



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: 22 November 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: 22 November 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR SUSPENSION OF PROCEEDINGS
PRIOR TO START OF SREBRENICA EVIDENCE**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the Accused’s “Motion for Suspension of Proceedings Prior to Srebrenica Evidence”, filed on 11 November 2011 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused requests the Chamber to suspend the trial for a period of one month prior to the commencement of the Srebrenica component of the case, so that the conditions of a fair trial are in place and he is not further penalised for the violations by the Office of the Prosecutor (“Prosecution”) of its disclosure obligations.¹

2. The Accused states that the Prosecution’s violations of its disclosure obligations under Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) have prevented him and his defence team from reviewing hundreds of thousands of pages related to Srebrenica.² He explains that among the late disclosures, 12,392 items relating to Srebrenica were disclosed to him on 21 December 2010, 22 videos on 26 January 2011, and 248 other items on 16 March 2011 (“Disclosed Material”).³ In addition, the Accused claims that he has been disclosed, throughout the past year, hundreds of documents relating to Srebrenica, including thousands of pages of testimony from the ongoing case of *Prosecutor v. Tolimir* (“Additional Material”).⁴

3. The Accused explains that because he has prioritised the examination of the considerable volume of material relating to the municipalities component of the case which was disclosed late, and given the pace of the trial, he and his defence team have “simply put aside” the Disclosed Material and the Additional Material, without reviewing them.⁵ Thus, the Accused faces the prospect of having to commence the Srebrenica component of the case completely unprepared as a result of the lack of time and resources to review such material.⁶

4. On 15 November 2011, the Prosecution filed the “Prosecution Response to Motion for Suspension of Proceedings Prior to Srebrenica Evidence”, with confidential Appendices A–C (“Response”), opposing the Motion and arguing that the Accused has failed to show that it is in

¹ Motion, para. 1.

² Motion, para. 1.

³ Motion, para. 2.

⁴ Motion, para. 2.

⁵ Motion, para. 3.

⁶ Motion, para. 6.

the interests of justice to adjourn the proceedings for a period of one month prior to the commencement of the Srebrenica component of the case.⁷

5. Specifically, the Prosecution states that the Accused misstates the volume of Disclosed Material, and erroneously claims these items to be “late-disclosed exculpatory material”.⁸ It explains that, contrary to the Accused’s claim that 12,392 items were disclosed to him on 21 December 2010, by that date the Accused had already had access to 7,191 of those items and thus only 5,190 were disclosed to him for the first time.⁹ This number of items, together with those disclosed to the Accused on 26 January 2011 and 16 March 2011, puts the total number of Disclosed Material at 5,469.¹⁰ The Prosecution contends that, in any event, the Disclosed Material was provided to the Accused as relevant material pursuant to Rule 68(ii) of the Rules and that the Accused has not alleged that the Prosecution violated Rule 68(i) with respect to the Disclosed Material.¹¹

6. The Prosecution further submits that the Accused has had almost a year to review the Disclosed Material along with his other trial-related work, which is more than sufficient time.¹² Furthermore, the Prosecution’s disclosure of Additional Material has been clearly identified for the Accused and staggered in such a way that he could easily have reviewed it on a rolling basis as disclosed.¹³

7. The Prosecution then submits that the Accused’s arguments that he could not review the Disclosed Material and the Additional Material at any stage this year because of lack of time and resources are without merit.¹⁴ Furthermore, given the Accused’s choice to allocate part of his time and resources to investigating peripheral matters that could be dealt with as effectively after the conclusion of the Prosecution’s case, his failure to review the Disclosed Material and the Additional Material should more properly be ascribed to a misallocation of resources and to the Accused prioritising other tasks.¹⁵

8. The Prosecution also claims that the Accused should have filed the Motion at a much earlier date, given that he has known for almost one year that he had relevant material in his

⁷ Response, paras. 1, 20.

⁸ Response, para. 2.

⁹ Response, para. 8. The Prosecution attaches to the Motion, as confidential Appendices A to C, disclosure letters dated 21 December 2010, 26 January 2011 and 16 March 2011.

¹⁰ Response, para. 8.

¹¹ Response, para. 9.

¹² Response, para. 11.

¹³ Response, para. 11.

¹⁴ Response, paras. 12–14.

