

**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: 18 August 2010

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 18 August 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S SEVENTH AND EIGHTH MOTIONS FOR FINDING OF
DISCLOSURE VIOLATIONS AND FOR REMEDIAL MEASURES**

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 “Seventh Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential Annexes on 15 July 2010 (“Seventh Motion”), and the Accused’s “Eighth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with a confidential Annex on 20 July 2010 (“Eighth Motion”) (together “Motions”), and hereby issues its decision thereon.

I. Submissions

1. The Motions filed by the Accused argue violations of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by the Office of the Prosecutor (“Prosecution”) in relation to the late disclosure of material by the Prosecution. Specifically, the Accused alleges violations of Rule 66(A)(ii), in connection with the late disclosure of a total of five documents by the Prosecution.

2. On 16 July 2010, the Prosecution filed the “Prosecution’s Response to Karadžić’s Seventh Motion for Finding Disclosure Violation and for Remedial Measures” (“Response to the Seventh Motion”). Subsequently, on 20 July 2010, it filed the “Prosecution’s Addendum to its Response to Karadžić’s Seventh Motion for Finding Disclosure Violation and for Remedial Measures with Confidential Appendix” (“Addendum”).

3. On 22 July 2010, the Prosecution filed the “Prosecution’s Response to Karadžić’s Eighth Motion for Finding Disclosure Violation and for Remedial Measures” (“Response to the Eighth Motion”).

A. Seventh Motion

4. In the Seventh Motion, the Accused requests the Trial Chamber to make a specific finding that there has been a violation of Rule 66(A)(ii) of the Rules by the Prosecution for its late disclosure of three documents.¹ The Accused argues that these documents should have been disclosed by the deadline of 7 May 2009 set by the pre-trial Judge, and thus their disclosure on 18 June 2010 amounted to a violation of Rule 66(A)(ii).² The Accused argues that the lead

¹ Seventh Motion, para. 2 and Annex A. The documents in question are a Record of Interview with Stjepan Kljuić, dated 9 December 1999 (a copy of this 18-page document was attached in Annex A to the Seventh Motion); Record of Witness Interview with Stjepan Kljuić, dated 4 October 2000 (a copy of this two-page document was attached in Annex A to the Seventh Motion); and a purported transcript of interview with KDZ386, dated 28 February 2006 (a copy of this 130-page document was attached in Annex A to the Seventh Motion).

² Seventh Motion, paras. 1-2, citing the Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

prosecutors in the present case should personally certify compliance with Rule 66(A)(ii) as to all remaining witnesses and that the Trial Chamber should exclude the testimony of the affected witnesses.³

5. In the Response to the Seventh Motion, the Prosecution submits that these documents were “identified as a result of additional measures implemented by the Prosecution in light of the Trial Chamber’s recent decision” concerning previous disclosure violations.⁴ However, it fails to expressly address whether their late disclosure amounted to a violation of Rule 66(A)(ii).

6. The Prosecution further notes that one of the documents referred to in the Seventh Motion was “erroneously disclosed on 13 July 2010 by the Prosecution as a prior statement of Witness KDZ386; [when] in fact the Transcript is the statement of another Prosecution witness”.⁵ This transcript had already been correctly identified and disclosed on 7 May 2009, under Rule 66(A)(ii), as a statement of the other witness.

7. In addition, the Prosecution argues that the failure by the Accused to show actual prejudice in connection with the alleged disclosure violations in the Seventh Motion precludes the granting of any remedy by the Trial Chamber.⁶ In support of this submission, the Prosecution argues that the Accused will have sufficient time to consider these additional documents given that the affected witness, namely Stjepan Klujić, is scheduled to be approximately the 80th witness in the present witness calling order.⁷

B. Eighth Motion

8. In the Eighth Motion, the Accused makes reference to the disclosure by the Prosecution on 19 July 2010 of two statements from witness KDZ029.⁸ The Accused suggests that the late disclosure of these statements “appears to be the result of the prosecution’s failure to follow the jurisprudence which requires disclosure of statements taken by third parties in the possession of

³ Seventh Motion, para. 11.

