



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-04-82-T
Date: 31 January 2008
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: Mr Hans Holthuis

Decision: 31 January 2008

PROSECUTOR
v.
LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

PUBLIC

**DECISION ON BOŠKOSKI DEFENCE URGENT MOTION FOR
AN ORDER TO DISCLOSE MATERIAL PURSUANT TO
RULE 66(B)**

The Office of the Prosecutor:

Mr Dan Saxon
Ms Antoinette Issa
Ms Meritxell Regue
Ms Nisha Valabhji
Mr Gerard Dobbyn

Counsel for the Accused:

Ms Edina Rešidović and Mr Guénaél Mettraux for Ljube Boškosi
Mr Antonio Apostolski and Ms Jasmina Zivković for Johan Tarčulovski

1. This Trial Chamber (“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 “Boškoski Defence Urgent Motion for an Order to Disclose Material pursuant to Rule 66(B)” filed by Counsel for Ljube Boškoski (“Boškoski Defence”) on 25 January 2008 (“Motion”). By its Motion the Boškoski Defence requests that the Chamber order the Prosecution to disclose (i) any statement; audio, video or other record, decision or note that mentions any of the proposed Boškoski Defence witnesses; and (ii) any statement, audio, video or other record, decision or note sought and obtained by the Prosecution in relation to a particular witness, *i.e.* material which the Prosecution sought to obtain specifically in relation to a particular witness or the proposed evidence of that witness; (iii) any statements or notes taken after the filing by the Boškoski Defence of its witness list on 10 January 2008 that would relate to or make reference to the role, function or proposed evidence of any of the proposed witnesses; and (iv) any statement, record, decision or note known to the Prosecutor that would affect the credibility of a particular witness, in particular material sought and obtained for that purpose. The Office of the Prosecutor (“Prosecution”) responded on 29 January 2008 opposing the Motion.

A. Background and submissions

2. On 12 April 2007, at the pre-trial conference, the Chamber, *inter alia*, ordered that during the presentation of evidence for the Prosecution the Defence may, 24 hours before the start of the evidence of a witness, give notice to the Prosecution that it is withholding documents going to credit of this witness until the examination-in-chief of the witness commences.¹ The Chamber also made an order that the same rule but in reverse would apply during the cases of each Accused.²

3. In the present Motion the Boškoski Defence submits that on 24 January 2008 it has asked the Prosecution to disclose several categories of material pursuant to Rules 66 and 68 of the Rules of Procedure and Evidence (“Rules”), including, pursuant to Rule 66(B), any material in the Prosecution’s possession “that mention or relate to any of the proposed Boškoski Defence witnesses” as well as material which is intended to be used by the Prosecution at trial. The Boškoski Defence submits further that on 25 January 2008 the Prosecution responded that it would not disclose material that pertains to credibility of Defence witnesses, referring to the rules and practice of this trial, which, in its view, permit a party to withhold material going to credibility until the start of cross-examination. The Boškoski Defence submits that Rule 66(B) of the Rules obliges the Prosecution to permit the Defence to inspect any books, documents and objects in the

¹ T 281.

Prosecution's custody or control which are material to the preparation of the defence. It submits that the Defence must receive the material sought so that it may conduct further investigation if necessary, assess the credibility of a witness, raise questions with the witness in relation to any such documents, or decide not to call a particular witness. Finally, it is submitted that the ruling of the Chamber on which the Prosecution seeks to rely does not concern the disclosure obligations of the Prosecution but should be interpreted as a rule of fairness regarding notice to be given to the other party with respect to a party's intention to use a particular document with a particular witness.

4. The Prosecution responds that it is complying with its ongoing disclosure obligations as set out in Rules 66 and 68 of the Rules. It submits, however, that in compliance with the Chamber's order made at the pre-trial conference and in accordance with the practice followed by counsel for both Accused during the Prosecution case it will withhold material affecting the credibility of a witness until the start of cross-examination. It is submitted further that disclosure by the Prosecution of material that goes to credibility of Defence witnesses would undermine one of the purposes of cross-examination, namely to test the reliability and the credibility of the evidence of a witness. Further, it submits that the authorities cited by the Boškoski Defence should be distinguished from the circumstances in the present case in so far as they concern disclosure by the Prosecution of documents under Rule 66(B) before the filing of the defence witness list, and, therefore, before a decision was made to call certain person as a witness. It is submitted further that the Boškoski Defence request is vague, that the Prosecution is not legally required to provide assistance to the Defence on how to better present its case and that granting the request would undermine the purpose of Rule 65*ter* to ensure that the parties are sufficiently prepared for trial. Finally it is submitted that some of the material in question is open source material and the Prosecution is not under obligation to disclose it.

B. Law and discussion

5. Rule 66(B) of the Rules provides:

The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

6. At the outset the Chamber would observe that Rule 66(B) of the Rules applies to three categories of documents: (i) documents or other records that are material to the preparation of the defence, (ii) documents or other records that are intended for use by the Prosecutor as evidence at trial; and (iii) documents or other material which were obtained from or belonged to the accused. It

² T 285.

is the Chamber's understanding that the material identified by the Boškoski Defence in its Motion is intended to be used by the Prosecution to test credibility of Boškoski Defence witness and is not to be relied on for the truth of its content. Therefore, no disclosure obligations under Rule 66(B) arise with respect to documents intended to be used by the Prosecution as evidence at trial.

