



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: 11 November 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: 11 November 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S TWENTY-SECOND, TWENTY-FOURTH AND TWENTY-SIXTH DISCLOSURE VIOLATION MOTIONS

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 “Twenty-Second Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential annex on 7 October 2010 (“Twenty-Second Motion”), “Twenty-Fourth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly on 13 October 2010 (“Twenty-Fourth Motion”), and “Twenty-Sixth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly on 28 October 2010 (together “Motions”) and hereby issues its decision thereon.¹

I. Background and Submissions

1. In the Motions, the Accused again argues that the Office of the Prosecutor (“Prosecution”) has violated its disclosure obligations under Rules 66(A)(ii) and 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”). Each of these Motions is addressed below in turn. Before commencing its discussion of the Motions, the Chamber notes that it previously ordered the Prosecution to complete all searches for and disclosure of Rule 66(A)(ii) materials by 1 October 2010², and that on 1 October 2010 the Prosecution stated that it had completed the implementation of the additional measures put in place to identify and ensure the disclosure of remaining Rule 66(A)(ii) materials in accordance with the Chamber’s order, with the exception of four items the disclosure of which was pending approval from the Rule 70 provider.³

A. Twenty-Second Motion

2. In the Twenty-Second Motion, the Accused makes reference to the disclosure by the Prosecution, on 6 October 2010, of two witness statements relating to Evert Albert Rave (“Rave Materials”) after the 7 May 2009 deadline for disclosure of all Rule 66(A)(ii) material that was set by the pre-trial Judge.⁴ The Accused submits that this late disclosure also missed the

¹ The Accused filed the “Twenty-Third Motion for Finding of Disclosure Violation and for Remedial Measures” on 12 October 2010 (“Twenty-Third Motion”) and the “Twenty-Fifth Motion for Finding of Disclosure Violation and for Remedial Measures” on 18 October 2010 (“Twenty-Fifth Motion”). He withdrew the Twenty-Third Motion on 27 October 2010 and the Twenty-Fifth Motion on 29 October 2010 in light of the Prosecution’s responses thereto.

² Decision on Accused’s Ninth and Tenth Motions for Finding of Disclosure Violations and for Remedial Measures, 26 August 2010, para. 23 (“Decision on Ninth and Tenth Motions”).

³ Prosecution Notice of Compliance with Trial Chamber’s Decision Concerning Rule 66(A)(ii) Disclosure, 1 October 2010 (“Notice of Compliance”).

⁴ Twenty-Second Motion, paras. 1-2. Copies of these documents were attached in Confidential Annex B to the Twenty-Second Motion. The two documents are Dutch MOD Srebrenica investigation debriefing statements.

1 October 2010 deadline set by the Chamber for the provision of all outstanding Rule 66(A)(ii) material in the possession of the Prosecution to him.⁵

3. The Accused submits that the Prosecution's need to seek consent pursuant to Rule 70 from the relevant provider, prior to disclosure of the Rave Materials, does not excuse the delay in disclosure.⁶ In support of this submission he notes that the Rave Materials date back to 1995, have been in the possession of the Prosecution for a long time, and that the "[r]equest for consent to disclose the statements could and should have been made long before the deadline of 1 October 2010".⁷ In addition, the Accused submits that in any event the Rave Materials should not have been obtained subject to Rule 70(B) provisions as that Rule was meant to apply to material "used solely for the purpose of generating new evidence" and that the Rave Materials did not fall into this category as Rave was an eyewitness to events in Srebrenica relevant to the Indictment.⁸

4. The Accused thus requests the Chamber to make a finding that the Prosecution has violated Rule 66(A)(ii) by failing to disclose the Rave Materials by 7 May 2009.⁹ In addition, given the absence of any justification by the Prosecution for not disclosing the Rave Materials even by the 1 October 2010 deadline, the Accused requests that the Chamber exclude Rave's testimony from the trial.¹⁰

5. On 21 October 2010, the Prosecution filed the "Prosecution's Response to Karadžić's Twenty-Second Motion for Finding of Disclosure Violation and for Remedial Measures" ("Response to Twenty-Second Motion"). It submits that the Rave Materials were indeed identified as a result of the additional measures it implemented following the Chamber's order, and had not been identified or disclosed previously as they had been missed due to oversight on its part.¹¹

6. The Prosecution states that its Notice of Compliance had made reference to four items which could not be disclosed due to pending Rule 70 clearance, which included the Rave Materials.¹² It sought clearance to disclose the Rave Materials on 30 September 2010, received

⁵ Twenty-Second Motion, para. 13. Reference made to Decision on Ninth and Tenth Motions.

⁶ Twenty-Second Motion, para. 14.