¹⁵ Response, paras. 13–14.

possession which had not been reviewed.¹⁶ The Prosecution explains that with the start of the Srebrenica component of its case less than two weeks away, an adjournment prior to its commencement would adversely affect the presentation of its case and unduly inconvenience those witnesses whose testimony would have to be postponed.¹⁷ Thus, given that the Accused has failed to explain the lengthy delay between receiving the Disclosed Material and the filing of the Motion, there is no good cause as to why the presentation of the Prosecution's case should be interrupted or the witnesses inconvenienced.¹⁸ Consequently, maintaining the current schedule and hearing the testimony of scheduled Prosecution witnesses before the witness recess will not unduly prejudice the Accused.¹⁹

9. Finally, in the event that the Chamber is nevertheless minded to grant the Accused a brief adjournment to review the Disclosed Material and the Additional Material, the Prosecution requests that such adjournment take place after the winter recess to give it sufficient time to adapt its case presentation and reschedule its witnesses.²⁰

10. On 18 November 2011, the Accused filed a "Supplemental Submission: Motion for Suspension of Proceedings Prior to Srebrenica Evidence" ("Supplemental Submission") in support of the Motion, stating that he has just become aware that, despite having been granted access to all confidential material in the *Tolimir* case on 9 September 2009,²¹ he has not yet been given access to either the public or the confidential exhibits in that case.²² Thus, it would be unfair to commence the Srebrenica component of the case without him having access to this material.²³

11. On 21 November 2011, the Prosecution filed its "Prosecution Response to Supplemental Submission: Motion for Suspension of Proceedings Prior to Srebrenica Evidence" ("Response to Supplemental Submission") stating that the Supplemental Submission provides no grounds for justifying a one month adjournment of the proceedings prior to the commencement of the

¹⁶ Response, paras. 15–16.

¹⁷ Response, para. 17.

¹⁸ Response, paras. 16–17.

¹⁹ Response, para. 18.

²⁰ Response, para. 19.

²¹ Supplemental Submission, para. 3 referring to *Prosecutor v. Zdravko Tolimir*, Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the Tolimir Case, 9 September 2009 ("*Tolimir* Decision on Access").

²² Supplemental Submission, para. 2. The Accused states that he has just been informed by the Registry that: 1) public exhibits from the *Tolimir* case have not been disclosed as a matter of course on an ongoing basis, but have to be specifically requested by the Accused; 2) confidential Prosecution exhibits have not yet been disclosed because the Prosecution has only recently given the Registry clearance to do so; and 3) confidential Defence exhibits have not yet been disclosed because the Defence has not yet given the Registry clearance to do so; Supplemental Submission, para. 4.

²³ Supplemental Submission, para. 5.

Srebrenica component of the case, either by itself or when viewed cumulatively with the reasons set forth in the Motion.²⁴

12. The Prosecution submits that, according to its records, there are 2,979 Prosecution exhibits and 323 Defence exhibits in the *Tolimir* case, of which approximately 591 Prosecution exhibits and 26 Defence exhibits are confidential.²⁵ The Prosecution recently notified the Registry that the Accused can have access to all the confidential Prosecution exhibits from the *Tolimir* case.²⁶ However, according to the Prosecution, the Accused already has access to all but two confidential Prosecution exhibits from that case.²⁷ In relation to the confidential Defence exhibits, the Prosecution states that only four are still not available to the Accused.²⁸ Thus, the fact that the Accused does not have access to two confidential Prosecution exhibits and four confidential exhibits from the *Tolimir* case does not constitute grounds to suspend the trial for one month.²⁹ If, after receiving access to and reviewing these items, the Accused deems them to be sufficiently important to the testimony of a witness in this case, he may seek to recall that witness for further cross-examination upon a showing of good cause.³⁰

II. Applicable Law

13. The Chamber recalls once again that Articles 20(1) and 21(4)(c) of the Statute of the Tribunal (“Statute”) protect the rights of an accused person to be tried expeditiously, with full respect for his rights, and without undue delay. In addition, Article 21(4)(b) of the Statute provides that an accused person should have “adequate time and facilities for the preparation of his defence”. The Chamber also recalls that an adjournment of the proceedings is an exceptional measure, which it will only order if convinced that it is in the interests of justice to do so.³¹

III. Discussion

14. The Chamber notes that the Accused does not allege a violation by the Prosecution of its Rule 68 disclosure obligations with respect to the Disclosed Material and Additional Material.

²⁴ Response to Supplemental Submission, paras. 1, 6.

²⁵ Response to Supplemental Submission, para. 2.

²⁶ Response to Supplemental Submission, para. 3. *See* Prosecution’s Notice of Compliance with Decision on Karadžić’s Motion for Access to Confidential Material in the *Tolimir* Case, 25 October 2011 (“Notice on Access”).

²⁷ Response to Supplemental Submission, para. 3.