7. Pursuant to Rule 66(B) of the Rules the Chamber may order inspection of documents and other records if these records are material for the preparation of the defence. The Appeals Chamber has held that for a Trial Chamber to order inspection of documents considered material to the preparation of the defence case, the defence must (i) demonstrate that the material sought is in the custody or control of the Prosecution; (ii) establish *prima facie* the materiality of the document sought to the preparation of the defence case; and (iii) specifically identify the requested material.³

8. With respect to the *prima facie* materiality requirement the jurisprudence has established that the Prosecution's obligation under this Rule is not limited to the Prosecution's case-in-chief, nor is it confined to material countering Prosecution evidence.⁴ The Appeals Chamber has held that this Rule applies to material which is relevant to the selection of witnesses for the defence case as this is an important element of the preparation of the defence.⁵ Documents or other records relevant to credit, therefore, may in certain circumstances be considered material for the purposes of Rule 66(B). An example of this is where a document relevant to credit may be capable of influencing a decision whether to call certain witness or not.

9. For an obligation under Rule 66(B) of the Rules to arise, the defence must further specifically identify the requested material.⁶ As held by the Appeals Chamber "Rule 66(B) does not create a broad affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination."⁷ An obligation for the Prosecution under Rule 66(B) arises only with respect to sufficiently specific request by the defence.⁸ The Defence

³ *Prosecutor v. Karemera et al.*, Case No: ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal concerning Disclosure Obligations", 23 January 2008 ("Karamera Decision"), para 12. See also *Prosecutor v. Bagosora et al.*, Case No. ICTR-96-7-T, Decision on the Motion by the Defence Counsel for Disclosure, 27 November 1997 ("Bagosora. Decision of 27 November 1997"), p 5; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Rules, 25 September 2006 ("Bagosora Decision of 25 September 2006"), paras 10-11. Rule 66(B) of the Rules of the Procedure and Evidence of the International Criminal Tribunal for Rwanda ("ICTR") in its relevant part is identical to Rule 66(B) of the Rules.

⁴ See *Bagosora* Decision of 25 September 2006, paras 8, 9.

⁵ See *Bagosora* Decision of 25 September 2006, para 9; *Karamera* Decision, para 14.

⁶ *Prosecutor v. Karemera et al.*, Case No: ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal concerning Disclosure Obligations", 23 January 2008 ("Karamera Decision"), para 12. See also *Prosecutor v. Bagosora et al.*, Case No. ICTR-96-7-T, Decision on the Motion by the Defence Counsel for Disclosure, 27 November 1997 ("Bagosora. Decision of 27 November 1997"), p 5; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Rules, 25 September 2006 ("Bagosora Decision of 25 September 2006"), paras 10-11.

⁷ *Bagosora* Decision of 25 September 2006, para 10.

⁸ *Bagosora* Decision of 25 September 2006, para 10.

may not rely on “conclusory allegations or a general description of the information.”⁹ The Appeals Chamber has held that the specificity requirement has been satisfied in cases where the defence has sought access to precise category of documents, such as immigration-related material,¹⁰ or witness statements of a specific witness.¹¹

10. In the present case the Boškoski Defence seeks an order to the Prosecution to disclose four categories of material. In the Chamber’s view it is not clear how the documents specified in the first category (any statement; audio, video or other record, decision or note that mentions any of the proposed Boškoski Defence witnesses) could satisfy the *prima facie* materiality test established by the jurisprudence. It is not apparent that such documents will go to credibility of one or more of the Boškoski Defence witnesses or are in any way *prima facie* material for the preparation of the defence.

11. Further, in the Chamber’s view, it is not apparent that the documents referred to in the second category (*i.e.* statements, records, or notes obtained by the Prosecution in relation to one or more of the proposed Boškoski Defence witnesses) and in the third category of the Motion (*i.e.* statements or notes taken since the filing of the Defence witness list “that would relate to or make reference to the role, function or proposed evidence of any of the proposed witnesses”) are *prima facie* material to the preparation of the defence. While in this broad list of items there may be documents or groups of documents which may meet the *prima facie* materiality test established by the jurisprudence, these documents are not defined with sufficient specificity to trigger the Prosecution’s disclosure obligation pursuant to Rule 66(B).

12. The Boškoski Defence further seeks disclosure of “any statement, record, decision or note known to the Prosecution that would affect the credibility of a particular witness, in particular material sought and obtained for that purpose.” Documents that may affect credibility of a witness may, in certain circumstances, be material to the preparation of the defence and therefore may be subject to disclosure under Rule 66(B). However, the Boškoski Defence request in this respect is not defined with sufficient specificity to enable the Chamber to decide whether such material is indeed *prima facie* material to its case. The requirements of Rule 66(B), therefore, have not been satisfied.

⁹ See *Prosecutor v Delalić et al*, Case No: IT-96-21-T, “Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence”, 26 September 1996, paras 9, 10.

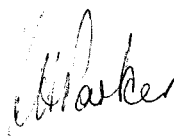
¹⁰ *Bagosora* Decision of 25 September 2006, para 10.

¹¹ *Karamera* Decision.

For the foregoing reasons and pursuant to Rules 54, and 66(B) of the Rules, the Chamber **DENIES** the Motion and **ORDERS** that the procedural orders made at the pre-trial conference on 12 April 2007 shall remain in force.

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

Dated this thirty-first day of January 2008
At The Hague
The Netherlands



Judge Kevin Parker
Presiding Judge

[Seal of the Tribunal]