⁴ Response to the Seventh Motion, p. 1, referring to the Decision on Accused’s Second Motion for Finding Disclosure Violation and for Remedial Measures, 17 June 2010, para. 15 (“Decision on the Second Disclosure Violation Motion”), and Consolidated Response to Karadžić’s Third, Fourth and Fifth Motions for Finding Disclosure Violations and for Remedial Measures, 6 July 2010, para. 15.

⁵ Addendum, para. 2.

⁶ Response to the Seventh Motion, p. 1.

⁷ Response to the Seventh Motion, pp. 1-2.

⁸ Eighth Motion, paras. 1-2. The documents in question are two statements given by KDZ029 in 1992 to non-governmental organisations investigating crimes in Bosnia and Herzegovina (copies of these two-page documents are attached in Annex A to the Eighth Motion).

the prosecution”.⁹ The Accused notes that the Trial Chamber had required that all statements of KDZ029 be disclosed thirty days before the anticipated commencements of the trial.¹⁰

9. The Accused seeks a specific finding that the Prosecution violated Rule 66(A)(ii), and requests that the Prosecution be directed to disclose by the end of the summer judicial recess all statements made by its intended witnesses, which are currently in its possession, and “to certify that such disclosure is complete”.¹¹

10. In the Response to the Eighth Motion, the Prosecution acknowledges that, due to an oversight, the first document referred to in the Eighth Motion was not disclosed when it should have been, namely in 2009.¹² However, the Prosecution notes that the second document referred to in the Eighth Motion was erroneously disclosed for a second time on 19 July 2010, and that it had already been disclosed on 18 September 2009 along with other documents relating to this witness.¹³

11. The Prosecution again asserts that the failure by the Accused to show actual prejudice in connection with the alleged disclosure violations in the Eighth Motion precludes the granting of any remedy by the Trial Chamber and that the certification requested by the Accused is unworkable and should be dismissed.¹⁴

II. Applicable Law

12. 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*”.

13. Rule 68 *bis* provides that the 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 its recent Decision on Accused’s Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures (“Decision on the Third, Fourth, Fifth, and Sixth Motions”), the Trial Chamber outlined the importance of the

⁹ Eighth Motion, para. 12.

¹⁰ Eighth Motion, para. 2, citing Decision on Protective Measures for Witnesses, 30 October 2008, para. 34.

¹¹ Eighth Motion, para. 12-13.

¹² Response to the Eighth Motion, para. 4.

¹³ Response to the Eighth Motion, para. 3.

¹⁴ Response to the Eighth Motion, para. 4.

disclosure regime and the necessary connection between actual prejudice to the Accused and the remedy for breach of those provisions.¹⁵ This discussion will also not be repeated here.

III. Discussion

14. In its Decision on the Third, Fourth, Fifth, and Sixth Motions, the Trial Chamber commented once again on the importance of the Rule 66(A)(ii) disclosure obligations incumbent upon the Prosecution, the concerns of the Trial Chamber regarding compliance by the Prosecution with those obligations, and the 7 May 2009 deadline applicable to this case.¹⁶ That discussion will not be repeated here.

A. Seventh Motion

15. The Chamber notes that the third and final document identified in the Seventh Motion was mistakenly disclosed by the Prosecution on 13 July 2010 as a prior statement of KDZ386. Given that this transcript had no connection to KDZ386 and had already been correctly identified and disclosed on 7 May 2009, the Trial Chamber finds that there was no violation of Rule 66(A)(ii) with respect to this document.

16. The first two documents identified in the Seventh Motion are records of interview with the witness Stjepan Klujić, dated 9 December 1999 and 4 October 2000 respectively. Having reviewed these documents, the Trial Chamber is of the view that they are statements which fall within the scope of Rule 66(A)(ii) and that they should have been disclosed in accordance with the deadline set by the pre-trial Judge.¹⁷ Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of these two documents.

17. Having considered the length and subject matter of these two documents, and the time available to the Accused to consider them before the relevant witness will be called to testify, the Trial Chamber is not satisfied that the Accused has demonstrated that he has been prejudiced by their late disclosure.¹⁸ It follows that the exclusion of the testimony of the affected witness

¹⁵ Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures, 20 July 2010, paras. 21-22 ("Decision on the Third, Fourth, Fifth, and Sixth Motions").

