explicitly ordered that all transcripts disclosed pursuant to **Rule 66(A)** should be transcribed into a language the Accused understands rather than provided to him in audio format.

6. The Trial Chamber then determined, for the purpose of that motion, "that B/C/S is the appropriate 'language' in which [Dr Karadžić] should receive documents which the Statute or the Rules require to be in a language that he understands".⁵

7. In the 25 November Decision, the Chamber noted that there was no reason to reconsider its order that the accused be provided with transcripts of Rule 66(A) material, rather than

¹ "Decision on the Accused's Request that all Materials, Including Transcripts, be Disclosed to him in Serbian and Cyrillic Script", 25 September 2008 ("25 September Decision").

² "Decision on Accused Motion for Full Disclosure of Supporting Material", 25 November 2008 ("25 November Decision"), para. 33.

³ 25 September 2008 decision at para. 7

⁴ 25 September 2008 decision, para. 11

⁵ 25 September Decision, para. 10; reaffirmed by 25 November Decision, para. 16.

audio tapes.⁶ The Chamber explicitly referenced Rule 66(A)(ii) when refusing to reconsider this requirement.⁷

8. The Chamber also explicitly held that “while accepting that transcription in B/C/S of the relevant material requires expenditure of time and resources, this is no justification for reconsideration of the Decision.”⁸ The prosecution’s second attempt at reconsideration, in which it bemoans the volume of translations under Rule 66(A)(ii), should fare no better.

9. In the decision, the Trial Chamber also observed that “although there was some evidence that the Accused has a good understanding of English, the Chamber was not prepared to conclude that he could handle legal matters in English.”⁹

10. Therefore, the prosecution’s latest motion must be judged under the stringent and exceptional test for reconsideration.

Language Which the Accused Understands

11. The European Court of Human Rights has long recognized “the right of an accused to participate effectively in a criminal trial”.¹⁰ The onus is on the trial judge to reassure himself or herself that language-comprehension issues “would not prejudice [the accused’s] full involvement in a matter of crucial importance for him”.¹¹ The ICTY Appeals Chamber in *Tolimir* stated that Article 21(4)(a) of the Statute and Rule 66(A) of the Rules oblige the Prosecution “to provide relevant material in a language which the accused understands sufficiently in order to allow for the effective exercise of his right to conduct his defence.”¹²

12. The Trial Chamber in the present case has accepted that “the *raison d’être* behind the disclosure rules is undoubtedly to permit the accused to make effective use of that material”.¹³ The test for the determination of comprehension of a given language for the purposes of the Tribunal’s Statute and Rules may thus be understood to consist of two elements: that the accused (a) has a “sufficient understanding” of the language to enable him, in using that language, to (b) “effectively” conduct his defence. The notion of “effective” here undoubtedly

⁶ 25 November Decision at para. 27

⁷ 25 November Decision at para. 28

⁸ 25 November Decision, para. 29

⁹ 25 November Decision, para. 29.

¹⁰ *Stanford v. U.K.*, ECHR, 23 February 1994, para. 26.

¹¹ *Cuscani v. U.K.*, ECHR, 24 December 2002, para. 38.

¹² *Prosecutor v. Tolimir*, “Decision on Interlocutory Appeal Against Oral Decision of the Pre-Trial Judge of 11 December 2007”, 28 March 2008 (“*Tolimir* Decision”), para. 15.

¹³ 25 November Decision, para. 18.

includes “efficient”, because an “effective” use that requires an inordinate amount of time for its achievement is, in a trial context, unsustainable, and, in the final analysis, ineffective.

13. Moreover, the interpretation and application of the above test is necessarily affected by the circumstances of the accused. “To permit the accused to make effective use of that material” will have a different meaning where the accused is, for example, self-represented. In its 25 November Decision, the Chamber correctly distinguished Dr Karadžić’s case from other cases in which decisions have been taken on similar matters, on the basis in that Dr Karadžić is self-represented.¹⁴ Moreover, within the class of self-represented accused, a legally trained and a non-legally trained accused may reasonably be expected to be treated differently when it comes to “permitting the accused to make effective use of that material” – with more leeway given to a non-legally trained accused.

14. The Prosecution’s latest motion gives the Chamber no reason to depart from its position in the 25 September and 25 November Decisions about the accused’s current understanding of the English language and his ability to use it effectively in his defence.

