UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

Case No.: IT-95-5/18-T

Date: 30 June 2011

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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: **30 June 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S FORTY-NINTH AND FIFTIETH 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 "Forty-Ninth Motion for Finding of Disclosure Violation and for Sanctions (May 2011)", filed publicly with confidential annexes on 1 June 2011 ("Forty-Ninth Motion") and the Accused's "Fiftieth Motion for Finding of Disclosure Violation and Motion for Seventh Suspension of Proceedings" made orally on behalf of the Accused by his legal adviser on 3 June 2011 ("Fiftieth Motion"), and hereby issues its decision thereon.

I. Submissions

A. Forty-Ninth Motion

1. In the Forty-Ninth Motion, the Accused argues violations of Rule 68 of the Tribunal's Rules of Procedure and Evidence ("Rules") by the Office of the Prosecutor ("Prosecution") in relation to the disclosure of eight documents to him in May 2011 (together "Documents").[1] He submits that the Documents have been in the Prosecution's possession for a number of years but were only disclosed to him in May 2011 which was more than 19 months after the commencement of trial and more than one month after the "final" deadline set by the Chamber for the disclosure of Rule 68 material.[2] He argues that he has been prejudiced by this late disclosure as he was "unable to assess the documents in preparing for trial as part of the development of his overall defence strategy".[3]

2. The Documents include a transcript of an interview in April 2001 with the late General Vlado Lizdek who was a brigade commander of the SRK in Šabac ("Lizdek Interview"); a report of interview with the Vogošća Chief of Police, Branko Vlačo in June 1993 ("Vlačo Interview"); an UNPROFOR memorandum dated 13 September 1994 ("UNPROFOR Memorandum"); a memorandum from General Philippe Morillon dated 15 February 1993 ("First Morillon Memorandum"); an UNPROFOR military report on the Igman Operation ("UNPROFOR Report"); a memorandum from General Morillon dated 6 January 1993 ("Second Morillon Memorandum"); notes of an interview with a UN official in September 2002 ("First UN Interview"); and notes of an interview with a UN official in September 2003 ("Second UN Interview").[4]

[1] Forty-Ninth Motion, para. 1.
[2] Forty-Ninth Motion, para. 2.
[3] Forty-Ninth Motion, para. 25.
[4] Forty-Ninth Motion, para. 1.

3. While the Accused acknowledges that five of the Documents appear to have Rule 70 conditions, he submits that the Prosecution "could and should have endeavoured to obtain the consent of those parties so that it could meet the Chamber's 31 March deadline" for the disclosure of Rule 68 material.[5] He expresses serious concern with respect to three documents, which he claims were potentially exculpatory, but which were not disclosed pursuant to Rule 68 as they were only provided following Rule 66(B) requests.[6] The Accused submits that this indicates that the Prosecution's searches have failed to identify all Rule 68 material and that future Rule 66(B) requests may uncover additional violations of Rule 68.[7]

4. The Accused requests an express finding by the Chamber that the Prosecution has violated Rule 68 by its late disclosure of the Documents and that a sanction be imposed on the Prosecution for its continuing violation of its obligations under Rule 68.[8] The Accused suggests admitting the Documents "as a sanction for their non-disclosure at a time when they could have been admitted" and holding an oral hearing on the issue of why the Prosecution has been unable to ensure adequate disclosure of all Rule 68 material.[9] In addition, he suggests that the Chamber may wish to "consider whether the cumulative effect of these disclosure violations has demonstrated that the prosecution is unable to manage a case of this scope and that the appropriate remedy is to reduce the scope of the case".[10]

5. On 8 June 2011, the Prosecution filed the "Prosecution's Response to Karadžić's Forty-Ninth Motion for Finding of Disclosure Violation and for Sanctions (May 2011) and Fiftieth Motion for Finding of Disclosure Violation and Motion for Seventh Suspension of Proceedings with Appendices A to E" ("Response"). It submits that the Accused has not been prejudiced by the disclosure of the Documents, that some of the documents were disclosed pursuant to Rule 66(B) and do not contain exculpatory information and that the other documents contain "information that is marginally exculpatory, if at all, and which has been disclosed to the Accused already in other documents and statements".[11] The specific submissions of the Accused and the Prosecution with respect to each document are outlined below.

[5] Forty-Ninth Motion, para. 4.
[6] Forty-Ninth Motion, para. 5.
[7] Forty-Ninth Motion, para. 5.
[8] Forty-Ninth Motion, paras. 27-28.
[9] Forty-Ninth Motion, paras. 28-29.
[10] Forty-Ninth Motion, para. 30.
[11] Response, para. 1.