¹⁶ Decision on the Third, Fourth, Fifth, and Sixth Motions, paras. 24, 44-45.

¹⁷ See Decision on the Third, Fourth, Fifth, and Sixth Motions, para. 29, which cites the definition of "witness statement" in *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukic's Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B, 3 November 2008, para. 12, and *Prosecutor v. Milutinović et. al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 29 September 2006, para. 14, citing the Appeals Chamber in *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and additional filings, 26 September 2000, para. 15.

¹⁸ Kljuić is approximately 80th in the present witness calling order. See Response to the Seventh Motion, p. 1.

is not justified, in light of the fact that the Chamber “should exclude evidence only if its probative value is *substantially* outweighed by its prejudicial impact”.¹⁹

18. The Trial Chamber continues to stress that an order requiring the Prosecution to certify compliance with its Rule 66(A)(ii) disclosure obligations for all remaining witnesses is not an effective and practical remedy.²⁰

B. Eighth Motion

19. The Chamber recognises that the second document referred to in the Eighth Motion and pertaining to KDZ029 was erroneously provided to the Accused for a second time on 19 July 2010.²¹ All statements of KDZ029 were required to be disclosed thirty days before the anticipated commencement of the trial.²² However, this statement was first disclosed to the Accused on 18 September 2009, in accordance with that deadline, and, therefore, the Trial Chamber finds that there was no violation of Rule 66(A)(ii) with respect to the second document referred to in the Eighth Motion.

20. The first document referred to in the Eighth Motion is a one-page statement from KDZ029. Having reviewed this document, the Trial Chamber is of the view that it falls within the scope of Rule 66(A)(ii) and should have been disclosed 30 days prior to the commencement of the trial, which was not done.²³ Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of the first document identified in the Eighth Motion.

21. However, having considered the length and subject matter of the document, and the time available to the Accused to analyse it before the relevant witness will be called to testify, the Trial Chamber is not satisfied that the Accused has demonstrated that he has been prejudiced by its late disclosure.²⁴ It follows that the additional remedies sought by the Accused are not warranted at this stage.

22. The Chamber reiterates its serious concern about the further disclosure violations by the Prosecution and stresses the importance of ensuring that this is not repeated.²⁵ It recognises that

¹⁹ Decision on the Third, Fourth, Fifth, and Sixth Motions, para. 41, and Decision on the Second Disclosure Violation Motion, para. 16, citing Rule 89 of the Rules.

²⁰ Decision on the Third, Fourth, Fifth, and Sixth Motions, para. 32; Decision on the Second Disclosure Violation Motion, para. 18.

²¹ Response to the Eighth Motion, para. 3.

²² Decision on Protective Measures for Witnesses, 30 October 2008, para. 34.

²³ See paragraph 16 above for references for the definition of “witness statement”.

²⁴ KDZ029 is approximately 125th in the present witness calling order. See Response to the Eighth Motion, para. 4.

²⁵ Decision on the Third, Fourth, Fifth, and Sixth Motions, paras. 44-47.

the documents which are the subject of the Motions were identified and disclosed as a result of additional measures that the Trial Chamber ordered the Prosecution to implement to ensure that all material in its possession which should have been disclosed to the Accused has been so disclosed.²⁶ The Chamber has required the Prosecution to provide a detailed report by 20 August 2010, which outlines these additional procedures and gives an indication of whether they have been completed.²⁷ Should there be further disclosure violations by the Prosecution following the full implementation of these procedures the Chamber will consider whether any sanctions are necessary.

IV. Disposition

23. For the foregoing reasons, the Trial Chamber notes the disclosure violations identified above, but given the absence of demonstrated prejudice to the Accused, and pursuant to Rules 54, 66A(ii), and 68 *bis* of the Rules, the Trial Chamber hereby **DENIES** the Motions.

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



Judge O-Gon Kwon
Presiding

Dated this eighteenth day of August 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ Response to the Seventh Motion, p. 1, referring to Decision on the Second Disclosure Violation Motion, para. 15.

²⁷ Decision on the Third, Fourth, Fifth, and Sixth Motions, para. 47.