



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: 3 February 2011

Original: English

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**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:** 3 February 2011

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

***PUBLIC***

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**DECISION ON ACCUSED'S THIRTIETH AND THIRTY-FIRST DISCLOSURE  
VIOLATION MOTIONS**

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**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 “Thirtieth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with a confidential annex on 11 January 2011 (“Thirtieth Motion”), and “Thirty-First Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with a confidential annex on 14 January 2011, and re-classified as a confidential filing by the Chamber on 20 January 2011<sup>1</sup> (“Thirty-First Motion”) (together “Motions”), and hereby issues its decision thereon.

## I. Submissions

### **A. Thirtieth Motion**

1. In the Thirtieth Motion, the Accused submits that the Office of the Prosecutor (“Prosecution”) violated Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by failing to disclose to him, as soon as practicable, a memorandum dated 17 August 1994 (“Memorandum”).<sup>2</sup> The Accused argues that the Memorandum was not disclosed “as soon as practicable”, given that it was not provided to him until 7 January 2011, even though it formed part of a collection of documents which would likely have been in the Prosecution’s possession for at least ten years.<sup>3</sup>

2. The Accused submits that the Memorandum contains information which tends to contradict two allegations in the Indictment relating to “denying the freedom of movement in Sarajevo, and the charges of persecution and forcible transfer from Rogatica municipality”, and that the exculpatory nature of the Memorandum is demonstrated by the fact that the Prosecution disclosed it pursuant to Rule 68.<sup>4</sup> In addition, the Accused argues that he was prejudiced by this late disclosure as he could not assess the Memorandum in preparing for trial and developing his overall defence strategy and he could not use the document during his cross-examination of General David Fraser.<sup>5</sup> He thus requests the Chamber to make a finding that the Prosecution has violated Rule 68 by failing to disclose the Memorandum as soon as practicable and to suspend

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<sup>1</sup> On 19 January 2011, the Prosecution filed the “Prosecution’s urgent motion for reclassification of Karadžić’s ‘Thirty-First Motion for Finding of Disclosure Violation and for Remedial Measures’”. This Motion was not opposed by the defence and the Chamber granted the Prosecution’s request and re-classified the Thirty-First Motion as a confidential filing: Hearing, T. 10646 (20 January 2011). The Accused filed a public redacted version of the Thirty-First Motion on 20 January 2011.

<sup>2</sup> Thirtieth Motion, paras. 1-2.

<sup>3</sup> Thirtieth Motion, paras. 2, 6.

<sup>4</sup> Thirtieth Motion, paras. 3-4.

<sup>5</sup> Thirtieth Motion, paras. 5, 7.

the trial for three months before the commencement of the Prosecution's case dealing with the alleged takeover of municipalities in Bosnia and Herzegovina, to allow him to "review and assimilate all of the late disclosure, under Rule 66(A)(ii), Rule 66(B) and Rule 68".<sup>6</sup>

3. On 14 January 2011, the Prosecution filed a confidential "Prosecution's Response to Karadžić's Thirtieth Motion for Finding of Disclosure Violation and for Remedial Measures" ("Response to Thirtieth Motion").<sup>7</sup> The Prosecution submits that the Accused has not demonstrated any prejudice with respect to the disclosure of the Memorandum, and his claim that he could have used the document during his cross-examination of General Fraser is "unfounded" as there was no indication that General Fraser attended the meeting which was the subject of the Memorandum.<sup>8</sup> In support of this submission the Prosecution argues that the information in the Memorandum can be clarified with an upcoming Prosecution witness who can testify to its content and that the Memorandum has already been admitted into evidence during the testimony of Mr. Jeremy Bowen.<sup>9</sup> The Prosecution fails to make any submission relating to the issue of whether or not the Memorandum was disclosed as soon as practicable, but concludes that there is no basis to grant an adjournment as a consequence of its disclosure.<sup>10</sup>

#### **B. Thirty-First Motion**

4. In the Thirty-First Motion, the Accused submits that the Prosecution violated Rule 68 of the Rules by failing to disclose, as soon as practicable, five documents which were provided to him on 14 January 2011.<sup>11</sup> The Accused again argues that the documents were not disclosed "as soon as practicable" given that they formed part of a collection of documents which would likely have been in the Prosecution's possession for at least ten years.<sup>12</sup>

5. The Accused submits that the documents contain information which tends to contradict four allegations in the Indictment relating to "denying freedom of movement in Sarajevo, unreasonably restricting humanitarian aid, control over paramilitary groups by Dr. Karadžić, and a policy of ethnic cleansing" and that their exculpatory nature is demonstrated by the fact that the Prosecution disclosed them pursuant to Rule 68.<sup>13</sup> In addition, the Accused argues that he

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<sup>6</sup> Thirtieth Motion, paras. 9-10.