Lizdek Interview

6. The Accused submits that the Lizdek Interview is exculpatory as it contradicts the "prosecution's evidence concerning scheduled shelling and sniping incidents" and also allegations that the VRS was responsible for a campaign of terror by shelling and sniping.[12] He submits that Lizdek was the SRK Brigade Commander responsible for the area from which the shell which landed on the Markale market on 5 February 1994 was alleged to have originated.[13] Lizdek denied that the mortar had been fired from the Serb side and stated that an investigation by the SRK had determined that mortars north of Sarajevo had not been fired.[14] The Accused alleges that this violation caused him prejudice as he could have elicited this evidence during the testimony of Richard Phillips who was present during the interview.[15] He observes that the Lizdek Interview was only disclosed following a specific request for statements of deceased individuals and demonstrates that the Prosecution's searches have not been effective in identifying all Rule 68 material and that continuing violations can be expected unless measures are adopted now.[16]

7. The Prosecution claims that the Lizdek Interview had not been found in its searches as it had not been properly entered into its Evidence Unit due to human error.[17] It acknowledges that the Lizdek Interview was potentially exculpatory and should have been disclosed earlier pursuant to Rule 68.[18] However, it submits that the Accused has not been prejudiced by this late disclosure as he "overstates the allegedly exculpatory nature" of the document and specifically draws into question which Markale incident Lizdek is speaking about in the interview.[19] It argues that the Accused fails to explain how his defence or cross-examination would have been different if he possessed the Lizdek Interview earlier.[20] While the Accused submits that he would have elicited this evidence through his cross-examination of Phillips who attended the interview in question, the Prosecution argues that exculpatory aspects of the transcript fall outside the scope of Phillips' expert testimony which was limited to the SRK structure.[21] In addition the Prosecution concludes that the Accused could now tender the Lizdek Interview

[12] Forty-Ninth Motion, paras. 6-12.
[13] Forty-Ninth Motion, para. 6.
[14] Forty-Ninth Motion, para. 7.
[15] Forty-Ninth Motion, para. 13.
[16] Forty-Ninth Motion, para. 14.
[17] Response, para. 4.
[18] Response, para. 5.
[19] Response, para. 6.
[20] Response, para. 7.
[21] Response, para. 7.

pursuant to Rule 92 *quater* which was the "appropriate means by which parties may elicit out-of-court statements of deceased persons".[22]

Vlačo Interview

8. The Accused submits that the Vlačo Interview is exculpatory given that it includes denials by Vlačo that women were sexually abused in Vogošća or that prisoners were mistreated.[23] He submits that he was prejudiced by this late disclosure as he was unable to put Vlačo's statements to witnesses Eset Muračević and Ramiz Mujkić to challenge their credibility given their testimony that they were imprisoned and mistreated in Vogošća.[24] He notes that the Vlačo Interview was only disclosed following a Rule 66(B) request.[25]

9. The Prosecution argues that the Vlačo Interview does not contain exculpatory information and was therefore not disclosed pursuant to Rule 68 of the Rules.[26] According to the Prosecution, contrary to the Accused's suggestion the document does not indicate that Vlačo "flatly denie(d) that prisoners are mistreated" and there is very little discussion of the scheduled detention location described as the "Bunker".[27] It observes that the remainder of the Vlačo Interview pertains to Sonja's Café which is not a scheduled detention location, and that the Indictment does not allege responsibility for acts of sexual violence perpetrated at this location.[28] In any event, the Prosecution submits that the Accused has not been prejudiced by this late disclosure.[29] In support of this submission, the Prosecution observes that the Accused failed to show how the Vlačo Interview contradicted the evidence of Mujkić given that he did not testify about the locations discussed in the interview.[30] It contends that the focus of the Vlačo Interview were alleged visits by UNPROFOR officers to Sonja's Café, which is not relevant to the case.[31] It also observes that Vlačo's testimony in the State Court which had been disclosed to the Accused in May 2009 contained the "very same information" about the treatment of detained persons in Vogošća but had not been used by the Accused during his cross-examination of Muračević or Mujkić.[32]

[22] Response, para. 7.
[23] Forty-Ninth Motion, paras. 1, 15-16.
[24] Forty-Ninth Motion, para. 17.
[25] Forty-Ninth Motion, para. 16.
[26] Response, para. 8.
[27] Response, para. 10.
[28] Response, para. 10.
[29] Response, para. 11.
[30] Response, para. 11.
[31] Response, para. 11.
[32] Response, para. 12.

UNPROFOR Memorandum

10. According to the Accused the UNPROFOR Memorandum is exculpatory as it "rebuts the prosecution's claim that the Serbs were responsible for the unwarranted shelling of Bihać" and that it also corroborates his defence that Serbs had been falsely blamed for shelling incidents in Sarajevo.[33] He claims that he was prejudiced by the failure to disclose the UNPROFOR Memorandum before the testimony of General Rose as he "could have jogged General Rose's memory as to who was responsible for those incidents" and also sought admission of the document into evidence.[34] He also notes that he was forced to use a news report about the fighting in Bihać during his cross-examination of Rose rather than the authoritative UNPROFOR Memorandum.[35] He observes that the UNPROFOR Memorandum was not discovered during the Prosecution's Rule 68 searches but was only disclosed to him following a Rule 66(B) request.[36]

11. The Prosecution argues that the paragraphs of the UNPROFOR Memorandum referred to by the Accused do not contain exculpatory information and that it was therefore not disclosed pursuant to Rule 68 of the Rules.[37] In support of this submission, the Prosecution contends that the events in Bihać are not charged in the Indictment and the evidence elicited on this issue by the Prosecution was "merely as a means of contextualising events elsewhere".[38] Accordingly, it suggests that the responsibility of the ABiH for clashes in Bihać which was raised by the Accused during his cross-examination of General Rose was neither exculpatory nor relevant.[39] It also contends that while the UNPROFOR Memorandum does state that the "BSA grip on Sarajevo resulted directly from a number of BiH offensives", the Prosecution's case has never been that the ABiH did not launch offensives in Sarajevo and that it had "consistently argued that one of the reasons Bosnian Serbs took measures to tighten their blockade of Sarajevo was in response to BiH offensives".[40]

12. With respect to the reports of two incidents which were attributed to the ABiH, the Prosecution argues that the Accused fails to substantiate his claim that these were "examples of shelling blamed on the Bosnian Serbs" given that there was no suggestion in the UNPROFOR

[33] Forty-Ninth Motion, paras. 18-19.
[34] Forty-Ninth Motion, para. 21.
[35] Forty-Ninth Motion, para. 18.
[36] Forty-Ninth Motion, para. 20.
[37] Response, para. 13.
[38] Response, para. 14.
[39] Response, para. 14.
[40] Response, para. 15.