⁷ Twenty-Second Motion, para. 14.

⁸ Twenty-Second Motion, para. 15.

⁹ Twenty-Second Motion, para. 16.

¹⁰ Twenty-Second Motion, para. 16.

¹¹ Response to the Twenty-Second Motion, para. 2.

¹² Response to the Twenty-Second Motion, para. 2.

clearance on 4 October 2010, and disclosed them to the Accused on 6 October 2010.¹³ In addition, the Prosecution argues that the Accused wrongly claims that the Rave Materials should not have been obtained under Rule 70(B).¹⁴ In support of this submission, the Prosecution argues that when determining the application of Rule 70(B), the Chamber is only required to enquire whether the information in question was provided on a confidential basis.¹⁵

7. The Prosecution also submits that the Accused has not demonstrated any prejudice with respect to the late disclosure of the Rave Materials, and his failure to do so precludes the granting of a remedy by the Chamber.¹⁶ In support of this submission, the Prosecution argues that the Accused will have sufficient time to consider these additional materials given that they are “not lengthy” and that the witness is approximately 210th in the current witness calling order.¹⁷ Finally, the Prosecution submits that the request for exclusion of the testimony of the witness should be dismissed as premature.¹⁸

B. Twenty-Fourth Motion

8. In the Twenty-Fourth Motion, the Accused alleges that the Prosecution violated Rule 68 of the Rules by failing to disclose “as soon as practicable” a memorandum dated 5 March 1992, prepared by Cyrus Vance, in which it is recorded that, at a meeting on that date, the Accused denied any involvement in the erection of barricades in Sarajevo at the time (“Vance Memorandum”).¹⁹ The Accused submits that the late disclosure of the Vance Memorandum to him on 8 October 2010 prevented him from using the document during his cross-examination of Herbert Okun and Colm Doyle, who testified about the same meeting and made no reference to his denial of responsibility for the erection of the barricades.²⁰

9. The Accused, by reference to the “Prosecution’s Consolidated Response to Karadžić’s Eighteenth and Nineteenth Motions for Finding of Disclosure Violation” filed on 11 October 2010, argues that the Prosecution has demonstrated “a dangerous and misguided concept of disclosure and fair trial” by suggesting that there was no violation of its disclosure obligations

¹³ Response to the Twenty-Second Motion, para. 2.

¹⁴ Response to the Twenty-Second Motion, para. 4.

¹⁵ Response to the Twenty-Second Motion, para. 4, which *inter alia* cites *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR 108*bis* & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 29 (“Decision on Interpretation of Rule 70”).

¹⁶ Response to the Twenty-Second Motion, paras. 1, 3.

¹⁷ Response to the Twenty-Second Motion, para. 4.

¹⁸ Response to the Twenty-Second Motion, para. 5.

¹⁹ Twenty-Fourth Motion, para. 1. A copy of the memorandum was attached in Annex A to the Twenty-Fourth Motion.

²⁰ Twenty-Fourth Motion, paras. 3-9. The Accused also notes that he could have used the document to demonstrate that Okun “had not faithfully recorded that denial in his diary”.

under Rule 68 given that its necessary searches had been delayed by the specific requests for disclosure of material made by him pursuant to Rule 66(B).²¹

10. He also argues that, given the Prosecution knew they would lead evidence about the barricades and the 5 March 1992 meeting for “years” and had known since at least May 2009 that Herbert Okun and Colm Doyle would be testifying about these issues, the failure by it to search for and disclose exculpatory material relating to the barricades and the 5 March 1992 meeting until after Herbert Okun and Colm Doyle had testified is “inexcusable”.²²

11. The Accused requests that the Chamber make a finding that the Prosecution has violated Rule 68 by failing to disclose this material as soon as practicable, and to order the Prosecution “to complete all Rule 68 disclosure by 17 December 2010, save for items which could not otherwise have been identified through the exercise of due diligence”.²³ In addition, the Accused requests that the memorandum referred to in the Twenty-Fourth Motion be admitted from the bar table and requests a three-month suspension of the trial to “review and assimilate the late disclosure, both under Rule 66(A)(ii) and Rule 68”.²⁴

12. On 26 October 2010, the Prosecution filed the “Prosecution’s Consolidated Response to Karadžić’s Twenty-Third and Twenty-Fourth Motions for Finding of Disclosure Violation and for Remedial Measures” (“Response to Twenty-Third and Twenty-Fourth Motions”). The Prosecution submits that the Vance Memorandum was disclosed to the Accused as soon as practicable and that, therefore, there has been no violation of Rule 68 in relation to it.²⁵ It characterises the Vance Memorandum as a Rule 70 document but provides no details as to when clearance for disclosure was sought and received with respect to this document.²⁶ The Prosecution further argues that there was no disclosure violation with respect to the Vance Memorandum because its approach of actively conducting searches of “its enormous evidence collections” to identify Rule 68 materials has been “frequently interrupted by Karadžić’s complex and wide-ranging, often urgent Rule 66(B) requests related to a huge variety of issues”.²⁷

²¹ Twenty-Fourth Motion, paras. 11-12.