²⁸ Response to Supplemental Submission, para. 4. *See also* *Prosecutor v. Zdravko Tolimir*, Defence Notice Pursuant to the Decision on Defence Requests for Access to Confidential Materials in the *Prosecutor v. Tolimir* Case, 21 November 2011.

²⁹ Response to Supplemental Submission, para. 5.

³⁰ Response to Supplemental Submission, para. 5.

³¹ Decision on Accused’s Motion for Suspension of Proceedings, 18 August 2010 (“Decision on Suspension of Proceedings”), para. 5.

It understands the basis for the Accused's request for a one-month adjournment of the trial prior to the commencement of the Srebrenica component of the Prosecution's case to be the Prosecution's systematic disclosure violations under Rule 68 of the Rules, which pertain to thousands of documents, and the resulting inability of the Accused to review the Disclosed Material and the Additional Material due to a lack of resources and time. Consequently, the Chamber shall only analyse whether the volume of the Disclosed Material and Additional Material, together with the Accused's alleged lack of time and resources to review them, as a result *inter alia* of past Rule 68 disclosure violations by the Prosecution, warrants a suspension of the trial proceedings.

15. In support of the Motion, the Accused refers to the pattern of violations of the Prosecution's Rule 68 disclosure obligations. This pattern is well known to the Chamber, which has expressed its concern on numerous occasions by stating *inter alia* that "[w]hile, individually, it may be said that the Accused has not suffered prejudice by the late disclosure of certain documents, the Chamber is increasingly troubled by the potential cumulative effect of such late disclosure".³² The pattern has also been demonstrated by the number of occasions on which the Chamber has found the Prosecution to be in violation of its disclosure obligations.³³ The Chamber has actively taken steps throughout the proceedings to protect the Accused's fair trial rights by implementing a series of measures to bring an end to this pattern and to ensure that "the Accused has sufficient time to review the disclosed material, and incorporate it, if necessary, into his defence strategy and cross-examination of the affected witnesses".³⁴ Amongst these measures, the Chamber has, in the past, granted suspensions of the proceedings when it has been satisfied that, given the circumstances, such a remedy would be in the interests of justice.³⁵ Having said that, the Chamber recalls its finding that it is not necessary for the trial

³² See Decision on Accused's Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Violation Motions, 11 November 2010 ("11 November 2010 Decision"), para. 41, referring to Hearing, T. 8908 (3 November 2010).

³³ See *inter alia*, Decision on Accused's Fifty-Ninth Disclosure Violation Motion, 14 October 2011; Decision on Accused's Fifty-Fifth Disclosure Violation Motion, 19 August 2011; Decision on Accused's Fifty-Third and Fifty-Fourth Disclosure Violation Motions, 22 July 2011; Decision on Accused's Fifty-First and Fifty-Second Disclosure Violation Motions, 7 July 2011; Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011; Decision on Forty-Eighth Disclosure Violation Motion, 30 May 2011; Decision on Accused's Forty-Seventh Motion for Finding Disclosure Violation and for Further Suspension of Proceedings, 10 May 2011 ("Decision on Sixth Suspension"); Decision on Accused's Forty-Sixth Disclosure Violation Motion, 20 April 2011; Decision on Accused's Forty-Third to Forty-Fifth Disclosure Violation Motions, 8 April 2011; Decision on Accused's Thirty-Second, Thirty-Third, Thirty-Fourth, Thirty-Fifth and Thirty-Sixth Disclosure Violation Motions, 24 February 2011; Decision on Accused's Thirtieth and Thirty-first Disclosure Violation Motions, 3 February 2011; Decision on Accused's Twenty-Ninth Disclosure Violation Motion, 11 January 2011.

³⁴ See *inter alia* Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010, paras. 42–43; 11 November 2010 Decision, para. 39.

³⁵ See *inter alia* Decision on Suspension of Proceedings; Decision on Accused's Motion for Fourth Suspension of Proceedings, 16 February 2011 ("Decision on Fourth Suspension"); Decision on Accused's Motion for Fifth Suspension of Proceedings, 17 March 2011 ("Decision on Fifth Suspension").

to be suspended whenever new Rule 68 material is provided to the Accused and that he, as any counsel representing an accused person at this Tribunal, must be able to consider newly-provided Rule 68 material on a continuing basis as part of his ongoing trial preparations.³⁶

