



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: 24 February 2011

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: 24 February 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S THIRTY-SECOND, THIRTY-THIRD, THIRTY-FIFTH AND
THIRTY-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 “Thirty-Second Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with a confidential annex on 28 January 2011 (“Thirty-Second Motion”), “Thirty-Third Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential annexes on 28 January 2011 (“Thirty-Third Motion”), “Thirty-Fifth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential annexes on 31 January 2011 (“Thirty-Fifth Motion”), and “Thirty-Sixth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential annexes on 1 February 2011 (“Thirty-Sixth Motion”) (together “Motions”), and hereby issues its decision thereon.¹

I. Submissions

A. Thirty-Second Motion

1. In the Thirty-Second 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, six documents.² The Accused argues that these documents were not disclosed “as soon as practicable” given that they were not provided to him until 19 January 2011, even though they formed part of a collection of documents which would likely have been in the Prosecution’s possession for at least ten years.³

2. The Accused submits that the documents contain information which tends to contradict a number of allegations in the Third Amended Indictment, including the joint criminal enterprise to terrorise the civilian population of Sarajevo and the intention to conduct a campaign of ethnic cleansing.⁴ He also suggests that one document demonstrates a pattern of weapons-smuggling to Bosnian Muslims by United Nations member states, which forced the Bosnian Serbs to “detain UN personnel as prisoners of war” and that the exculpatory nature of the six documents is demonstrated by the fact that the Prosecution disclosed them pursuant to Rule 68.⁵ In addition, the Accused argues that he was prejudiced by this late disclosure as he could not assess

¹ The Accused filed the “Thirty-Fourth Motion for Finding of Disclosure Violation and for Remedial Measures” on 31 January 2011. He withdrew this motion on 7 February 2011 in light of the Prosecution’s response thereto, Withdrawal of Thirty Fourth Disclosure Violation Motion, 7 February 2011, paras. 2-3.

² Thirty-Second Motion, paras. 1-8.

³ Thirty-Second Motion, paras. 2, 11.

⁴ Thirty-Second Motion, paras. 3-7.

⁵ Thirty-Second Motion, paras. 8-9.

the documents in preparing for trial and developing his overall defence strategy and he could not use the documents and/or introduce them during his cross-examination of Herbert Okun.⁶ He thus requests the Chamber to make a finding that the Prosecution has violated Rule 68 by failing to disclose the six 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 compliance with Rule 68" and to ensure that he has these documents before cross-examining future witnesses.⁷ Finally, the Accused requests that the six documents be "be admitted from the bar table to ameliorate the prejudice he has suffered by the late disclosure".⁸

3. On 2 February 2011, the Prosecution filed the "Prosecution Response to Thirty-Second and Thirty-Fourth Motions for Finding of Disclosure Violation and for Remedial Measures" ("Response to Thirty-Second and Thirty-Fourth Motions"). The Prosecution submits that one of the six documents in question had been previously disclosed to the Accused in May 2009, as part of the document with Rule 65 *ter* number 11349, and that, therefore, there could be no violation with respect to it.⁹ In addition, it submits that the Thirty-Second Motion should be dismissed as the documents do not fall within the ambit of Rule 68(i) and that the Accused has failed to "present a *prima facie* case making out the probably exculpatory or mitigating nature of the material".¹⁰ According to the Prosecution, these documents were provided to the Accused "because they may be relevant to issues related to the defence case...even if the documents do not strictly fall within the ambit of Rule 68(i)".¹¹ The Prosecution presents distinct arguments as to why none of the documents "suggest the innocence or mitigate the guilt of the Accused or undermine the case presented by the Prosecution at trial".¹² It argues that, in any event, the Accused has failed to demonstrate any prejudice and therefore cannot be granted a remedy.¹³ In support of this submission it notes that the five documents which had not been previously disclosed to the Accused were only 13 pages in total length.¹⁴

⁶ Thirty-Second Motion, paras. 10-12.

⁷ Thirty-Second Motion, paras. 14-15.

⁸ Thirty-Second Motion, para. 16.

⁹ Response to Thirty-Second and Thirty-Fourth Motions, para. 5.

¹⁰ Response to Thirty-Second and Thirty-Fourth Motions, para. 1.

¹¹ Response to Thirty-Second and Thirty-Fourth Motions, para. 4.

¹² Response to Thirty-Second and Thirty-Fourth Motions, paras. 5-17.

¹³ Response to Thirty-Second and Thirty-Fourth Motions, para. 1.

¹⁴ Response to Thirty-Second and Thirty-Fourth Motions, para. 20.