Memorandum that the Bosnian Serbs were ever blamed for these incidents.[41] Given these submissions the Prosecution concludes that the Accused fails to establish how the UNPROFOR Memorandum was exculpatory.[42]

First Morillon Memorandum, UNPROFOR Report, and Second Morillon Memorandum

13. According to the Accused, the First Morillon Memorandum includes observations on 15 February 1993 that the ABiH had broken the ceasefire and admitted to attacking the headquarters of the French Battalion and that President Alija Izetbegović had "refused the delivery of humanitarian aid".[43] He submits that the UNPROFOR Report states that when the Bosnian Serbs withdrew from positions on Mount Igman as agreed, the Bosnian Muslims occupied these positions in violation of the agreement on that issue.[44] Finally, the Accused observes that the Second Morillon Memorandum suggests that Bosnian Muslims were responsible for the "siege of Sarajevo" given their failure to honour the agreement on the free movement of civilians and the use of the airport to move the military, which endangered civilians.[45]

14. The Accused submits that the First Morillon Memorandum, the UNPROFOR Report, and the Second Morillon Memorandum are exculpatory as they support his case that "Muslims, and not the Bosnian Serbs, were responsible for many of the acts and conditions which led to the terror and difficult conditions experienced by the civilians of Sarajevo".[46] He argues that this late disclosure caused him prejudice as he could have used these documents and moved for their admission into evidence during his cross-examination of UN witnesses who served under General Morillon at that time.[47]

15. The Prosecution submits that the First Morillon Memorandum, the UNPROFOR Report, and the Second Morillon Memorandum were found in the lead up to the 31 March 2011 deadline for disclosure of Rule 68 material and were disclosed when clearance was received from the Rule 70 provider on 26 April 2011.[48]

16. With respect to the First Morillon Memorandum, the Prosecution argues that attribution of blame to the ABiH for breaking a cease fire in February 1993 is not exculpatory and that the

[41] Response, para. 16.
[42] Response, para. 15.
[43] Forty-Ninth Motion, para. 1.
[44] Forty-Ninth Motion, para. 1.
[45] Forty-Ninth Motion, para. 1.
[46] Forty-Ninth Motion, para. 22.
[47] Forty-Ninth Motion, para. 23.
[48] Response, paras. 17, 20, 23.

Accused fails to establish how this information "is a defence to the allegations that Bosnian Serb forces shelled and sniped civilians and civilians objects".[49] It also observes that the "exact same information" was contained in a statement of General Morillon's Military Assistant, Colonel Pyers Tucker which had been disclosed to the Accused in May 2010.[50] In any event the Prosecution observes that the author of the First Morillon Memorandum is scheduled to testify as a Prosecution witness which would give the Accused an opportunity to explore the issue further if he wanted to.[51]

17. The Prosecution argues that the Accused fails to explain how the UNPROFOR Report which details the withdrawal of forces from Mount Igman under UNPROFOR supervision is exculpatory or is of any relevance to his defence.[52] In any event it observes that withdrawal of Serb troops from Mount Igman was "extensively canvassed" in a witness statement of General Francis Briquemont which had been disclosed to the Accused in July 2009.[53]

18. With respect to the Second Morillon Memorandum, the Prosecution acknowledges that the statement by General Morillon that the Bosnian Government was "responsible for the continuation of the siege of Sarajevo" could be considered exculpatory.[54] However, it submits that the Accused has not been prejudiced by this disclosure given that the author of the memorandum is scheduled to testify as a Prosecution witness and that no other witness has been identified as being privy to the information found in the Second Morillon Memorandum.[55]

First UN Interview and Second UN Interview

19. The Accused observes that the First UN Interview includes a statement that "General Mladić viewed the UN personnel taken hostage in May 1995 as prisoners of war" and that the Second UN Interview referred to a statement by Mladić which "indicated that he could care less" about decisions taken by the Accused.[56] He submits that these two documents are exculpatory as they "demonstrate the lack of *mens rea* of the Serb leadership as to Count 11" and his lack of control for the purposes of liability under Article 7(1) and Article 7(3) of the

[49] Response, para. 18.
[50] Response, para. 19 and Appendix B.
[51] Response, para. 19.
[52] Response, para. 21.
[53] Response, para. 22 and Appendix C.
[54] Response, para. 24.
[55] Response, para. 24.
[56] Forty-Ninth Motion, para. 1.