15. When the Prosecution requested reconsideration of the 25 September Decision, it asserted that it had become clear that the accused understood English for the purposes of the Statute and the Rules.¹⁵ In support of the present Motion, the Prosecution makes arguments similar to those in its Request for Reconsideration, namely: that Dr Karadžić is assisted by English-speaking legal associates;¹⁶ that he is filing legal submissions in English;¹⁷ that he has handled certain translation matters himself;¹⁸ and that he testified in English in a hearing in the *Krajišnik* case.¹⁹ Therefore, these matters are not a proper subject of yet another reconsideration.

16. As additional evidence, the Prosecution mentions that Dr Karadžić spent a year of graduate studies in the United States;²⁰ that he “interacted with the international community” in his official capacity and “conversed in English on all matters, including complex and critical political negotiations”;²¹ and that he appeared in and gave interviews in English to the

¹⁴ Ibid., paras 17-18, 28.

¹⁵ *Prosecutor v. Karadžić*, “Prosecution’s Response to Karadžić’s Motion for Full Disclosure of Supporting Material and Prosecution’s Request for Reconsideration or Clarification”, 12 November 2008 (“Request for Consideration”), paras 11-17.

¹⁶ Ibid., paras 11, 18; Motion, para. 26.

¹⁷ Ibid., para. 14; Motion, para. 19.

¹⁸ Ibid., para. 14; Motion, para. 20.

¹⁹ Ibid., para. 15; Motion, para. 21.

²⁰ Motion, para. 13.

²¹ Motion, para. 14.

international press.²² The Prosecution also makes reference to the opinions of certain individuals who characterize Dr Karadžić's spoken English as "very good"²³ or "excellent".²⁴ Yet, with the only exception of the web-log note by one of his legal advisors,²⁵ all the so-called "new evidence"²⁶ presented in the Motion was available to the Prosecution at the time of its Request for Reconsideration, and much of it relates to events predating 1995.

17. Therefore, there is no justification for this most recent effort at re-reconsideration.

18. An Accused's level of understanding of the English language and extent of his ability to use it effectively (and efficiently) in his defence are questions of fact, to be decided on a case-by-case basis.²⁷

19. In Dr. Karadzic's case, the Prosecution has not elicited any evidence that he had any formal training in the English language. Indeed he has not.

20. While it has shown that Dr. Karadzic resided in the United States for a short period more than 30 years ago, and conversed in English from time to time 14 to 17 years ago, the Prosecution has not shown that he has a sufficient understanding of the English language in 2009 to justify dispensing with the requirement that he receive important material in his case in a language he understands. The fact that he knows enough conversational English to converse with his associates does not equate to a sufficient understanding of the language for purposes of his trial on these serious charges.

21. In fact, during the 1992-95 time period, Dr. Karadzic normally spoke English in informal meetings and when there were no facilities for translation. Whenever facilities for translation existed, he availed himself of them. He did not rely on his knowledge of English when making important agreements or at formal meetings.

22. From 1996 to 2008, Dr. Karadzic almost never spoke English.

23. Since the first day of his arrival at the ICTY, when engaging in official conversations with Tribunal officials at the United Nations Detention Unit, Dr. Karadzic has always communicated through a Serbian interpreter.

²² Motion, para. 17.

²³ Motion para. 18.

²⁴ Motion paras 14, 16.

²⁵ Motion, paras 6, 18.

²⁶ Motion, para. 6.

²⁷ *Tolimir* Decision, para. 15.

24. The fact that Dr. Karadzic' associates draft pleadings and correspondence for him in English is evidence of the delegation of tasks within his defence team, not Dr. Karadzic's own ability to draft such documents in English.

25. One particular limitation for Dr Karadžić is that he is unfamiliar with English legal terms and therefore cannot confidently handle legal matters in English. "Legal matters" should be understood in a broad sense, not as limited to submissions on the law. The prosecution's sharp distinction between factual content and legal matters²⁸ is unrealistic, not only because the Prosecution is adducing factual allegations to prove legal categories but because the former are often infused with legal qualifications or opinions. While Dr Karadžić has never studied law in Serbian, he has a far better understanding of legal terms in Serbian than in English. It is common sense that one absorbs the meaning of legal terms in one's native language over a lifetime of being immersed in it. The situation is very different when one learns a foreign language at an advanced age.