²² Twenty-Fourth Motion, para. 13.

²³ Twenty-Fourth Motion, para. 17.

²⁴ Twenty-Fourth Motion, paras. 18-19.

²⁵ Response to Twenty-Third and Twenty-Fourth Motions, para. 4.

²⁶ Response to Twenty-Third and Twenty-Fourth Motions, para. 4.

²⁷ Response to Twenty-Third and Twenty-Fourth Motions, para. 4.

13. The Prosecution also challenges the Accused's assertion that the Vance Memorandum constitutes Rule 68 material with respect to Okun's and Doyle's evidence.²⁸ It submits that since the Accused was present at the meeting referred to in the Vance Memorandum, there was nothing to prevent him, during his cross-examination of both witnesses, from raising "his asserted denial of involvement" in the establishment of the barricades, and that he failed to do so.²⁹ The Prosecution further argues that the Accused's claimed lack of involvement in the establishment of the barricades in early March 1992 does not undermine the independent evidence which suggests that the barricades would only be dismantled on his order.³⁰

14. The Prosecution also submits that the Accused has not demonstrated any prejudice with respect to the disclosure of the Vance Memorandum, and his failure to do so precludes the granting of a remedy by the Chamber and nullifies any claim of a fair trial violation.³¹ In response to the Accused's request that the Vance Memorandum be admitted from the bar table, the Prosecution argues that the matters discussed therein can be "put to other witnesses" and the document itself can be tendered as an exhibit at that time.³²

15. The Prosecution refers to the continuing nature of its disclosure obligation under Rule 68 and the decision of the Chamber that "[f]or this reason alone it would be against the practice at the Tribunal, and impractical, to impose a deadline upon the Prosecution to fulfil its obligation of disclosure of exculpatory material" in support of its submission that the Accused's request for such a deadline should be dismissed.³³ It also argues that the Accused has failed to substantiate how the disclosure of the Vance Memorandum pursuant to Rule 68 in October 2010, justifies a suspension of the trial.³⁴

C. Twenty-Sixth Motion

16. In the Twenty-Sixth Motion, the Accused argues that there has been a violation of Rule 68 of the Rules in connection with the disclosure by the Prosecution, on 13 and 22 October 2010, of documents amounting to 14,276 pages ("Additional Materials").³⁵

²⁸ Response to Twenty-Third and Twenty-Fourth Motions, paras. 5-6.

²⁹ Response to Twenty-Third and Twenty-Fourth Motions, paras. 5-6.

³⁰ Response to Twenty-Third and Twenty-Fourth Motions, para. 6.

³¹ Response to Twenty-Third and Twenty-Fourth Motions, para. 7.

³² Response to Twenty-Third and Twenty-Fourth Motions, para. 7.

³³ Response to Twenty-Third and Twenty-Fourth Motions, para. 8, citing Decision on Accused's Motion to Set Deadlines for Disclosure, 1 October 2009, para. 19 ("Decision on Deadlines for Disclosure").

³⁴ Response to Twenty-Third and Twenty-Fourth Motions, para. 9. The Prosecution also repeats its submission that the Rule 66(A)(ii) materials which had been previously disclosed was limited, had been provided well in advance of the relevant witness' testimony and that therefore there was no basis for the suspension of trial for three months.

³⁵ Twenty-Sixth Motion, para. 1.

These Additional Materials apparently came from the same source as documents disclosed to the Accused on 31 August 2010. The source was a computer hard drive seized by the Serbian Ministry of Interior (“MUP”) from the premises of Dragomir Pećanac on 2 December 2009, and addressed by the Chamber in the “Decision on the Accused’s Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures” of 10 September 2010 (“Decision on Seventeenth Motion”). The Accused submits that the seven-and-a-half month delay from when the Additional Materials were received by the Prosecution on 9 March 2010, until their disclosure in October 2010, demonstrates that the Prosecution has violated its obligation under Rule 68 to ensure that such material be disclosed as soon as practicable.³⁶