Statute of the Tribunal.[57] He suggests that this caused him prejudice as he was unable to use this information during his cross-examination of General Rupert Smith.[58]

20. The Prosecution observes that the First UN Interview had already been disclosed to the Accused on 5 October 2009 pursuant to Rule 66(B).[59] When Mr. Robinson requested the English translation of this document on 16 May 2011, the Prosecution immediately provided him with that version.[60] It submits that the Accused's claim that this is a disclosure violation which caused him prejudice was unfounded, given that the First UN Interview had been provided to him in a working language of the Tribunal more than a year and half ago.[61] In addition, the Prosecution submits that it had already elicited the alleged exculpatory information referred to in the First UN Interview during General Smith's testimony, which undermines the Accused's suggestion that he was unable to elicit this information during his cross-examination.[62] The Prosecution also observes that the portion of the First UN Interview referred to by the Accused involves the discussion of a code cable which reflected Mladić's views that the detained UN personnel were prisoners of war, and that this document has already been admitted as an exhibit in this case.[63]

21. With respect to the Second UN Interview, the Prosecution submits that it was identified in November 2010, and that it immediately sought Rule 70 clearance at the time, but only received consent for the disclosure of the document on 12 May 2011.[64] It contends that the Accused has not been prejudiced by its disclosure given that the passages refer to a period around September 1995, that General Smith was not a participant at this meeting, and that the Accused fails to establish how the information contained in the Second UN Interview could have been elicited during his cross-examination of General Smith.[65] In addition it notes that General Smith was "examined and cross-examined extensively on the topic of the relationship between Milošević, Mladić and the Accused".[66]

[57] Forty-Ninth Motion, para. 24.
[58] Forty-Ninth Motion, para. 24.
[59] Response, para. 26.
[60] Response, para. 26.
[61] Response, para. 27.
[62] Response, para. 28.
[63] Response, para. 28.
[64] Response, para. 29.
[65] Response, para. 30.
[66] Response, para. 30.

B. Fiftieth Motion

22. Following Dr. Patrick Treanor's testimony on 2 June 2011 about the Variant A and B document, and his evidence that the Accused had tasked a person by the name of Jovan Čizmović to go to the municipalities to ensure the instructions contained in the Variant A and B document were carried out, Mr. Robinson asked the Prosecution whether they had interviewed Mr. Čizmović, and, if so, to disclose those interviews.[67] Following this request, that same afternoon, material pertaining to two interviews with Mr. Čizmović conducted by members of the Prosecution in 2002 and 2009 respectively were provided to the Accused.[68] In the Fiftieth Motion, Mr. Robinson refers to the disclosure by the Prosecution of three transcripts and seven hours of audiotape on the afternoon of 2 June 2011 ("Čizmović Material").[69]

23. On 3 June 2011, the Accused filed the "Annexes to Fiftieth Motion for Finding of Disclosure Violation and Motion for Seventh Suspension of Proceedings". On 6 June 2011, the Accused filed the "Memorandum in Support of Fiftieth Motion for Finding of Disclosure Violation and Motion for Seventh Suspension of Proceedings" ("Memorandum").

24. Mr. Robinson submits that the interviews are "extremely exculpatory" as they indicate that Mr. Čizmović had never heard about the Variant A and B document and had not travelled to municipalities to implement the instructions contained therein.[70] In addition, the Accused makes reference to two intercepted telephone conversations, which were used in Dr. Treanor's testimony to support his conclusion that Mr. Čizmović was implementing these instructions.[71] He submits that these very same intercepts were played to Mr. Čizmović who "emphatically denied that they related to the Variant A and B instructions".[72]

25. Mr. Robinson suggests that this late disclosure, in the middle of Dr. Treanor's cross-examination, prejudiced the Accused given that it "changes [his] whole approach to the testimony of Dr. Treanor" as the Čizmović Material called into question his work and would require the Accused to challenge his reliability and credibility.[73] On 3 June 2011, a suspension of Dr. Treanor's testimony was requested orally to allow the Accused sufficient time to review

[67] Fiftieth Motion, T. 14190-14191, (3 June 2011); Memorandum in Support of Fiftieth Motion for Finding of Disclosure Violation and Motion for Seventh Suspension of Proceedings, 6 June 2011, ("Memorandum") para. 5.
[68] Fiftieth Motion, T. 14191 (3 June 2011).
[69] Fiftieth Motion, T. 14190-14196 (3 June 2011).
[70] Fiftieth Motion, T. 14191 (3 June 2011); Memorandum, para. 5.
[71] Fiftieth Motion, T. 14191-14192 (3 June 2011); Memorandum, para. 5.
[72] Fiftieth Motion, T. 14191-14192 (3 June 2011); Memorandum, para. 5.
[73] Fiftieth Motion, T. 14192 (3 June 2011).

the Čizmović Material before resuming his cross-examination.[74] The Accused also requested an express finding that the Prosecution violated Rule 68 with respect to the late disclosure.[75]

26. The Prosecution in its oral response to the Fiftieth Motion questioned the time it would take to review the Čizmović Material and indicated that it had taken steps to have the audio-tape transcribed and have the transcript provided to the Accused by the afternoon of 3 June 2011.[76] It suggested that the testimony of Dr. Treanor encompassed much more than the issue relating to the Variant A and B document, and that the Chamber should continue with his testimony, with extra time given to the Accused to pose additional questions about issues which might arise from the Čizmović Material.[77] Mr. Robinson replied that to continue as suggested by the Prosecution would be unfair given that the Čizmović Material would change their whole approach to the cross-examination of Dr. Treanor, and that they should be given time to consider the material and decide what their approach should be given that they "should be in the position [they] would be in if [they] had this information before the trial even started".[78]

27. Having heard these arguments the Chamber decided to suspend the testimony of Dr. Treanor and to resume his cross-examination following the completion of the testimony of the next scheduled witness.[79]