26. In such a case, any departure from everyday vocabulary requires specialist study. As Professor Trechsel observes, an accused requires "not just the knowledge of everyday language [...] but also a certain understanding of the legal language which forms part of that language which is used in court proceedings and may remain quite foreign to someone who gets along reasonably well in everyday life".²⁹ The Prosecution is wrong to suggest that the depth and range one enjoys in one's native language is the same as the depth and range achieved in a language one has learned casually, late in life, in the course of practical affairs or non-legal studies.

27. Dr. Karadzic's unfamiliarity with legal terms is just one obstacle to his ability to defend himself when using the English language. The other obstacle is time. Naturally, to the extent that he is able to understand English, his reading speed is much slower than his reading speed in Serbian. Therefore, if forced to read witness testimonies in English, it may take Dr. Karadzic three or four times longer than it would take him to read the same transcript in Serbian. Apart from the prejudice suffered by lack of comprehension, Dr. Karadzic would be prejudiced in his preparation for trial by the sheer time it would take to read the material.

²⁸ Motion, paras 19-20, 22, 26.

²⁹ Trechsel, *Human Rights in Criminal Proceedings*, 334.

Transcripts or Audio Tapes?

28. In its second ground, the Prosecution has requested the Chamber to determine that disclosing to the accused B/C/S audio-files together with transcripts in English fulfils its obligation pursuant to Rule 66(A)(ii) of the Rules.³⁰ In its 25 September Decision, the Chamber held that “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”.³¹ Also here, the Prosecution has not demonstrated a change in the circumstances that would lead the Chamber to arrive at a different conclusion.

29. It is imperative for the preparation and conduct of Dr Karadžić’s defence as a self-represented accused that he is able to read, understand, and draw upon Prosecution materials personally. It is imperative for the Tribunal as a whole, and not only for Dr Karadžić, that he is able to do so efficiently and effectively. As explained above, the accused has a limited comprehension of English; and this significantly affects the speed with which he can read and process material in English.

30. Dr Karadžić recalls that the Chamber has already characterized this proposal as “unrealistic”.³² It would also require cumbersome waste of court time to confront a witness with his prior testimony. Dr. Karadzic would have to bring the audio file to court, cue it to the appropriate minute and second at which the pertinent testimony was found, and then arrange for it to be played for the witness. This would be inefficient and ineffective when compared with the standard practice of loading the transcript of the testimony onto the e-court system and displaying the relevant portion to the witness.

31. The relief sought by the Prosecution would result in a transfer of its burden, which it can fulfil with many staff members not occupied with trial preparation, onto the Accused who is preparing for his trial on his own. Dr. Karadzic simply does not have time to waste listening to audio files and making notes with the minute and second of each potentially relevant statement when he could be breezing through written Serbian transcripts and highlighting them. If the Trial Chamber wants to avoid undue delay in the commencement and the conduct of the trial, it will not burden the accused with this tremendously time-consuming undertaking.

³⁰ Motion, paras 1, 23.

³¹ 25 September Decision, para. 11; 25 November Decision, para. 16.

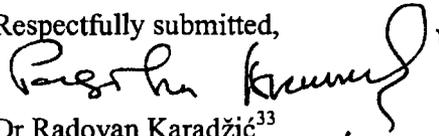
³² 25 November Decision, para. 28.

Conclusion

32. The prosecution's motion for re-consideration is a misguided one. As in its previous submissions, it has no evidence, and it is indeed not true, that Dr. Karadzic has a sufficient understanding of the English language such as to enable him to defend himself in this highly complex case in that language. Its effort to avoid the burdens of translation is short sighted, as it risks misunderstandings, delays, and possible reversal of any judgement obtained under such circumstances. For those reasons, Dr Karadžić respectfully requests that the Chamber, as it has in the past, deny this motion in its entirety.

Word count: 2576

Respectfully submitted,



Dr Radovan Karadžić³³

³³ Dr. Karadžić wishes to acknowledge with gratitude the contribution of Dr. Alexander Zahar of Griffith Law School, Australia, and Roman Graf of the University of Lausanne, Switzerland to the preparation of this motion.