B. Thirty-Third Motion

4. In the Thirty-Third Motion, the Accused submits that the Prosecution has violated Rule 66(A)(ii) of the Rules by disclosing a prior statement of KDZ354 on 20 January 2010, which was after both the original 7 May 2009 deadline set by the pre-trial Judge for the disclosure of such material (“7 May 2009 Deadline”) and the subsequent 1 October 2010 deadline set by the Trial Chamber for the disclosure of Rule 66(A)(ii) material which the Prosecution had failed to disclose previously (“1 October 2010 Deadline”).¹⁵ He requests the Chamber to find that Rule 66(A)(ii) has been violated by the late disclosure of this statement and that the witness’s testimony be excluded as a sanction.¹⁶

5. On 4 February 2011, the Prosecution filed the “Prosecution’s Response to Karadžić’s Thirty-Third, Thirty-Fifth, and Thirty-Sixth Motions for Finding of Disclosure Violations and for Remedial Measures” (“Response to Thirty-Third, Thirty-Fifth, and Thirty-Sixth Motions”). It concedes that it violated Rule 66(A)(ii) by failing to disclose the statement referred to in the Thirty-Third Motion in a timely manner and that the failure to disclose this statement earlier was due to human error on its part.¹⁷ However, it submits that the Accused has not been prejudiced by this late disclosure given that “[v]irtually all of the information contained in the statement was previously disclosed”, the statement is only three-pages in length, and the Accused will have had five weeks to review and integrate the statement into his preparation before the witness’s anticipated testimony.¹⁸

6. The Prosecution stresses the exceptional measures it has taken to identify and disclose Rule 66(A)(ii) material but acknowledges that it has not “achieved perfection” and it continues to identify whether there remains Rule 66(A)(ii) material which “has been exceptionally omitted from its disclosure”.¹⁹ It submits that the Tribunal’s jurisprudence does not support granting a remedy for a breach of disclosure obligations in the absence of actual prejudice and that, therefore, there is no basis to grant the Accused’s request to exclude witness testimony given he does not allege that he has been prejudiced by this late disclosure.²⁰ It emphasises that each witness “provides highly relevant and probative evidence” and that the extreme measure of excluding their evidence would be disproportionate and contrary to the interests of justice.²¹

¹⁵ Thirty-Third Motion, paras. 1-3.

¹⁶ Thirty-Third Motion, paras. 4-5.

¹⁷ Response to Thirty-Third, Thirty-Fifth, and Thirty-Sixth Motions, para. 2.

¹⁸ Response to Thirty-Third, Thirty-Fifth, and Thirty-Sixth Motions, para. 7.

¹⁹ Response to Thirty-Third, Thirty-Fifth, and Thirty-Sixth Motions, para. 3.

²⁰ Response to Thirty-Third, Thirty-Fifth, and Thirty-Sixth Motions, paras. 4-5.

²¹ Response to Thirty-Third, Thirty-Fifth, and Thirty-Sixth Motions, para. 11.

C. Thirty-Fifth Motion

7. In the Thirty-Fifth Motion, the Accused submits that the Prosecution has violated Rule 66(A)(ii) of the Rules by disclosing a prior statement and transcript of prior testimony of Boško Milić on 26 January 2010, which was after the 7 May 2009 Deadline and the 1 October 2010 Deadline.²² He requests the Chamber to find that Rule 66(A)(ii) has been violated by the late disclosure of these statements and that the witness's testimony be excluded as a sanction.²³

8. The Prosecution again concedes that it violated Rule 66(A)(ii) by failing to disclose the statements referred to in the Thirty-Fifth Motion in a timely manner and that the failure to disclose these statements earlier was due to human error on its part.²⁴ Once again, it submits that the Accused has not been prejudiced by this late disclosure given that the statements in question are only three pages and 29 pages in length respectively, that the information in the statements had been contained in prior disclosure, and the Accused will have time to incorporate them into his witness preparation given that Boško Milić will not testify before May 2011.²⁵ The Prosecution's common submissions which are of relevance to this motion, pertaining to the exclusion of witness testimony and efforts taken to comply with its Rule 66(A)(ii) disclosure obligations, are referred to in paragraph 6 above.

D. Thirty-Sixth Motion

9. In the Thirty-Sixth Motion, the Accused submits that the Prosecution has violated Rule 66(A)(ii) of the Rules by disclosing a prior statement of Mehmed Musić on 27 January 2010, which was after the 7 May 2009 Deadline and the 1 October 2010 Deadline.²⁶ He again requests the Chamber to find that Rule 66(A)(ii) has been violated by the late disclosure of this statement and that the witness's testimony be excluded as a sanction.²⁷

10. The Prosecution once more concedes that it violated Rule 66(A)(ii) by failing to disclose the statement referred to in the Thirty-Sixth Motion in a timely manner and that the failure to disclose this statement earlier was due to the failure to recognise the witness's name as a result of limitations in its search technology.²⁸ It submits that the Accused has not been prejudiced by this late disclosure given that the statement in question is only two pages in length, "mostly

²² Thirty-Fifth Motion, paras. 1-3.