28. Mr. Robinson expressed a broader concern that despite the Prosecution having completed the process of reviewing and disclosing all potentially exculpatory material in its possession, following the Accused's request for and provision of the Čizmović Material, it was apparent that there remained material in the Prosecution's collections which were exculpatory and had not yet been disclosed.[80] Mr. Robinson submitted that this demonstrated a "systemic problem within the Office of the Prosecutor, that they simply have not identified all of the material that we're entitled to. And as a result of that, the trial is unsafe, it's not fair. It's an unfair trial, even with your best efforts, if we don't have the exculpatory material from the Prosecution".[81] The Accused suggests that unless further action is taken "further disclosure

[74] Fiftieth Motion, T. 14192-14194 (3 June 2011).
[75] Memorandum, paras. 2, 8.
[76] Hearing, T. 14197-14200 (3 June 2011).
[77] Hearing, T. 14199 (3 June 2011).
[78] Hearing, T. 14200-14201 (3 June 2011).
[79] Hearing, T. 14202-14204 (3 June 2011).
[80] Hearing, T. 14194-14196 (3 June 2011).
[81] Hearing, T. 14195 (3 June 2011).

violations are likely to be uncovered throughout the trial and will undermine the fairness and finality of the Trial Chamber's judgement".[82]

29. In light of this submission, Mr. Robinson submitted that the Prosecution, in a case of this size, was "not capable of discharging [its] disclosure obligations without some kind of supervision" and proposed that the Chamber appoint a special master to oversee the disclosure practices of the Prosecution to ensure that all exculpatory material has been disclosed and that the trial should only resume when the special master can certify that all exculpatory material has in fact been disclosed to the Accused.[83] In support of this submission the Accused makes reference to the multiple opportunities which the Prosecution had to comply with its disclosure obligations and argues that its failure to do so demonstrates that the appointment of a special master is "necessary for the conduct of a fair trial".[84] He submits that a continuation of the trial would be unsafe and render the trial unfair, and that proceedings should be suspended until the special master "is appointed, completes his work, and is able to assure the Trial Chamber that the prosecution has fully complied with its disclosure obligations".[85]

30. In its Response, the Prosecution acknowledges that the Čizmović Material should have been disclosed earlier pursuant to Rule 68, but claims that while the interview in question was found in its searches, by "inadvertence" only the fourth tape of the interview was disclosed.[86] The Prosecution proceeds to suggest that the Accused "embellishes the exculpatory nature of these interviews" and that they do not actually tend to demonstrate his innocence.[87] It also observes that given Dr. Treanor did not use witness statements and testimony as source material for his reports, the Čizmović Material does not provide "any additional information to that already possessed by the Defence vis-à-vis the issue of the credibility and reliability of Dr. Treanor's evidence".[88]

31. The Prosecution makes an assurance that it will remedy any systemic implications of the failure to disclose the Lizdek Interview and Čizmović Material by conducting a more exhaustive review of interviews, especially the rare cases where the interview has not been transcribed.[89] It also contends that a suspension of the trial is unnecessary given that the Accused has not been

[82] Memorandum, para. 11.
[83] Hearing, T. 14195-14196 (3 June 2011); Memorandum, paras. 13-15.
[84] Memorandum, para. 13.
[85] Memorandum, para. 19.
[86] Response, para. 31.
[87] Response, para. 32.
[88] Response, para. 33.
[89] Response, para. 34.

prejudiced by the recent disclosure of the material.[90] In support of this submission it argues that it is incorrect to suggest that multiple disclosure violations "add up to prejudice to the Accused, where each of those individual findings was accompanied by a determination that no prejudice had been caused".[91] It suggests that if the Accused does establish that he has been prejudiced by the untimely disclosure of material, this can be addressed by a request for additional time to prepare for cross-examination of upcoming witnesses or a request to recall a witness for further cross-examination.[92]

32. With respect to the Accused's suggestion that a special master be appointed, the Prosecution contends that this measure is not necessary for the conduct of a fair trial.[93] It notes that it has been transparent in its approach to disclosure, has acted in good faith, and is "best placed to identify any additional measures to ensure the Defence receives all of the disclosure it is entitled to under the Rules as efficiently as possible".[94] It concludes that given that the Accused has suffered no prejudice both the Forty-Ninth Motion and Fiftieth Motion should be dismissed.[95]

II. Applicable Law

33. 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".[96] 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.[97]

34. The Chamber reiterates that regardless of the Prosecution's internal practices, there is a clear obligation to disclose potentially exculpatory material "as soon as practicable" and that the "ongoing nature of the obligation relates only to the fact that as new material comes into the

[90] Response, para. 37.
[91] Response, para. 38.
[92] Response, para. 40.
[93] Response, para. 41.
[94] Response, para. 41.
[95] Response, para. 42.
[96] Decision on the Accused's Motion to Set Deadlines for Disclosure, 1 October 2009 ("Deadlines for Disclosure Decision"), para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgement, 29 July 2004 ("*Blaškić* Appeals Judgement"), para. 267.
[97] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeals Judgement"), para. 179.

possession of the Prosecution it should be assessed as to its potentially exculpatory nature and disclosed accordingly".[98]

35. 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.[99]

III. Discussion

A. Forty-Ninth Motion

Lizdek Interview

36. The Prosecution has acknowledged that the Lizdek Interview was potentially exculpatory and should have been disclosed earlier. Having conducted its own review of the relevant portions of the Lizdek Interview, the Chamber concludes that it is potentially exculpatory, and that the Prosecution has violated its obligation under Rule 68 of the Rules by failing to disclose this document as soon as practicable, given that it was received by the Prosecution in April 2001 but was only disclosed to the Accused in May 2011.

