

**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: 22 April 2009

IN THE TRIAL CHAMBER

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

Acting Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION'S RESPONSE TO KARADŽIĆ'S MOTION ON
THE MODALITIES OF RULE 66(A)(ii) DISCLOSURE**

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-PT

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION'S RESPONSE TO KARADŽIĆ'S MOTION ON THE
MODALITIES OF RULE 66(A)(ii) DISCLOSURE**

I. INTRODUCTION

1. Karadžić has filed a "Motion on the Modalities of Rule 66(A)(ii) Disclosure" ("Motion").¹ He seeks the disclosure of witness statements and testimonies pursuant to Rule 66(A)(ii) in witness folders on an external drive and further submits that each witness folder should contain five sub-folders, each containing particular items.² Karadžić also moves to "exclude the testimony of any witness whose statements and transcripts are not disclosed by 7 May 2009"³ unless they are subject to protective orders.

2. The jurisprudence of this Tribunal does not oblige the Prosecution to comply with Karadžić's requests, and does not support a blanket rule excluding evidence as sought by Karadžić. The Prosecution is willing to provide, on a voluntary basis, further Rule 66(A)(ii) materials on an external drive, with witness folders each containing the prior statements and testimony of the witness in sub-folders, but it opposes the Motion in all other respects.

¹ Transmitted on 9 April 2009 and filed on 14 April 2009.

² Motion, para.4.

³ Motion, para.6.

II. DISCUSSION

3. The Prosecution is not obliged under the Rules of Procedure and Evidence (“Rules”)⁴ or the Tribunal’s jurisprudence⁵ to provide Karadžić with disclosure material organized in the manner he seeks.⁶ In requesting that the material disclosed to him be organised in a particular way, Karadžić cites time constraints and the volume of the material provided to him.⁷ However, such constraints do not translate into added obligations on the part of the Prosecution. The organisation of disclosure material to facilitate Karadžić’s preparation is generally the task of his case manager, not the Prosecution. However, where it is not unduly burdensome to do so, the Prosecution is willing to assist Karadžić on a voluntary basis.

4. *External drive.* First, Karadžić seeks Rule 66(A)(ii) disclosure on an external drive. Until now, the Prosecution has disclosed Rule 66(A)(ii) materials on CD/DVD, a procedure Karadžić had requested.⁸ However, the Prosecution is able and willing to procure an additional drive and effect disclosure in this manner in order to facilitate this request. Thus, with respect to the Rule 66(A)(ii) disclosure which is to take place by 7 May 2009, the Prosecution is willing to comply with this request on a voluntary basis.

5. *Items A and B.* Next, Karadžić seeks specific items in each witness folder.⁹ With respect to Item A, the prior statements of the witness, and Item B, the prior testimony of the witness, the Prosecution is willing to provide these materials in sub-folders and indeed has already done so in the past. In relation to Item B and the request to segregate the testimony by case, an index provided with each disclosure letter shows the case(s) in which the testimony was given as well as the corresponding dates of testimony and transcript page ranges. Hence this information is already provided.

⁴ See Rule 66(A)(ii).

⁵ *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj’s Interlocutory Appeal Against the Trial Chamber’s Decision on Form of Disclosure, 17 April 2007, para.19 (“Šešelj Appeal Decision”) (affirming with respect to electronic disclosure of Rule 66(A) and (B) and Rule 68(i) materials, that what is required is only that reasonable and necessary assistance in the circumstances is given to an accused; accused entitled to effective use of the material disclosed electronically).

⁶ Motion, paras.3 and 4.

⁷ See Motion, para.5.

⁸ *Prosecutor v. Karadžić*, Motion for Disclosure of Rule 68 Material, 6 Feb. 2009.

⁹ Motion, para.4.

6. *Item C.* Karadžić further seeks that “any exhibits to be offered through the witness” be included in the sub-folder (Item C). The Prosecution is not required to effect Rule 66(A)(ii) disclosure in this manner pursuant to the Rules.¹⁰ Furthermore, Rule 66(A)(ii) disclosure will be taking place by 7 May 2009, eleven days prior to the filing of the exhibit list.¹¹ Thus the determination as to which exhibits will be tendered through each witness will not be complete by 7 May, the deadline for disclosure. It is therefore not possible to facilitate Karadžić’s requests under Item C.

7. *Item D.* Karadžić also seeks the inclusion of Rule 68 material in the sub-folders (Item D). However, pursuant to the Trial Chamber’s decision in this case, Rule 68 material is disclosed via the Electronic Disclosure System (EDS).¹² In addition, Rule 68 review is an ongoing process; the Prosecution has no obligation to complete its Rule 68 disclosure, in whole or in part, by 7 May 2009. As a result, Karadžić’s request in Item D is neither covered by the Prosecution’s obligations, nor feasible.