17. Having conducted a limited examination of some of the Additional Materials disclosed, the Accused points to four examples of documents which he submits are potentially exculpatory.³⁷ He also submits that, given their disclosure pursuant to Rule 68, the Prosecution has also acknowledged their “likely exculpatory nature”.³⁸ He refers to a previous decision of the Chamber to suspend the trial for five working days, irrespective of whether there had been a Rule 68 violation, to allow him and his team to review 5,740 pages of potentially exculpatory material which had been disclosed to him in August 2010.³⁹ He uses this as a basis for his request for an immediate suspension of at least 24 working days in order to review the Additional Materials.⁴⁰ In addition, he requests that the Prosecution be ordered to notify the defence and the Chamber in the future if and when it comes into possession of any collections of documents which may include exculpatory material.⁴¹

18. On 29 October 2010, the Prosecution filed the “Prosecution Response to Twenty-Sixth Motion for Finding of Disclosure Violation and for Remedial Measures” (“Response to Twenty-Sixth Motion”). It submits that it has complied with its Rule 68 disclosure obligations with respect to all of the material contained on the computer hard drive seized by the MUP and provided to ICTY Field Office in Belgrade on 9 March 2010 (“Hard Drive Material”), which includes the Additional Materials.⁴² The Prosecution argues that the Accused’s request for an adjournment to review the Additional Materials is not in the interests of justice on the basis that the Accused has been provided with “comprehensive and searchable indices of these

³⁶ Twenty-Sixth Motion, paras. 4,6.

³⁷ Twenty-Sixth Motion, para. 7. The documents cited allegedly affect the credibility of witness Bakir Nakaš, demonstrate the use of civilian facilities in Sarajevo as military installations, relate to the smuggling of arms to the safe area of Srebrenica, and the large numbers of Bosnian Army soldiers in Srebrenica and attacks launched from the enclave against Serb villages.

³⁸ Twenty-Sixth Motion, para. 8.

³⁹ Twenty-Sixth Motion, para. 10.

⁴⁰ Twenty-Sixth Motion, paras. 10-11.

⁴¹ Twenty-Sixth Motion, para. 12.

documents” and that the majority of them relate to the Srebrenica and Municipalities’ components of its case.⁴³ The Prosecution acknowledges that a limited number of documents—between 350 and 400 are relevant to the Sarajevo component of the case, but suggests that they are “easily identifiable and clearly described on the indices, which will enable the Accused and his Defence team to target their review of those documents which are relevant to evidence of upcoming witnesses”.⁴⁴ On this basis the Prosecution submits that it is not in the interests of justice to grant the “exceptional measure” of an adjournment as requested by the Accused.⁴⁵

19. The Prosecution notes its earlier clarification that its review and indexing of the Hard Drive Material was ongoing in light of previously identified technical difficulties, and that all this material would be disclosed in two batches.⁴⁶ The Additional Materials were disclosed following the completion of that process. The Prosecution refers to the Decision on Seventeenth Motion, where the Chamber found that, as of 31 August 2010, there had been no breach of Rule 68 with respect to the Hard Drive Material.⁴⁷ It submits that since that date it has continued to act in good faith and has taken “all reasonable and practicable steps to ensure that the Hard Drive Material was reviewed, indexed and disclosed to the Accused as soon as practicable”.⁴⁸ In support of this submission, the Prosecution mentions “significant additional resources” that it has devoted to the exercise and the steps it has taken to ensure that when the Additional Materials were finally disclosed they were fully indexed for the assistance of the Accused and his defence team.⁴⁹

II. Applicable Law

20. Rule 66(A)(ii) of the Rules requires the Prosecution (within a time-limit prescribed by the Chamber or pre-trial Judge) to make available to the Defence “copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*”. The

⁴² Response to Twenty-Sixth Motion, para. 1.

⁴³ Response to Twenty-Sixth Motion, para. 2.

⁴⁴ Response to Twenty-Sixth Motion, para. 3.

⁴⁵ Response to Twenty-Sixth Motion, paras. 3, 13-14.

⁴⁶ Response to Twenty-Sixth Motion, para. 6.

⁴⁷ Response to Twenty-Sixth Motion, para. 11.

⁴⁸ Response to Twenty-Sixth Motion, para. 12.

⁴⁹ Response to Twenty-Sixth Motion, para. 12.

applicable deadline for the disclosure of all material falling within Rule 66(A)(ii) in this case was 7 May 2009.⁵⁰

21. Rule 68 imposes a continuing obligation on the Prosecution to “disclose to the Defence 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”.⁵¹ In order to establish a violation of this obligation by the Prosecution, the Defence must “present a *prima facie* case making out the probable exculpatory or mitigating nature” of the materials in question.⁵² The Chamber has previously outlined the Appeals Chamber’s jurisprudence on the scope and application of the obligation to disclose “as soon as practicable” exculpatory material under Rule 68.⁵³ That discussion will not be repeated here.