37. The Chamber is concerned by the Prosecution's observation that the Lizdek Interview was not identified in its "systematic" searches because it had not been properly entered into its Evidence Unit due to human error. This undermines the very suggestion that these searches were systematic.[100]

Vlačo Interview

38. Having reviewed the Vlačo Interview, the Chamber observes that it contains statements by Vlačo that the prisoners under his command including those held at the "Bunker" in Vogošća were "very well treated" and that there had "been a lot of lies about Vogošća […] The filthiest lies were about women being sexually abused. This is totally untrue".[101] Contrary to the Prosecution's suggestion, these denials do not appear to be limited to incidents in Sonja's Café, which is not a scheduled detention location. Therefore, the Chamber finds that the Vlačo Interview is potentially exculpatory with respect to incidents charged in Vogošća and the

[98] Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010, para. 11.
[99] *Kordić and Čerkez* Appeals Judgement, para. 179; *Blaškić* Appeals Judgement, para. 268.
[100] *See* para. 54 *infra*.
[101] Forty-Ninth Motion, Annex B.

Prosecution violated its obligation to disclose this material pursuant to Rule 68 as soon as practicable, given that it was only disclosed to the Accused in May 2011 and there is no suggestion that it was recently received by the Prosecution.

39. While typically the decision about what material is potentially exculpatory and should be disclosed pursuant to Rule 68 is a fact-based assessment left within the discretion of the Prosecution,[102] there can be examples where the Prosecution's view of what is not potentially exculpatory does not accord with the view of the Accused or the Chamber. The failure to disclosure the Vlačo Interview is such an example.

UNPROFOR Memorandum

40. Having reviewed the UNPROFOR Memorandum, the Chamber notes that it contains information which suggests that certain incidents in Bihać were caused by the actions of the ABiH firing mortars from the town centre.[103] However, given that events in Bihać do not form part of the Indictment, the Chamber is not convinced that the Accused has presented a *prima facie* case as to how this material, so far as it relates to incidents in Bihać, is potentially exculpatory. While the Accused points to two incidents which are attributed to the ABiH in the UNPROFOR Memorandum, the Chamber finds that there was no suggestion in this document that these incidents were originally attributed to the Bosnian Serbs. It follows that there is no basis for the Accused's claim that these were examples of shelling wrongly blamed on the Bosnian Serbs.

41. While the UNPROFOR Memorandum does contain a statement that the "recent tightening of BSA grip upon Sarajevo has resulted directly from a number of BiH offensives", the Chamber is not convinced that this undermines or contradicts the case presented by the Prosecution which has "argued that one of the reasons why Bosnian Serbs took measures to tighten their blockade of Sarajevo was in response to BiH offensives".[104] The Chamber also accepts that the Prosecution's case has never been that the ABiH did not launch offensives in Sarajevo.[105] It follows that the Chamber is not satisfied that the Accused has presented "a *prima facie* case making out the probable exculpatory or mitigating nature"[106] of the UNPROFOR Memorandum and therefore finds that the Prosecution has not violated Rule 68 of the Rules with respect to its disclosure to the Accused in May 2011.

[102] Deadlines for Disclosure Decision, para. 19, citing, *Blaškić* Appeals Judgement, para. 264 and *Kordić and Čerkez* Appeals Judgement, para. 183.
[103] Forty-Ninth Motion, Annex C.
[104] Response, para. 15.
[105] Response, para. 15.

First Morillon Memorandum

42. Having reviewed the First Morillon Memorandum, the Chamber is not convinced that the Accused has presented a *prima facie* case as to how the suggestion that the ABiH was responsible for breaking the ceasefire in February 1993 and for conducting an attack on the headquarters of the French Battalion is potentially exculpatory. However, the reference in the document to President Izetbegović's refusal of humanitarian aid could be construed as supporting the Accused's case that the actions of the Bosnian Muslims and not the Bosnian Serbs were responsible for the difficult conditions experienced by the civilians of Sarajevo.[107] In that sense, the First Morillon Memorandum is potentially exculpatory and should have been disclosed to the Accused as soon as practicable. While the Prosecution only received Rule 70 clearance to disclose this document on 26 April 2011, this does not excuse the original failure by the Prosecution to identify this document and seek the required clearance earlier. It follows that the Prosecution violated Rule 68 of the Rules by failing to disclose the First Morillon Memorandum as soon as practicable, given that it was only disclosed to the Accused in May 2011 and there is no suggestion that it was recently received by the Prosecution.

UNPROFOR Report

43. The UNPROFOR Report records negotiations and clashes surrounding the withdrawal of Bosnian Serb forces from positions on Mount Igman.[108] The Accused fails to demonstrate how this information supports his case that "Muslims, and not the Bosnian Serbs, were responsible for many of the acts and conditions which led to the terror and difficult conditions experienced by the civilians of Sarajevo".[109] Having reviewed the UNPROFOR Report and the Accused's submissions, the Chamber is not satisfied that the Accused has presented "a *prima facie* case making out the probable exculpatory or mitigating nature"[110] of the UNPROFOR Report and therefore finds that the Prosecution has not violated Rule 68 of the Rules with respect to its disclosure in May 2011.