<sup>7</sup> The Prosecution indicated in paragraph 1 of the Response to Thirtieth Motion that it was filed confidentially as their arguments referred to a protected witness and they wanted to avoid linking his pseudonym to the Memorandum.

<sup>8</sup> Response to Thirtieth Motion, paras. 2, 4.

<sup>9</sup> Response to Thirtieth Motion, para. 3.

<sup>10</sup> Response to Thirtieth Motion, para. 4.

<sup>11</sup> Thirty-First Motion, para. 2.

<sup>12</sup> Thirty-First Motion, para. 10.

<sup>13</sup> Thirty-First Motion, para. 8.

was prejudiced by this late disclosure as he could not assess the documents in preparing for trial and developing his overall defence strategy and he could not use the documents in cross-examination of witnesses who have already testified, specifically United Nations personnel who testified about events in and around Sarajevo.<sup>14</sup> He repeats the request made in the Thirtieth Motion that the Chamber make a finding that the Prosecution has violated Rule 68 by failing to disclose the five documents as soon as practicable and to suspend the trial for three months before the commencement of the Prosecution's case dealing with the alleged takeover of municipalities in Bosnia and Herzegovina, to allow the Prosecution to complete its Rule 68 disclosure and for him to incorporate that disclosed material, if necessary, into his cross-examination of upcoming witnesses.<sup>15</sup>

6. On 25 January 2011, the Prosecution filed a confidential "Prosecution's Response to Karadžić's Thirty-First Motion for Finding of Disclosure Violation and for Remedial Measures" ("Response to Thirty-First Motion"). The Prosecution submits that one of the five documents in question had been previously disclosed to the Accused as part of the document with Rule 65 *ter* number 09338 in May 2009, and that while "a technical breach of Rule 68 has occurred in relation to the other four documents", the Accused has not been prejudiced by the late disclosure of those documents.<sup>16</sup> In support of this argument the Prosecution submits that the content of three of the documents was "comprehensively covered" in other documents which had been previously disclosed to the Accused.<sup>17</sup> It characterises the remaining document as "second-hand hearsay evidence" of an appeal made by the Accused and that its late disclosure had not prevented the Accused from "raising the issue of ostensibly exculpatory orders and statements" with other witnesses.<sup>18</sup> The Prosecution argues that this contradicts the Accused's claim that this late disclosure prevented him from raising these issues in his cross-examination of witnesses who could speak to these issues and that, in fact, he had cross-examined earlier witnesses on these same issues.<sup>19</sup>

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<sup>14</sup> Thirty-First Motion, para. 8.

<sup>15</sup> Thirty-First Motion, para. 14.

<sup>16</sup> Response to Thirty-First Motion, para. 1.

<sup>17</sup> Response to Thirty-First Motion, paras. 5-9.

<sup>18</sup> Response to Thirty-First Motion, para. 9.

<sup>19</sup> Response to Thirty-First Motion, paras. 7, 9-10.

## II. Applicable Law

7. Rule 68 of the Rules 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”.<sup>20</sup> In order to establish a violation of this obligation by the Prosecution, the Accused must “present a *prima facie* case making out the probable exculpatory or mitigating nature” of the materials in question.<sup>21</sup> The Trial 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.<sup>22</sup> That discussion will not be repeated here.

8. 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 the relevant breach.<sup>23</sup>

## III. Discussion

### **A. Thirtieth Motion**

9. The Memorandum includes a statement which suggests that the civilian population of Sarajevo had “major administrative obstacles in leaving Sarajevo” and that the Government of Bosnia and Herzegovina, police and military officials had contributed to this policy.<sup>24</sup> In addition, there is a suggestion that the forced eviction of civilians from Rogatica was not ethnic cleansing as portrayed in the media but “part of an agreement between the two parties”.<sup>25</sup> The Chamber finds that this material is potentially exculpatory and should have been disclosed to the Accused “as soon as practicable”. The Prosecution has yet again failed to indicate when the Memorandum came into its possession. In the absence of that clarification, and given that the Memorandum is dated 17 August 1994, the Chamber considers it appropriate to presume that the Prosecution did not recently acquire it and finds that the Prosecution violated its obligation under Rule 68 of the Rules to disclose potentially exculpatory material as soon as practicable.

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<sup>20</sup> Decision on the Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009, para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgement, 29 July 2004, para. 267 (“*Blaškić* Appeals Judgement”).

<sup>21</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179 (“*Kordić and Čerkez* Appeals Judgement”).

<sup>22</sup> Decision on Accused’s Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 29 September 2010, paras. 14-17 (“Decision on Seventeenth Motion”).