22. Rule 70(B) provides that if the Prosecution is in possession of information which has been provided to it on “on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information...”. The Appeals Chamber has recognised that while the Chamber has the authority to assess whether information has been provided in accordance with Rule 70(B), “such enquiry must be of a very limited nature: it only extends to an examination of whether the information was in fact provided on a confidential basis...”.⁵⁴

23. Rule 68 *bis* provides that a Trial Chamber may, *proprio motu* or at the request of either party, decide on sanctions to be imposed on a party which fails to comply with its disclosure obligations under the Rules. In determining the appropriate remedy (if any), the Chamber has to examine whether or not the accused has been prejudiced by a breach of these disclosure obligations.⁵⁵

24. Finally, with regard to the relief requested by the Accused in the Twenty-Fourth Motion, the Chamber also recalls that Rule 89(C) of the Rules provides that “[a] Chamber may admit any relevant evidence which it deems to have probative value” and thus allows for admission of

⁵⁰ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

⁵¹ Decision on Deadlines for Disclosure, para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 267 (“*Blaškić Appeals Judgement*”).

⁵² *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179 (“*Kordić and Čerkez Appeals Judgement*”).

⁵³ Decision on Accused’s Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 29 September 2010, paras. 14-17.

⁵⁴ Decision on Interpretation of Rule 70, para. 29.

⁵⁵ *Kordić and Čerkez Appeals Judgement*, para. 179; *Blaškić Appeals Judgement*, para. 268.

evidence from the bar table, without the need to introduce it through a witness.⁵⁶ Once the requirements of Rule 89(C) are satisfied, the Chamber has the discretionary power over the admission of evidence, which includes the ability to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial pursuant to Rule 89(D).⁵⁷ In accordance with the Chamber's "Order on Procedure for Conduct of Trial", issued on 8 October 2009 ("Order"), the party requesting admission of evidence from the bar table is required to:

- (i) provide a short description of the document of which it seeks admission; (ii) clearly specify the relevance and probative value of each document; (iii) explain how it fits into the party's case, and (iv) provide the indicators of the document's authenticity.⁵⁸

III. Discussion

A. Twenty-Second Motion

25. Having reviewed the Rave Materials, the Chamber is of the view that they are statements which fall within the scope of Rule 66(A)(ii) of the Rules.⁵⁹ Therefore, they should have been disclosed in accordance with the 7 May 2009 deadline set by the pre-trial Judge. The Rave Materials are dated 30 August 1995 and 3 October 1995 respectively, and were not disclosed to the Accused until 6 October 2010. The Prosecution has not clarified when they came into its possession. In light of this, the Chamber considers it appropriate to presume that the Rave Materials were in the possession of the Prosecution before the 7 May 2009 deadline, and it will proceed on that presumption.

26. The Chamber recognises that the Prosecution's Notice of Compliance made reference to items which could not be disclosed by the 1 October 2010 deadline for the completion of additional measures to identify and disclose any remaining Rule 66(A)(ii) material due to pending Rule 70 clearance, and that the disclosure of the Rave Materials was subject to the consent of the relevant Rule 70 provider.⁶⁰ On 26 August 2010, the Chamber clearly ordered the Prosecution to complete "all searches *and* the resulting disclosure" of any remaining Rule

⁵⁶ Decision on Deadlines for Disclosure Decision on Accused's Motion to Set Deadlines for Disclosure, 1 October 2009, para. 10; Decision on Second Prosecution Bar Table Motion for the Admission of Bosnian Serb Assembly Records, 5 October 2010 ("Decision on Second Bar Table Motion"), paras. 5-7.

⁵⁷ Decision on Second Bar Table Motion, para. 6.

⁵⁸ Order, Appendix A, Part VII, para. R.

⁵⁹ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15.

66(A)(ii) material by 1 October 2010.⁶¹ It was thus incumbent upon the Prosecution, as soon as the Rave Materials were identified as having failed to have been disclosed in a timely manner, to obtain the necessary Rule 70 clearance as a matter of urgency so that they could then be disclosed to the Accused by 1 October 2010. The Chamber, however, accepts that the Prosecution sought and obtained Rule 70 clearance for the disclosure of the Rave Materials immediately upon their discovery.

27. This does not, however, excuse the delay in originally identifying the relevant documents and requesting that clearance so that they could be disclosed in accordance with the May 2009 deadline. The Prosecution itself acknowledges that the Rave Materials had not been disclosed earlier due to oversight on its part.⁶² Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by failing to disclose the Rave Materials in accordance with the deadline set by the pre-trial Judge.