Second Morillon Memorandum

44. The Prosecution has acknowledged that the Second Morillon Memorandum could be considered exculpatory. Having conducted its own review of the Second Morillon Memorandum, the Chamber concludes that it is potentially exculpatory and that the Prosecution

[106] *Kordić and Čerkez* Appeals Judgement, para. 179.
[107] Forty-Ninth Motion, para. 1.
[108] Forty-Ninth Motion, Annex E.
[109] Forty-Ninth Motion, para. 22.
[110] *Kordić and Čerkez* Appeals Judgement, para. 179.

has violated its obligation under Rule 68 of the Rules by failing to disclose this document as soon as practicable given that it was only disclosed to the Accused in May 2011 and there is no suggestion that it was recently received by the Prosecution. While the Prosecution only received Rule 70 clearance to disclose this document on 26 April 2011, this does not excuse the original failure by the Prosecution to identify this document and seek the required clearance earlier.

First UN Interview and Second UN Interview

45. Given that the First UN Interview had already been disclosed to the Accused on 5 October 2009 in a working language of the Tribunal, the Chamber finds that the Accused's submission that its additional disclosure in May 2011 amounted to a disclosure violation is without merit. In the absence of submissions on the issue, the Chamber will not assess whether the original disclosure in October 2009 amounted to a violation of Rule 68 of the Rules.

46. With respect to the Second UN Interview the Prosecution acknowledges that it was identified as potentially containing Rule 68 material in November 2010.[111] Having conducted its own review of the relevant portions of the Second UN Interview, the Chamber concludes that it is potentially exculpatory and should have been disclosed as soon as practicable. While the Rule 70 provider did not consent to its disclosure until 12 May 2011, this does not excuse the original failure by the Prosecution to identify this document before November 2010 and seeking the required clearance earlier. It follows that the Prosecution violated Rule 68 of the Rules by failing to disclose the Second UN Interview as soon as practicable, given that it was only disclosed to the Accused in May 2011 and there is no suggestion that it was recently received by the Prosecution.

Assessment of Prejudice

47. While the Prosecution violated its disclosure obligations under Rule 68 of the Rules by the late disclosure of the Lizdek Interview, Vlačo Interview, First Morillon Memorandum, Second Morillon Memorandum, and Second UN Interview, the Chamber finds that the Accused has suffered no prejudice as a result of these violations. In reaching this conclusion, the Chamber reviewed these documents and observes that their content is not of such significance that their late disclosure has had a detrimental impact on the Accused's overall preparation for trial or the approach to his defence.

48. The Chamber is also mindful of its previous observation that "if a newly disclosed document adds nothing new to the material already available to the Accused, even if that

[111] Response, para. 29.

document is potentially exculpatory, it is hard to conclude that his cross-examination of witnesses or the development of his overall defence strategy has been negatively affected".[112] It also notes that the Accused retains the ability to seek admission of the Lizdek Interview pursuant to Rule 92 *quater*, and that the author of the First Morillon Memorandum and Second Morillon Memorandum is scheduled to testify as a Prosecution witness and the Accused will therefore have an opportunity to use these documents with this witness if he so wishes. In these circumstances, while these disclosure violations reflect poorly on the approach taken by the Prosecution in relation to its disclosure obligations, it cannot be said that the Accused has been prejudiced by this late disclosure.

49. In reaching these conclusions, the Chamber also considered the length of these documents and was mindful of the Prosecution Periodic Disclosure Report, filed on 13 May 2011, which demonstrates that the volume of disclosure dropped drastically in the month from 16 April 2011 to 13 May 2011.[113] The volume of disclosure for that month was the second smallest in terms of pages and documents disclosed since the Prosecution was first required to file periodic disclosure reports in December 2008. It is worth noting that this is the first full month since the passing of the 31 March 2011 deadline imposed by the Chamber for disclosure of all Rule 68 material in the Prosecution's possession and indicates that the major concerns with respect to Rule 68 searches and disclosure in these proceedings may have been addressed.

50. The Chamber notes the Accused's concern that his Rule 66(B) requests identified documents which should have been disclosed pursuant to Rule 68 and is not satisfied with the explanations provided by the Prosecution. However, given the absence of demonstrated prejudice to the Accused, the Chamber finds that there is no basis to reduce the scope of the case or to admit the relevant documents as a "sanction" for their non-disclosure. Having said that, the Prosecution will be called on to report on this issue in the manner outlined below.

A. Fiftieth Motion

51. In its Response, the Prosecution acknowledges that the Čizmović Material should have been disclosed earlier pursuant to Rule 68. Having conducted its own review of the relevant portions of the Čizmović Material, the Chamber concludes that it is potentially exculpatory and that the Prosecution has violated its obligation under Rule 68 of the Rules by failing to disclose

[112] Decision on Accused's Forty-Seventh Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings, 10 May 2011, para. 18.

[113] Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 13 May 2011, para. 1, indicates that 238 documents totalling 2,583 pages were disclosed from 16 April 2011 to 13 May 2011. This can be compared with the 9,893 documents totalling 115,722 pages which were disclosed in the previous month, Prosecution Periodic Disclosure Report with Confidential Appendices, A, B and C, 15 April 2011, para. 1.

this material as soon as practicable given that it was only disclosed to the Accused in June 2011 and there is no suggestion that it was recently received by the Prosecution.