<sup>23</sup> *Kordić and Čerkez* Appeals Judgement, para. 179; *Blaškić* Appeals Judgement, para. 268.

<sup>24</sup> Thirtieth Motion, confidential annex A, p. 2.

<sup>25</sup> Thirtieth Motion, confidential annex A, p. 2.

10. While the Accused suggests that this late disclosure prevented him from using the Memorandum when cross-examining General Fraser, the Chamber notes that the issues in the Memorandum have limited, if any, relevance to the content of General Fraser's testimony and that the Accused has already cross-examined another witness about its content.<sup>26</sup> In addition, having considered the subject matter and length of the Memorandum, and the fact that it has already been entered into evidence, the Chamber is not satisfied that the Accused has demonstrated that the Memorandum is of such significance that its late disclosure had a detrimental effect on his cross-examination of other witnesses or that it has prejudiced the Accused's general approach to cross-examination or his overall defence strategy.

### **B. Thirty-First Motion**

11. The Chamber notes that the second document referred to in the Thirty-First Motion had been previously disclosed to the Accused in May 2009 as part of the document with Rule 65 *ter* number 09338. The Chamber reiterates that the Prosecution should identify when a document has been previously disclosed and endeavour to avoid the duplication of disclosure which causes confusion and unnecessarily adds to the time needed by the Accused to review this disclosed material. The remaining four documents include information about three separate issues. This includes a public appeal made by the Accused in 1992, calling on all authorities in Republika Srpska to protect citizens of other nationalities, information which relates to the smuggling of ammunition in UNHCR vehicles, and information which suggests that the objective of the Bosnian Muslim government was to provoke international military intervention in the conflict. The Chamber finds that this material is potentially exculpatory and should have been disclosed to the Accused "as soon as practicable".

12. The Prosecution itself acknowledges that these four documents were in its possession before the beginning of trial and that, despite the need to seek clearance from the relevant Rule 70 provider, their late disclosure was a breach of Rule 68 of the Rules. The Chamber finds that the Prosecution failed to disclose these four documents as soon as practicable and therefore breached its disclosure obligations under Rule 68 of the Rules. However, having considered the subject matter and length of the four documents, and that according to the Prosecution other documents covering similar issues had already been disclosed to the Accused, the Chamber is not satisfied that the Accused has demonstrated that he has been prejudiced by their late disclosure.

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<sup>26</sup> Hearing, T. 10243-10244 (14 January 2011)

### C. General observations

13. The suspension of proceedings is an extreme measure, and the Chamber has previously emphasised its expectation that the Accused should be able “consider newly-provided Rule 68 material on a continuing basis as part of his ongoing trial preparations” and that “it is not necessary for the trial to be suspended whenever new Rule 68 material” is disclosed.<sup>27</sup> On the two occasions where proceedings were suspended to allow the Accused time to review newly-provided Rule 68 material, the Chamber was mindful of the large volume of material disclosed and the importance of allowing the Accused sufficient time to review and incorporate that material if necessary into his ongoing preparations for trial.<sup>28</sup> It follows that, given the very limited number of documents referred to in the Motions, their short length and the Chamber’s conclusion in paragraphs 10 and 12 above, that the Accused has not been prejudiced by this late disclosure, the requested suspension of trial is unwarranted.

14. The Chamber has recently emphasised that it will be vigilant in “ensuring that this pattern of disclosure violations is brought to an end, that future violations do not cause prejudice to the Accused or compromise in any way his right to a fair trial”.<sup>29</sup> In that regard, the Chamber notes that it is to be expected that there will be future batches of Rule 68 material disclosed to the Accused leading up to the 18 April 2011 deadline set by the Chamber for the Prosecution to complete its review for and disclosure of all outstanding Rule 68 material currently in its possession.<sup>30</sup> The Chamber urges the Prosecution to expedite this process and complete the resulting disclosure before this date if possible to limit the potential disruption to the trial caused by further disclosure violation motions.

### IV. Disposition

15. For the foregoing reasons, the Trial Chamber notes the disclosure violations identified above and, pursuant to Rules 54, 68, and 68 *bis* of the Rules, hereby **DENIES** the Motions.

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<sup>27</sup> Decision on Accused’s Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Violation Motions, 11 November 2010, para. 40 (“Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Motions”).

<sup>28</sup> Hearing, T. 6593-6594 (13 September 2010); Decision on Seventeenth Motion, para. 7; Hearing, T. 8907 (3 November 2010); Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Motions, para. 40.

<sup>29</sup> Decision on Accused’s Twenty-Ninth Disclosure Violation Motion, 11 January 2011, para. 17.

<sup>30</sup> Decision on Request for Reconsideration, 10 December 2010, paras. 15, 17.

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



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Judge O-Gon Kwon  
Presiding

Dated this third day of February 2011  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**