28. Having considered the length of the Rave Materials, and the time available to the Accused to consider them before the affected witness will be called to testify, the Chamber is not satisfied that the Accused has been prejudiced by their late disclosure. The Chamber recalls that pursuant to Rule 89(D) it “may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”. It follows, that in the absence of demonstrated prejudice, there is no justification for the exclusion of the testimony of this witness.

B. Twenty-Fourth Motion

29. The Vance Memorandum reports on a series of meetings held in Belgrade and Sarajevo on 4 March and 5 March 1992. It includes a section on meetings held to discuss the tensions in Bosnia and Herzegovina at the time, and records that the Accused “denied any involvement with the erection of the barricades which completely paralysed Sarajevo last Monday”.⁶³ The Chamber is satisfied that this statement which evidences a denial of responsibility at the earliest opportunity, if read in conjunction with other evidence which demonstrates that the Accused was not involved in the erection of the barricades in Sarajevo is potentially exculpatory and it should, therefore, have been disclosed to the Accused “as soon as practicable” pursuant to Rule 68.

⁶⁰ In assessing whether the Rave Materials benefit from the protections afforded by Rule 70(B), the Chamber only needs to be satisfied that it was actually provided on a confidential basis: Decision on Interpretation of Rule 70, para. 29.

⁶¹ Decision on Ninth and Tenth Motions, para. 23.

⁶² Response to the Twenty-Second Motion, para. 2.

⁶³ Twenty-Fourth Motion, Annex A, p. 2.

30. The Vance Memorandum is dated 5 March 1992, and it was not disclosed to the Accused until 8 October 2010. The Prosecution has again not stated when it came into its possession. In light of this lack of clarification by the Prosecution and the date of the Vance Memorandum, the Chamber considers it appropriate to presume that it was not recently acquired by the Prosecution, and it will proceed on that presumption.

31. While the Chamber appreciates the burden placed on the Prosecution by the Accused's multiple Rule 66(B) requests, the obligation to disclose potentially exculpatory material pursuant to Rule 68 is independent of that burden, and the Chamber does not accept that compliance with the Rule 66(B) requests is a satisfactory explanation for delay in disclosing Rule 68 material. On the understanding that a substantial number of months, if not years, passed between the Prosecution's acquisition of the Vance Memorandum and its disclosure to the Accused, the Chamber finds that it was not disclosed "as soon as practicable" and that, therefore, the Prosecution violated its Rule 68 obligation in relation thereto.

32. This late disclosure prevented the Accused from referring to the Vance Memorandum during his cross-examination of witnesses Okun and Doyle. However, having reviewed the Vance Memorandum and the content of the testimony of Okun and Doyle, the Chamber is not satisfied that the content of the Vance Memorandum is of such significance that its late disclosure had a detrimental effect on his cross-examination of those witnesses or has prejudiced the Accused's general approach to cross-examination or his overall defence strategy.

33. The Chamber remains deeply disturbed, nonetheless, by the continuing violations of the Prosecution's disclosure obligations, under both Rule 66(A)(ii) and Rule 68, and the cumulative effect of the same. While the Prosecution's obligation to identify and disclose potentially exculpatory material pursuant to Rule 68 is an ongoing one, the Chamber has already emphasised that "this process should now have been completed and that all Rule 68 material *currently in the possession of the Prosecution* should have been disclosed to the Accused".⁶⁴ The Chamber had directed the Prosecution as early as 1 October 2009 to expedite its search for exculpatory materials contained in its collections of evidence.⁶⁵ The position taken by the Prosecution that Rule 68 "searches on witness's names must be necessarily conducted proximate to the witness's testimony"⁶⁶ is not consistent with the decision of the Chamber that with the exception of new materials or material recently received by the Prosecution, the disclosure of all Rule 68 material should have been complete.

⁶⁴ Decision on Accused's Third, Fourth, Fifth and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures, para. 25 ("Decision on Third to Sixth Motions"), (emphasis added).

⁶⁵ Decision on Deadlines for Disclosure, 1 October 2009, para. 20.

34. With respect to the Accused's request for the admission into evidence of the Vance Memorandum from the bar table, the Chamber is satisfied that, as it is concerned with his knowledge of and actions with respect to the tensions in and around Bosnia and Herzegovina, and Sarajevo, following the referendum in April 1992, it is relevant and has probative value in relation to this case. However, as set out clearly in the Order, it is incumbent on the party tendering any document from the bar table to explain how it fits into its case.⁶⁷ This is a different and additional requirement than describing the relevance and probative value of the document to the case overall, and is essential for ensuring that the document is properly placed in context. The Chamber is not satisfied that the Accused has met this requirement in this instance, and will, therefore, deny the admission into evidence of the Vance Memorandum at this stage. The Chamber notes that this does not prevent the Accused tendering the Vance Memorandum through an appropriate witness in court or in a future bar table motion.