²³ Thirty-Fifth Motion, paras. 4-5.

²⁴ Response to Thirty-Third, Thirty-Fifth, and Thirty-Sixth Motions, para. 2.

²⁵ Response to Thirty-Third, Thirty-Fifth, and Thirty-Sixth Motions, para. 8.

²⁶ Thirty-Sixth Motion, paras. 1-3.

²⁷ Thirty-Sixth Motion, paras. 4-5.

²⁸ Response to Thirty-Third, Thirty-Fifth, and Thirty-Sixth Motions, para. 2.

duplicates information he has had in his possession since May of 2009” and that the Accused would have had over two-and-a-half weeks to incorporate it into his witness preparation for Mehmed Musić who is scheduled to testify in February 2011.²⁹ The Prosecution’s common submissions which are of relevance to this motion, pertaining to the exclusion of witness testimony and efforts taken to comply with its Rule 66(A)(ii) disclosure obligations, are referred to in paragraph 6 above.

II. Applicable Law

11. Rule 66(A)(ii) requires the Prosecution (within a time-limit prescribed by the Trial 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 applicable deadline for the disclosure of all material falling within Rule 66(A)(ii) in this case was 7 May 2009.³⁰ On 26 August 2010, following a series of disclosure violations by the Prosecution, the Trial Chamber issued the “Decision on Accused’s Ninth and Tenth Motions for Finding of Disclosure Violations and for Remedial Measures”, in which it ordered the Prosecution to complete all additional searches for and disclosure of Rule 66(A)(ii) materials by 1 October 2010.

12. 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”.³¹ 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.³² 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 68.³³ That discussion will not be repeated here.

13. 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

²⁹ Response to Thirty-Third, Thirty-Fifth, and Thirty-Sixth Motions, para. 9.

³⁰ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

³¹ Decision on the Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009 (“Decision on Deadlines for Disclosure”), para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgement, 29 July 2004 (“*Blaškić Appeals Judgement*”), para. 267.

³² *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez Appeals Judgement*”), para. 179.

³³ Decision on Accused’s Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 29 September 2010, paras. 14-17.

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.³⁴

14. Finally, with regard to the relief requested by the Accused in the Thirty-Second 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 evidence from the bar table, without the need to introduce it through a witness.³⁵ 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).³⁶ 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.³⁷

III. Discussion

A. Thirty-Second Motion

15. The Chamber notes that the first document referred to in the Thirty-Second Motion had been previously disclosed to the Accused in May 2009 as part of the document with Rule 65 *ter* number 11349 and that, therefore, there was no disclosure violation with respect to this document. The Chamber has recently emphasised 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”.³⁸ The Chamber expresses its surprise that the Prosecution has not adopted a system which makes it easy to identify precisely which documents have been already disclosed to the Accused and urges the Prosecution to use the upcoming adjournment in proceedings to improve its practices in this regard.

³⁴ *Kordić and Čerkez* Appeals Judgement, para. 179; *Blaškić* Appeals Judgement, para. 268.

³⁵ Decision on Deadlines for Disclosure, 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.

³⁶ Decision on Second Bar Table Motion, para. 6.

³⁷ Order, Appendix A, Part VII, para. R.

³⁸ Decision on Accused’s Thirtieth and Thirty-First Disclosure Violation Motions, 3 February 2011.

16. With respect to the second document, the Chamber notes that the Accused is not charged with persecutions committed in Bihać. However, the general suggestions in the document that the “offensive could be genuinely locally inspired, committed without guidance” and that the attack itself could be a “ploy to further discredit Karadžić in world opinion by falsifying a Bosnian Serb attack”, can be characterised as potentially exculpatory if it shows that this pattern extended beyond Bihać, which could then challenge the Prosecution’s case regarding the alleged takeover of other municipalities in Bosnia and Herzegovina.

17. It follows that the second document should have been disclosed to the Accused “as soon as practicable”. The Prosecution has yet again failed to indicate when the document came into its possession. In the absence of that clarification, and given that the document was not recently created, 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.

