



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-T

Date: 2 July 2010

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 2 July 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR ADDITIONAL TIME TO PREPARE CROSS-
EXAMINATION OF MOMČILO MANDIĆ**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL 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 seised of the Accused’s “Motion for Additional Time to Prepare Cross Examination of Momčilo Mandić”, filed on 30 June 2010 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. Mr. Momčilo Mandić (“Mandić”) is the subject of a subpoena issued by the Chamber, ordering him to appear to give testimony on 30 June 2010.¹ In the Motion, filed on the same day as Mandić’s evidence was scheduled to begin, the Accused requests the Trial Chamber to delay the commencement of his cross-examination of Mandić until 13 July 2010 to allow him additional time to review the “voluminous material” for this witness. The Accused submits that his team prepared its summary of Mandić’s evidence based on the original exhibit list filed by the Office of the Prosecutor (“Prosecution”) on 18 May 2009, while, on 22 April 2010, the Prosecution filed its updated notification for Mandić, pursuant to Rule 92 *ter* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), in which it added 142 new exhibits.² Additionally, the Prosecution filed another updated notification on 23 June 2010, adding 43 new exhibits to be used with Mandić.³ The Accused further submits that he needs time to review the 450 pages of transcript from Mandić’s testimony in *Stanišić and Župljanin*, given in May 2010.⁴ Finally, the Accused submits that the Prosecution disclosed 248 new documents authored by Mandić to him on 28 June 2010.⁵ He concludes that as a result of the recent filings and disclosure by the Prosecution, as well as the fact that Mandić’s testimony is of great scope and importance, it will take him a considerable amount of time to prepare his cross-examination and requests that the Trial Chamber delay its commencement.⁶

2. On 1 July 2010, Mr. Peter Robinson, one of the Accused’s legal advisors, stated the following in an oral submission on the matter:

I just wanted to point out that in the decision that you made on the accused’s motion for postponement of the trial on the 26th of February, 2010, at page 40, you indicated: “As the trial progresses should the accused make a reasonable request for more time to prepare his cross-examination of a particular witness or to deal with a particular document which the Prosecution seeks to introduce into evidence, on the basis that

¹ *Confidential Subpoena Ad Testificandum*, 16 June 2010; *Confidential Order Revising Subpoena Ad Testificandum*, 24 June 2010.

² Motion, paras. 3–4.

³ Motion, para. 7.

⁴ Motion, para. 6.

⁵ Motion, para. 8.

⁶ Motion, paras. 9–10.

relevant material was only recently disclosed to him, the Chamber will consider such a request and may grant appropriate relief.” And this is the time. We believe this falls squarely within that paragraph, and because of that, we think that the Chamber envisioned situations like this may occur, and this is one of those situations, given the volume of documents and the lateness of their disclosure to us.⁷

3. Also on 1 July 2010, the Prosecution filed its “Response to Karadžić’s Request for Additional Time to Prepare Cross Examination of Momčilo Mandić” (“Response”), opposing the Motion. The Prosecution submits that the Accused fails to demonstrate good cause for the requested adjournment, and that it has complied with all disclosure and notification obligations in a timely fashion. The Prosecution argues that the Accused misrepresents the notification history in the Motion by omitting two notifications for this witness on 20 October 2009 and 22 February 2010.⁸ The Prosecution further argues that filing an updated notification for Mandić on 23 June 2010 was well within the Trial Chamber’s guidelines, as it was filed seven days prior to the commencement of his testimony.⁹ The Prosecution submits that its disclosure on 28 June 2010 was in response to a late Rule 66(B) request by the Accused, made on 21 June 2010, and that it responded in an expeditious manner. The Prosecution argues that it was under no obligation to disclose every document authored by Mandić prior to the Rule 66(B) request by the Accused, and that the Accused had access to the Electronic Disclosure Suite (“EDS”) in order to locate any such documents.¹⁰ The Prosecution further asserts that the Accused’s submission in relation to this Rule 66(B) material is misleading, as he erroneously cites to jurisprudence governing Rule 68 disclosure.

II. Applicable Law

4. Rules 65 *ter*, 66, and 68 of the Rules establish certain Prosecution disclosure obligations *vis-à-vis* an accused person, and are fundamental to a fair trial.¹¹ Among these, Rule 65 *ter*(E)(ii) provides that the Prosecution shall serve on the defence copies of the exhibits listed in its Rule 65 *ter* exhibit list. According to Rule 66(A)(ii), the Prosecution shall make available to the defence (a) copies of all statements of the witnesses whom it intends to call to testify at trial, and (b) copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*, within the time-limit prescribed by the Trial Chamber or pre-trial judge.

⁷ T. 4516–4517 (1 July 2010).

⁸ Response, para. 2.

⁹ Response, para. 3.

¹⁰ Response, paras. 4–5.

¹¹ *See*, for example, *Prosecutor v. Lukić and Lukić*, Case No. I-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 November 2008, para. 15.

5. Under Rule 66(B), “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: (i) are material to the preparation of the defence, or (ii) are intended for use by the Prosecution as evidence at trial, or (iii) were obtained from or belonged to the accused.