C. Twenty-Sixth Motion

35. Having reviewed the four examples identified in the Twenty-Sixth Motion, the Chamber finds that at least some of the Additional Materials are potentially exculpatory. It follows that these documents should have been disclosed to the Accused "as soon as practicable" pursuant to Rule 68. Indeed, in disclosing all this material pursuant to Rule 68, the Prosecution appears to acknowledge its potentially exculpatory nature. In its Decision on the Seventeenth Motion, the Chamber already recognised that the fragmented nature of the Hard Drive Material necessarily delayed its review, indexing and disclosure by the Prosecution.⁶⁸ However, while the Chamber and the Accused were under the impression that the review of the Hard Drive Material and the resulting disclosure had been completed on 31 August 2010, the Prosecution has clarified that this process was ongoing at that date.

36. The Chamber acknowledges that the Prosecution "cannot be expected to disclose material which despite its best efforts it has not been able to review and assess".⁶⁹ In assessing the sufficiency of the efforts of the Prosecution the Chamber will consider whether it took "an inordinate amount of time before disclosing material in this case, and [whether the Prosecution] has failed to provide a satisfactory explanation for the delay".⁷⁰

⁶⁶ Response to Twenty-Third and Twenty-Fourth Motions, para. 8.

⁶⁷ See Decision on Prosecution's Bar Table Motion for Admission of Bosnian Serb Assembly Sessions, 22 July 2010, para. 11; Decision on the Prosecution's First Bar Table Motion, 13 April 2010, para. 15.

⁶⁸ Decision on Seventeenth Motion, para. 21.

⁶⁹ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Judgement, 19 April 2004, para. 197 ("*Krstić* Appeals Judgement"); *Blaškić* Appeals Judgement, paras. 274-275.

⁷⁰ *Krstić* Appeals Judgement, para. 197; *Kordić and Čerkez* Appeals Judgement, para. 209.

37. The Hard Drive Material was provided to the ICTY Office in Belgrade by the Serbian MUP on 9 March 2010, and arrived in The Hague on 23 March 2010. The first batch of documents from the Hard Drive Material was disclosed to the Accused on 31 August 2010 and the Additional Materials were disclosed in two batches on 13 October and 22 October 2010. The Prosecution was forced to implement an additional review protocol to address and isolate potentially privileged defence material identified in the over 10,000 files found on the Hard Drive Material. In addition, the highly fragmented nature of the documents, with each page saved as a separate file, delayed the Prosecution's review and disclosure of the Hard Drive Material. The Chamber finds that the additional two months following the disclosure of the first batch of the Hard Drive Material until the complete disclosure of all that material in late October 2010 is satisfactorily explained by the technical processes that the Prosecution needed to go through to review, reformat, and index the material. The Chamber is satisfied that since 31 August 2010, the Prosecution has acted in good faith and taken all reasonable steps to ensure that the Additional Material was disclosed to the Accused as soon as practicable. Therefore, the Chamber finds that despite the considerable delay between receipt of the Additional Material and its disclosure to the Accused, the Prosecution did not breach Rule 68 with respect to these documents.

38. However, the Chamber considers that it is preferable for the Prosecution to inform the Accused, and Chamber, whenever a large collection including potentially exculpatory material comes into its possession. Thus, while the Prosecution may not be able to disclose such material to the Accused until such time as it has all been processed and reviewed, the Accused would at least be put on notice of its existence and general content.

D. Suspension of Proceedings

39. The Chamber has recently emphasised that it has "actively taken steps to protect the Accused's fair trial rights", including ordering the Prosecution to implement additional measures to bring an end to the pattern of disclosure violations and ensuring that "the Accused has sufficient time to review the disclosed material, and incorporate it, if necessary, into his defence strategy and cross-examination of the affected witnesses".⁷¹ This included an order that no witness affected by late disclosure of Rule 66(A)(ii) material should be called to testify before 31 January 2011, to ensure that the Accused will have sufficient time to consider the recently disclosed materials.

⁷¹ Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010, paras. 42-43 ("Decision on Eighteenth to Twenty-First Motions").