18. Having reviewed the third, fourth, fifth, and sixth documents, the Chamber finds that the Accused has failed to “present a *prima facie* case making out the probable exculpatory or mitigating nature” of these documents.³⁹ With respect to the third document, the Chamber is not convinced that a document which suggests willingness by the Accused to make conditional concessions with respect to Sarajevo contradicts the allegation that he had the objective to terrorise the civilian population of Sarajevo. The Chamber also finds force in the Prosecution’s argument that even though the fourth document demonstrates that the Accused engaged in political negotiations to end the war, this does not necessarily contradict the allegation that he “also pursued a military campaign to expel Muslims from Serb-claimed territory”.⁴⁰ While the fifth document does suggest that there might have been some military justification for a 1993 Serb offensive in Srebrenica, it does not suggest that the same justification existed with respect to the alleged take-over of the Srebrenica enclave in 1995 and in no way contradicts the allegation that the Accused intended to ethnically cleanse Srebrenica. Having reviewed the sixth document, the Chamber is not satisfied that its content supports the Accused’s contention that UN member states were aiding the Bosnian Muslim Army.⁴¹ It follows that the third, fourth, fifth, and sixth documents are not potentially exculpatory, and there was no violation of Rule 68 of the Rules with respect to their disclosure.

³⁹ *Kordić and Čerkez Appeals Judgement*, para. 179.

⁴⁰ Response to Thirty-Second and Thirty-Fourth Motions, para. 12.

⁴¹ Response to Thirty-Second and Thirty-Fourth Motions, para. 17.

19. Having reviewed the second document, which was disclosed late in violation of Rule 68, and considering its short length, the Chamber is not convinced that it is of such significance that the Accused's development of his overall defence strategy was adversely affected or that he was prejudiced by its late disclosure. It follows that in the absence of demonstrated prejudice the requested remedy of suspension of proceedings for three months is unwarranted. Moreover, as the Chamber has recently decided to suspend the trial proceedings for a period of six weeks, commencing in March 2011, the Accused will have sufficient time to review the document and incorporate it into his ongoing preparations.⁴²

20. In relation to the Accused's request for the admission from the bar table of the six documents that are the subject of the Thirty-Second Motion, while the documents may be relevant and have probative value with respect to issues in this case, "it is incumbent on the party tendering any document from the bar table to explain how it fits into its case" in order to ensure that the document is properly contextualised.⁴³ 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 documents referred to in the Thirty-Second Motion. The Chamber notes that this does not prevent the Accused from tendering these documents through an appropriate witness in court or in a future bar table motion.

B. Thirty-Third Motion, Thirty-Fifth Motion and, Thirty-Sixth Motion

21. The prior statement of KDZ354, referred to in the Thirty-Third Motion, the prior statement and transcript of testimony of Boško Milić, referred to in the Thirty-Fifth Motion and, the prior statement of Mehmed Musić, referred to in the Thirty-Sixth Motion, pre-date the 7 May 2009 deadline set by the pre-trial Judge for the disclosure of Rule 66(A)(ii) statements. The Chamber therefore finds that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of these statements.

22. The Chamber notes that the statement referred to in the Thirty-Third Motion is only three pages in length and the Accused will have had at least five weeks to consider the statement before KDZ354 will be called to testify. Similarly, the statement and transcript referred to in the Thirty-Fifth Motion have a total length of 32 pages and Boško Milić will not testify before May 2011. The statement referred to in the Thirty-Sixth Motion is only two pages in length and the Accused will have had at least two-and-a-half weeks to consider it before Mehmed Musić is

⁴² Hearing, T. 11474-11476 (10 February 2011); Decision on Accused's Motion for Fourth Suspension of Proceedings, 16 February 2011.

called to testify. Having considered the length of the statements and the time available to the Accused to review them before the affected witnesses will be called to testify, the Chamber is not satisfied that the Accused has been prejudiced by this late disclosure. The Chamber has recently emphasised that the exclusion of relevant evidence is an extreme measure,⁴⁴ and, given the absence of demonstrated prejudice to the Accused, it is unwarranted in this case.

C. Consolidated Disclosure Violation Motions

23. The Chamber notes with concern the stream of disclosure violation motions which have been filed in January and February 2011. While it appreciates that this is, in part, a product of the inadequate disclosure practices of the Prosecution, it is of the view that unless a disclosure violation motion seeks an urgent remedy, the resources of all parties, including the defence and the Chamber would be better served if the Accused filed a consolidated disclosure violation motion on a monthly basis. The Accused's legitimate interest in documenting disclosure violations will be maintained without the burden of multiple disclosure violation motions, responses, and Trial Chamber decisions.

IV. Disposition

24. 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 **DENIES** the Motions.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-fourth day of February 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴³ Decision on Accused's Eighteenth to Twenty-First Motions, para. 32, citing 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.

⁴⁴ Decision on Accused's Twenty-Ninth Disclosure Violation Motion, paras. 15-16.