6. Finally, Rule 68(i), subject to the provisions of Rule 70, places an independent obligation upon the Prosecution to disclose to the defence, “as soon as practicable [...] any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence”. The disclosure of Rule 68 material is an ongoing obligation on the Prosecution.¹²

III. Discussion

7. The Trial Chamber recalls its Decision on the Accused’s Motion for Postponement of Trial (“Decision on Postponement of Trial”), filed on 26 February 2010, in which it denied the Accused’s motion to postpone the commencement of the trial, on the basis that, *inter alia*, such postponement was not justified by the volume of additional disclosure by the Prosecution, particularly given that the Accused had, at that point, 18 months to prepare.¹³ In particular, the Trial Chamber did not consider that the trial should be further delayed in order for the Accused and his defence team to review all of the Rule 66(B) material recently disclosed by the Prosecution in response to his requests.¹⁴ However, as Mr. Robinson noted in his oral submission, the Chamber stated the following in its Decision on Postponement of Trial:

Moreover, there are other means of ensuring that the Accused’s rights are not prejudiced in any way by the late disclosure of a particular item or items by the Prosecution, or his inability to review all disclosure material prior to the hearing of evidence. As the trial progresses, should the Accused make a reasoned request for more time to prepare for his cross-examination of a particular witness, or to deal with a particular document which the Prosecution seeks to introduce into evidence, on the basis that relevant material was only recently disclosed to him, the Chamber will consider such a request and may grant appropriate relief. Similarly, should the Accused, following his review of material disclosed to him at a late stage, discover new areas of relevant questioning that he would wish to put to a witness brought by the Prosecution, he may apply to the Chamber for the recall of that witness for further cross-examination. *Such requests should clearly demonstrate good cause for the relief sought*, including the reasons why the Accused considers he needs the

¹² *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 264.

¹³ Decision on Accused’s Motion for Postponement of Trial, 26 February 2010, para. 39.

¹⁴ The Accused filed an appeal against this decision on 9 March 2010. The Appeals Chamber dismissed this appeal on 31 March 2010, and the trial was scheduled to resume on 13 April 2010 with the hearing of the first witnesses. *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.67, Decision on Appeal from Decision on Motion for further Postponement of Trial, 31 March 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Scheduling Order, 1 April 2010.

additional time, or a witness to be recalled, with specific reference to the nature of the new information and how it is relevant to the particular witness.¹⁵

8. In accordance with this decision, the Chamber will consider the Accused's arguments in favour of the requested adjournment, to determine whether good cause has been shown.

9. With regard to the disclosure by the Prosecution on 28 June 2010 of material falling within the terms of Rule 66(B), the Chamber notes that this material was provided upon a request of the Accused made only a week previously. The Prosecution responded promptly to that request, and, on the information available to the Chamber there is therefore no basis upon which it could find that the Prosecution violated its Rule 66(B) disclosure obligations in relation to this material. It is also clear that there is a direct correlation between making numerous, and often, large requests for information, some at a relatively late stage, and the disclosure of a considerable quantity of material. Moreover, a Trial Chamber cannot place a deadline on the disclosure of material falling under Rule 66(B) because the defence can make requests for such material at any stage, nor can there be a right on the part of the defence to have reviewed all Rule 66(B) material provided to it prior to the hearing of evidence in the case.¹⁶ Otherwise, the defence could dictate when the trial should start simply by delaying its requests for Rule 66(B) material, and could argue that the trial should be adjourned whenever it makes requests for, and is given, additional Rule 66(B) material once the proceedings have begun.

10. As such, postponement of the commencement of the Accused's cross-examination of Mandić is not justified on the basis that disclosure by the Prosecution of the identified Rule 66(B) material has been, in some way, unreasonable.

11. The Chamber is also not convinced that the volume of the additional disclosure for Mandić justifies another delay to the hearing of evidence, particularly given that the Accused has now had over 13 months to prepare for this witness based on the Prosecution's initial notification that he is among its witnesses, filed on 18 May 2009. In particular, in the present circumstances, the Trial Chamber does not consider that the trial should be further delayed in order for the Accused and his defence team to review all of the Rule 66(B) material for Mandić recently disclosed by the Prosecution in response to his late request. The Chamber also notes that, due to scheduling difficulties, it sat only two days during the week of 14 June 2010 and three days during the week of 21 June 2010. Moreover, due to the anticipated lengthy examination of this witness by the Prosecution, the Accused still has additional time to prepare his cross-examination. As such, the Chamber finds that sufficient good cause has not been

¹⁵ Decision on Postponement of Trial, para. 40 (emphasis added).

¹⁶ See also *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on Trial Date, 12 June 2009, para. 43.

clearly demonstrated for the Trial Chamber to grant the Accused additional time to prepare his cross-examination of Mandić.

12. With regard to the Accused's remaining arguments concerning the notification by the Prosecution of the exhibits it would use with Mandić, the Chamber notes that the Prosecution has advised him on an ongoing basis, from its original notification filed in May 2009, of the exhibits it anticipated using. By February of 2010, the Accused was on notice of the majority of exhibits that the Prosecution would use with Mandić, with the exception of three items, added in April, and an additional 43 items notified on 23 June 2010. Moreover, the Accused has also been on notice since at least October 2009 that Mandić would be among the first witnesses to be called by the Prosecution in this case, and since the Chamber's issuance of a subpoena for his attendance, of the precise date when his testimony would begin. Yet he filed no motion to postpone the hearing of Mandić's evidence until the day of his appearance at the Tribunal.

13. For these reasons, the Chamber is not satisfied that the Accused has showed good cause to delay his cross-examination of Mandić.

IV. Disposition

14. Accordingly, the Trial Chamber, pursuant to Rules 54 and 66(B) of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this second day of July 2010
At The Hague
The Netherlands

[Seal of the Tribunal]