16. In the present case, the Accused relies on the alleged disclosure of 12,662 Srebrenica-related items during the period of 21 December 2010 to 16 March 2011, in three consecutive disclosure batches,³⁷ and argues that this late disclosure is equivalent to that which warranted the six-week suspension of the proceedings ordered by the Chamber in February 2011 through the Decision on Accused's Motion for Fourth Suspension of Proceedings.³⁸ Having reviewed the relevant disclosure letters provided by the Prosecution,³⁹ and the amount of items which, according to such letters, were already in the possession of the Accused by December 2010, the Chamber notes that the Disclosed Material amounts to approximately 5,500 items, as stated by the Prosecution,⁴⁰ a figure significantly lower than the figure provided by the Accused. The Chamber further notes that the additional one-week of suspension the Chamber granted on 10 May 2011 through the Decision on Accused's Forty-Seventh Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings already considered the disclosure of approximately 250 of these items.⁴¹

17. The Chamber finds it necessary to recall that the six-week suspension granted in the Decision on Accused's Motion for Fourth Suspension of Proceedings was prompted by the mass disclosure by the Prosecution of material related to the municipalities component of its case, on a date very close to that of the estimated commencement of that portion of its case.⁴² The Chamber considered at the time that "[t]he suggestion by the Prosecution that 32,000 pages of documents and 200 hours of video [...] can be disclosed *en masse* to the Accused on a single day, with an expectation that he should be able to continuously review and incorporate this volume of material, if necessary, into the conduct of his defence is untenable".⁴³ It then found that, under the circumstances, a six-week period of suspension was appropriate.⁴⁴

³⁶ See 11 November 2010 Decision, para. 40.

³⁷ See Motion, para. 2.

³⁸ Motion, para. 5, referring to the Decision on Fourth Suspension.

³⁹ Motion, confidential Appendices A to C. The Chamber also reviewed the information contained in the Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, dated 17 January 2011; the Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, dated 15 February 2011; and the Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, dated 15 April 2011.

⁴⁰ See Response, para. 8; confidential Appendices A to C.

⁴¹ Decision on Sixth Suspension, paras. 19–24. See also Forty-Seventh Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings (March 2011 – Rule 68), 19 April 2011, para. 10.

⁴² Decision on Fourth Suspension, paras. 9, 11.

⁴³ Decision on Fourth Suspension, para. 11.

⁴⁴ Decision on Fourth Suspension, paras. 12, 14.

18. In the present case, the Chamber notes that the Disclosed Material, consisting of approximately 5,500 items, is indeed voluminous. However, the Chamber cannot ignore the fact that the bulk of it was disclosed to the Accused on 21 December 2010 and has therefore been in his possession for almost one year. The Chamber recognises the pace at which the trial has generally progressed, especially after the summer recess.⁴⁵ In the Chamber's view, the Accused has failed to show good cause as to why he chose to set aside and not review the Disclosed Material for almost one year.

19. The Chamber is sympathetic to the burden placed on the Accused as a result of the late disclosure in the past by the Prosecution of large volumes of material, and it is for this reason that the Chamber decided to suspend the proceedings for a total period of nine weeks between March and May 2011.⁴⁶ Thus, without making a finding as to the use of time by the Accused and his defence team and their internal allocation of resources, the Chamber considers that the Accused has had plenty of opportunity to review, at least partially, the Disclosed Material. Given that the Accused has chosen to represent himself, he bears the burden of managing his own case and the resources granted to him. The Chamber finds it regrettable that the Accused continues to argue in support of his requests the issue of resource-limitations as an obstacle to his ongoing trial preparation.⁴⁷ Furthermore, the Accused has been aware for years of the general order in which the Prosecution intended to present its case,⁴⁸ and has known for months the general order in which the Prosecution intended to call its witnesses.⁴⁹ This, in the Chamber's view, should have provided sufficient time and notice to the Accused and his defence team to organise themselves and to prioritise and review the relevant portions of the Disclosed Material so as to enable them to determine whether or not any of the documents should be incorporated into their ongoing preparations for trial.

20. In addition to the arguments regarding the Disclosed Material, the Accused also bases his request on the Additional Material which, as discussed above, includes "hundreds of additional documents relating to Srebrenica" disclosed to him as of March 2011, as well as thousands of pages of transcripts from the *Tolimir* case which have been disclosed to him on an ongoing basis

⁴⁵ The Chamber also notes the one-week recess it granted in October, at the request of the Accused.

⁴⁶ See Decision on Fourth Suspension; Decision on Fifth Suspension; Decision on Sixth Suspension.