8. *Item E.* Karadžić seeks a hyperlinked index to all of the material in Items A-D. For the reasons elaborated above, the Prosecution is neither obliged, nor able, to provide the materials requested in Items C and D. Hence the request to hyperlink this material is rendered moot. In any event, the extent of organization of disclosure material by the Prosecution that Karadžić is demanding under this request is neither reasonable nor necessary.¹³ Moreover, the disclosure format which Karadžić requests in the Motion (witness folders, each containing various sub-folders) renders the process of creating hyperlinks both time-consuming and labour-intensive. The Prosecution thus objects to the format requested in Item E.

9. Finally, Karadžić moves to “exclude the testimony of any witness whose statements and transcripts are not disclosed by 7 May 2009, unless they are subject to a protective order varying the time for such disclosure.”¹⁴ He points in particular to the

¹⁰ See Rule 66(A)(ii).

¹¹ *Prosecutor v. Karadžić*, Order Following on Status Conference and Appended Work Plan, 6 April 2009, para.7(3) (“Order and Work Plan”).

¹² *Prosecutor v. Karadžić*, Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on Adequate Facilities, 10 March 2009.

¹³ See Šešelj Appeal Decision, para.19.

¹⁴ Motion, para.6.

exclusion of Rule 70 evidence which is not cleared by the provider by this date. Karadžić's position is untenable for several reasons.

10. First, it is a premature and disproportionate measure. A blanket decision to exclude evidence at this stage cannot be made in the abstract without regard to the particular circumstances of the witness, the stage of the proceedings, the nature and scope of the evidence in question, the timing and circumstances of the disclosure, and the resulting unfair prejudice, if any, to the Accused.¹⁵ For example, a witness may provide testimony in another case after 7 May 2009 and such testimony may therefore not be available at present. Short supplementary statements or proofing notes - which may be produced during the period leading up to the witness' court appearance and provide enhanced notice of discrete issues or details relevant to the witness' testimony - are similarly not available at present. There may be a witness who is presently unavailable but who becomes available at a later stage of the proceedings. There may be a witness who is presently unwilling to testify but later decides to testify. It should also be noted that the Rules envision the addition of witnesses at a later stage of the proceedings where this is in the interests of justice.¹⁶ Thus, a categorical exclusion at this stage of such evidence would be premature, disproportionate and contrary to the interests of justice. In this context, it should be noted that the Trial Chamber has requested the parties to "make all reasonable efforts to adhere to the...Work Plan."¹⁷ This language does not support the categorical measures Karadžić seeks.

11. Second, with respect to Rule 70 considerations, the provision of consent from Rule 70 providers rests with the providers. The Prosecution is making all reasonable efforts to obtain all necessary Rule 70 clearance as expeditiously as possible. In the event the Prosecution is unable to obtain all such Rule 70 clearance prior to the 7 May 2009 deadline, contrary to the suggestion in Karadžić's motion,¹⁸ this would not automatically

¹⁵ See *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DP, 18 Nov. 2003, para.8 (additional disclosure pertaining to a witness's evidence consisted of new evidence and the Defence was granted additional time to prepare); *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukić's Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B, 3 Nov. 2008, para.18 (late disclosure did not warrant the suppression of testimony; additional time to prepare would cure any prejudice the Defence may have suffered).

¹⁶ See *Prosecutor v. Milan Martić*, Decision on Prosecution's Motion to Amend its Rule 65ter Witness List, 9 Dec. 2005. Also, Rule 73bis(F) provides for the possibility of such additions after the start of trial and would even encompass situations where the witness was previously not included on the Rule 65ter list.

¹⁷ Order and Work Plan, para.7(11).

¹⁸ Motion, para.6.

result in a denial of adequate time and facilities for Karadžić to prepare his defence. Thus, there is no proper basis for the blanket exclusion of any such evidence, as sought by Karadžić.¹⁹

III. CONCLUSION

12. The Prosecution is able and willing to provide, on a voluntary basis, Rule 66(A)(ii) disclosure on an external drive with a folder for each witness and sub-folders containing the prior statements and testimony of the witness. For the reasons set forth above, the Motion should be dismissed in all other respects.

Word Count: 1648 words



Hildegard Uertz-Retzlaff
Senior Trial Attorney

Dated this 22nd day of April 2009,
At The Hague, The Netherlands

¹⁹ See *Prosecutor v. Milutinović et al*, Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65^{ter} Witness List, 20 April 2007, para.6 (noting the Trial Chamber's decision with respect to disclosure of materials related to a Rule 70 witness: even delays attributable to the Prosecution were not enough on their own to preclude the addition of a Rule 70 witness to the Rule 65^{ter} witness list; dismissing the Prosecution appeal in relation to the Rule 70 restrictions on the scope of cross-examination; the disclosure of witness-related materials was not an issue raised on appeal); see also *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Confidential Decision, 17 June 2008, para.24.