40. The Chamber has previously stated that the Accused does not have a “right to have reviewed before the trial begins *all* Rule 68 material disclosed to him, although clearly such material should be disclosed to him as soon as it is identified by the Prosecution and he should be able to seek appropriate relief from the Chamber should he be provided with Rule 68 material shortly before, or during the trial, which impacts his cross-examination or examination of witnesses”.⁷² It follows that it is not necessary for the trial to be suspended whenever new Rule 68 material is provided to the Accused and that he, as any counsel representing an accused person at this Tribunal, must be able to consider newly-provided Rule 68 material on a continuing basis as part of his ongoing trial preparations. However, given the sheer volume of the Additional Materials, on 2 November 2010, the Chamber issued an oral ruling in which it held that it was in the interests of justice for the proceedings to be suspended temporarily to allow the Accused and his team to review and incorporate the large volume of potentially exculpatory documents into “his ongoing cross-examination of the Prosecution witnesses and preparations for the Defence phase of the case”.⁷³

41. In deciding to suspend the proceedings, the Chamber also took into consideration “the significant number of violations” by the Prosecution of its disclosure obligations under Rules 66(A)(ii) and 68 of the Rules which have been found to date in this case.⁷⁴ The Chamber recalls that it has issued nine previous decisions pertaining to the Accused’s disclosure violation motions and has found disclosure violations to have been established with respect to multiple documents referred to in 18 of those motions. Mindful of this, the Chamber held that “[w]hile, individually, it may be said that the Accused has not suffered prejudice by the late disclosure of certain documents, the Chamber is increasingly troubled by the potential cumulative effect of such late disclosure”.⁷⁵ For this reason, in combination with the large volume of the Additional Materials which have been recently disclosed to the Accused, the Chamber determined that a period of suspension of one month is in the overall interests of justice.

42. The Chamber has recently emphasised that the Prosecution’s pre-trial disclosure obligations extended to the disclosure of all Rule 66(A)(ii) material pertaining to Rule 92 *bis* witnesses, “reserve” witnesses and witnesses called before the implementation of the “additional measures” by the Prosecution.⁷⁶ Therefore, the Prosecution was required to disclose all Rule 66(A)(ii) material relating to these witnesses by the 1 October 2010 deadline set by the Chamber for the completion of all additional searches and disclosure of outstanding Rule

⁷² Decision on the Accused’s Motion for Postponement of Trial, 26 February 2010, para. 33.

⁷³ 3 November 2010, T. 8907.

⁷⁴ 3 November 2010, T. 8907-8908.

⁷⁵ 3 November 2010, T. 8908.

66(A)(ii) materials. Due to the failure by the Prosecution to appreciate the breadth and scope of its disclosure obligations under Rule 66(A)(ii), and thus to disclose this material by 1 October 2010, the Chamber ordered them to search for and disclose this material by 30 November 2010.⁷⁷ While the Chamber will not revise this deadline, in light of the recent adjournment of proceedings, the Chamber expects that the Prosecution will utilise the time available to it as a result of the adjournment to expedite its search for and disclosure to the Accused of this material. The Chamber also encourages the Accused to use the adjournment to review any additional Rule 66(A)(ii) material which may be disclosed to him during this period.

43. The Chamber is deeply troubled by the manner in which disclosure has been carried out by the Prosecution in this case, during both the pre-trial and trial phases. It reminds the Prosecution that the sheer volume of material to be disclosed is related to the size and complexity of this case, which is largely of its own creation. Indeed, the Chamber urged the Prosecution, in the pre-trial stage, to seriously consider reducing the scope of the Indictment or indeed to divide the case into separate pieces. While the Prosecution did select certain crime sites and incidents for which it would not bring evidence at trial, this did not constitute a major reduction in the overall size of the case. Moreover, at this stage in the life of the Tribunal, the Chamber would expect that the procedures in place inside the Office of the Prosecutor for ensuring absolute compliance with its disclosure obligation in all cases should function efficiently and properly, rather than in the unsatisfactory manner evident in this case. The Chamber trusts that the Prosecutor himself, along with his staff, will do his utmost to ensure that the progress of this case is not further hindered by late disclosure.

IV. Disposition

44. For the foregoing reasons, the Trial Chamber notes the disclosure violations identified above and, pursuant to Rules 54, 66(A)(ii), 68 and 68 *bis* of the Rules, hereby **GRANTS** the Motions **IN PART**, and:

- a) **ORDERS** that, with the exception of new materials or material recently received by the Prosecution, the search for and disclosure of potentially exculpatory materials pursuant to Rule 68 be completed by 17 December 2010;

⁷⁶ Decision on Eighteenth to Twenty-First Motions, paras. 35, 37-38.

⁷⁷ Decision on Eighteenth to Twenty-First Motions, para. 39.

- b) **ORDERS** the Prosecution to notify the Accused if it comes into possession of any further collections of documents which may include potentially exculpatory material;
and
- c) **DENIES** the Motions in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this eleventh day of November 2010
At The Hague
The Netherlands

[Seal of the Tribunal]