⁴⁷ See Decision on the Accused's Motion to Exclude Testimony of Aernout Van Lynden, 17 May 2010, para. 6; Order on the Trial Schedule, 27 May 2010, para. 5; Decision on Accused's Second Submission on Trial Schedule, 23 September 2010, paras. 8–9. See also Decision on Prosecution's Motion for Admission of Evidence of Eight Experts Pursuant to Rules 92 *bis* and 94 *bis*, 9 November 2009, para. 20.

⁴⁸ See *inter alia* Rule 65 *ter* Conference, T. 156 (17 August 2009).

⁴⁹ See Tentative witness list provided by the Prosecution reflecting the order of remaining witnesses in its case, circulated on 23 August 2011. See also Prosecution's Submission of Order of Witnesses for November and December 2011 with Public Appendix A and Confidential Appendix B, 3 October 2011 ("3 October 2011 Submission on Order of Witnesses").

for the past year.⁵⁰ The Accused further supports his request on the fact that he has not yet been given access to the exhibits from the *Tolimir* case, as discussed above.⁵¹

21. The Chamber first notes that the Accused has not provided any specifics in relation to the Additional Material other than stating that part of the documents disclosed are transcripts from the *Tolimir* case. The Chamber has reviewed the disclosure reports filed by the Prosecution during the past year and notes that there are at least 60 items falling into this category.⁵² The Chamber finds this ongoing disclosure of transcripts to be reasonable and foreseeable, considering it arises from an ongoing case. In relation to the remaining exhibits from the *Tolimir* case, the Chamber is concerned to hear that the Accused has still not been provided with the relevant confidential material, despite being granted access to it back in 2009.⁵³ Having said that, the Chamber expects the Accused to be able to allocate resources to review, on a rolling basis, material arising from ongoing cases. Thus, having now heard from the Prosecution as to the small number of confidential exhibits from the *Tolimir* case which are still to be disclosed to the Accused and which have not been made previously available to him through other means, the Chamber is not satisfied that the ongoing disclosure of transcripts from the *Tolimir* case or the upcoming disclosure of other material in that case warrants any suspension of the proceedings.

22. In relation to the remainder of the Additional Material *i.e.*, “hundreds of additional documents relating to Srebrenica” which according to the Accused have been disclosed to him on an ongoing basis throughout the year, the Chamber notes that the Accused has not provided any information thereto and, consequently, has failed to show that this disclosure warrants any suspension of the proceedings.

⁵⁰ Motion, para. 2.

⁵¹ See para. 10 above.

⁵² See Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 15 March 2011; Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 15 April 2011; Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 13 May 2011; Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 15 June 2011; Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 15 July 2011; Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 15 August 2011; Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 15 September 2011; Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 17 October 2011; Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 15 November 2011.

⁵³ The Chamber notes that it took two years after the issuance of the *Tolimir* Decision on Access for the Prosecution to file its notice of compliance with such decision, and it has taken almost a month for the Registry to provide access to the Accused to all the Prosecution’s confidential material in that case after having received the Prosecution’s notice; Notice on Access. However, as stated above the Accused has already gained access through other means to most of the Prosecution’s confidential exhibits from the *Tolimir* case and only two Prosecution’s confidential exhibits are yet to be provided.

23. As in all prior occasions, the Chamber has to consider various elements when determining whether to grant the extraordinary measure of suspension of proceedings. In the present case, given the lack of good cause established by the Accused to justify granting a suspension, and the disruption that a suspension of the trial proceedings for one month prior to the commencement of the Srebrenica component of the case would cause, the Chamber is not satisfied that it is in the interests of justice to grant the Accused's request.

24. The Chamber nevertheless urges the Prosecution to provide to the Accused all relevant material in relation to the remaining Prosecution witnesses as early as possible, including the correct order in which it intends to call its witnesses,⁵⁴ and to inform him of the documents it intends to use with them so as to enable him to focus his efforts on these witnesses and the material relevant thereto.

IV. Disposition

25. Accordingly, the Chamber, pursuant to Articles 20(1) and 21(4)(c) of the Statute and Rule 54 of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-second day of November 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

⁵⁴ For example, witness Johannes Rutten was listed in the 3 October 2011 Submission on Order of Witnesses, but his name did not appear in the "Prosecution's Submission of Order of Witnesses and List of Exhibits for November 2011", filed on 20 October 2011 nor in the "Prosecution's Notification of Change in Order of Witnesses for November 2011 with Appendix A", filed on 8 November 2011. However, his name was then included in the "Prosecution's Notification of Witness List for the Week Commencing 21 November 2011 with Appendix A", filed on 17 November 2011, as one of the witnesses to testify during the period of 22 to 24 November 2011, without any apparent explanation on the part of the Prosecution.