52. The Chamber has already ruled on the Fiftieth Motion so far as it relates to the requested suspension of Dr. Treanor's testimony.[114] In these circumstances, the alleged prejudice to the Accused has been addressed by the additional time given to review the Čizmović Material and adjust the approach to his cross-examination of Dr. Treanor if necessary. The Chamber notes the broader concerns expressed by the Accused about the consistent failure by the Prosecution to meet its disclosure obligations and is also concerned by the issues raised. However, the Chamber does not consider that the latest batch of disclosure violations warrant a further suspension of proceedings or the appointment of a special master as suggested by the Accused. The Chamber considers that the next course of action is to require the Prosecution to report on specific issues and concerns as outlined below.

Disclosure Report

53. The Chamber previously ordered the Prosecution to furnish a detailed report on the measures it had taken to ensure compliance with its disclosure obligations by 20 August 2010.[115] Since that date, there have been numerous batches of disclosure, which have prompted a series of disclosure violation motions, findings of violations, and suspensions of proceedings. The multiple suspensions of the proceedings have been informed by the Chamber's objective of ensuring that the Accused has sufficient time to review newly disclosed material and that his right to a fair trial is not compromised. The reasons proffered by the Prosecution for the failure to identify and disclose the Rule 68 documents have often been completely inadequate.

54. At this stage, the Chamber considers that the Prosecution should provide a comprehensive explanation for the failings in its approach to its disclosure obligations and to satisfy the Chamber that everything has been done to ensure that the smooth conduct of these proceedings will not be affected by continuing issues surrounding disclosure. If the responses received are unsatisfactory, the Chamber will consider the Accused's suggestion that an oral hearing be held to canvass the failure of the Prosecution to meet it disclosure obligations. The Prosecution should file a report by 25 July 2011 ("Disclosure Report") addressing the specific concerns and questions enumerated below as well as any other issues it considers to be of relevance to this issue:

[114] Hearing, T. 14202-14204 (3 June 2011).

[115] Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures, 20 July 2010, para. 47.

i) What have been the main obstacles to timely disclosure by the Prosecution? What internal problems have caused these failures? What steps have been taken to ensure better internal oversight of the Prosecution's disclosure regime?

ii) Why was the Lizdek Interview not properly entered into the Prosecution's Evidence Unit? What are the steps taken by the Prosecution to ensure that evidence once received is properly recorded, indexed, and searched? Is this an isolated incident or is it possible that similar errors have occurred with respect to other documents? The Prosecution should make it clear on what basis it concludes that this is not a reflection of a more systemic problem.

iii) With respect to a number of disclosure violation motions[116], the Prosecution has contended that some of the documents disclosed pursuant to Rule 68 were not exculpatory but had been disclosed as material which could be "relevant" to the Accused's case. The Prosecution should provide a detailed explanation of how it conducted the review of documents in its possession for Rule 68 material, how it determined which documents should be disclosed pursuant to Rule 68, and whether it makes an assessment of whether a given document is potentially exculpatory before it is disclosed to the Accused under this rule.

iv) With respect to the Čizmović Material, the Prosecution claims that the interview in question was identified by the Prosecution, but due to "inadvertence" only the fourth tape of the interview was disclosed. The Prosecution should explain how this happened and what steps have been taken to ensure that this has not occurred with respect to other documents.

v) The Prosecution observes that it has "identified interviews as a category of documents that may not have been exhaustively reviewed".[117] Why was this category of documents not exhaustively reviewed? How voluminous is this category of documents? Are there any other categories of documents which were not exhaustively reviewed, and if so, why not?

[116] Prosecution's Response to Karadžić's Forty-Eighth Motion for Finding of Disclosure Violation and for Sanctions, 16 May 2011, para. 15; Prosecution's Response to Karadžić's Forty-Seventh Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings, 27 April 2011, para. 8; Prosecution's Response to Karadžić's Forty-Third Motion for Finding of Disclosure, 11 March 2011, para. 19; Prosecution's Response to Karadžić's Thirty-Seventh, Thirty-Eighth and Thirty-Ninth Motions for Finding of Disclosure Violation and for Remedial Measures, 29 March 2011, paras. 4-9; Prosecution Response to Thirty-Second and Thirty-Fourth Motions for Finding of Disclosure Violation and for Remedial Measures, 2 February 2011, para. 1.

[117] Response, para. 34.

IV. Disposition

55. For the foregoing reasons, the Trial Chamber, pursuant to Rules 54, 68, and 68 *bis* of the Rules, hereby:

a) **GRANTS,** by majority, Judge Kwon dissenting[118], the Forty-Ninth Motion and Fiftieth Motion in part, and finds that the Prosecution has violated Rule 68 of the Rules with respect to the late disclosure of the Lizdek Interview, Vlačo Interview, First Morillon Memorandum, Second Morillon Memorandum, Second UN Interview, and Čizmović Material;

b) **ORDERS,** the Prosecution to file the Disclosure Report by 1 August 2011; and

c) **DENIES,** the Forty-Ninth Motion and Fiftieth Motion in all other respects.

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

Judge O-Gon Kwon
Presiding

Dated this thirtieth day of June 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

[118] Judge Kwon refers to his Partially Dissenting Opinion in the Decision on Accused's Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon, 29 March 2011. While Judge Kwon agrees with the majority that there have been violations of Rule 68 of the Rules, in the absence of prejudice to the Accused, he considers that the motions should be dismissed in its entirety.