



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: 26 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: 26 August 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S NINTH AND TENTH 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 “Ninth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential Annexes on 3 August 2010 (“Ninth Motion”) and the Accused’s “Tenth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential Annexes on 10 August 2010 (“Tenth Motion”) (together “Motions”), and hereby issues its decision thereon.

I. Submissions

1. In the Motions, the Accused argues that there have been 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 to him. Specifically, the Accused alleges violations of Rule 66(A)(ii) of the Rules in connection with the late disclosure of a total of seven documents by the Prosecution.

2. On 16 August 2010, the Prosecution filed the “Prosecution’s Response to Karadžić’s Ninth Motion for Finding Disclosure Violation and for Remedial Measures” (“Response to the Ninth Motion”). Subsequently, on 17 August 2010, the Prosecution filed the “Prosecution’s Response to Karadžić’s Tenth Motion for Finding Disclosure Violation and for Remedial Measures” (“Response to the Tenth Motion”).

3. In addition, on 20 August 2010, the Prosecution filed the “Prosecution Submission of Report Concerning Additional Measures Related to Rule 66(A)(ii) Disclosure” (“Additional Measures Report”), as directed by the Chamber.¹ The Additional Measures Report details the progress made by the Prosecution towards completion of additional searches and reviews of its databases that were implemented to ensure that all material subject to disclosure under Rule 66(A)(ii) has been identified and disclosed to the Accused.

A. Ninth Motion

4. In the Ninth Motion, the Accused makes reference to the disclosure by the Prosecution on 27 July 2010 of six witness statements relating to four witnesses after the 7 May 2009 deadline for disclosure of all Rule 66(A)(ii) material that was set by the pre-trial Judge.² The

¹ Decision on Accused’s Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures, 20 July 2010, para. 47 (“Decision on Third, Fourth, Fifth, and Sixth Motions”).

² Ninth Motion, paras. 1-2. The documents in question are a Record of Interview with KDZ578, an 18-page Record of Interview with KDZ430, a 131-page OTP Revised Transcript of Interview with KDZ122, a nine-page ICTY

Accused requests that the Trial Chamber again makes a specific finding that the Prosecution has violated its obligations under Rule 66(A)(ii) of the Rules in relation to these statements, and that it grants him an appropriate remedy, including certification from the “attorney leading the witness that disclosure is complete”.³

5. In the Response to the Ninth Motion, the Prosecution acknowledges that the first five documents should have been disclosed earlier but had not been due to oversight on its part.⁴ However, the Prosecution states that these documents were identified by it as a result of the additional measures it has implemented following the Trial Chamber’s Decision on the Second Disclosure Violation Motion, which required that it undertake further searches for Rule 66(A)(ii) material to ensure that all such material had been properly disclosed to the Accused.⁵

6. With regard to the sixth document, the Prosecution argues that there has been no disclosure violation as it is a document subject to conditions imposed under Rule 70 of the Rules, requiring authorisation by the relevant provider prior to disclosure to the Accused.⁶ This authorisation was received on 6 July 2010, and the document was disclosed to the Accused on 27 July 2010.⁷

7. The Prosecution also submits that the Accused has not shown actual prejudice with respect to the disclosure of the six documents in question, and his failure to do so precludes the granting of a remedy by the Chamber.⁸ In support of this submission, the Prosecution argues that the Accused will have sufficient time to consider these additional materials given that the documents in question are not lengthy and the affected witnesses are scheduled to be approximately 27th, 60th, 160th, and 260th in the present witness calling order.⁹ In addition, it submits that the Accused’s request for certification that disclosure is complete from specific persons working in the Prosecution, is unworkable.¹⁰

Witness Statement of KDZ122, a one-page OTP Information Report of KDZ122, and a three-page Witness Proofing Note of KDZ450 (copies of these documents, with the exception of the first one, were attached in Confidential Annex B to the Ninth Motion).

³ Ninth Motion, paras. 13-14.

⁴ Response to the Ninth Motion, para. 2.

⁵ Response to the Ninth Motion, para. 2.

⁶ Response to the Ninth Motion, para. 3.

⁷ Response to the Ninth Motion, para. 3.

⁸ Response to the Ninth Motion, paras. 2-3.

⁹ Response to the Ninth Motion, paras. 2-3.

¹⁰ Response to the Ninth Motion, para. 4.

B. Tenth Motion

8. In the Tenth Motion, the Accused makes reference to the disclosure by the Prosecution on 6 August 2010 of a witness statement from Tomislav Kovać, given to the Republika Srpska's Ministry of Internal Affairs in 2005.¹¹ The Accused once again requests that the Trial Chamber make a specific finding of a violation of Rule 66(A)(ii) in relation to this document, and that it order "individual certifications of compliance with disclosure requirements".¹²

9. In the Response to the Tenth Motion, the Prosecution acknowledges that, due to an oversight, the document referred to in the Tenth Motion had not been disclosed when it should have been, even though it had been in its possession since 30 March 2009.¹³ The Prosecution again argues that the failure by the Accused to show actual prejudice with respect to this late disclosure precludes the granting of any remedy by the Trial Chamber and that the Accused's request for certification is unworkable and should be dismissed.¹⁴ In support of this submission, the Prosecution argues that the Accused will have sufficient time to consider this additional document given that Tomislav Kovać is scheduled to be approximately the 90th witness in the present witness calling order.¹⁵

C. Additional Measures Report

10. Having found that the Prosecution had violated its disclosure obligations under Rules 66(A)(ii) and 68 in relation to a number of documents in its Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures, the Chamber required the Prosecution to provide a detailed report by 20 August 2010 outlining the additional measures and searches implemented by it to ensure that all material subject to its disclosure obligations had been found and provided to the Accused.¹⁶ It also required the Prosecution to set out the timeline for the completion of these searches and review of material.¹⁷ In the Additional Measures Report, the Prosecution submits that it has "been diligently implementing these [additional] measures since they were put in place in order to

¹¹ Tenth Motion, paras. 1-2. A copy of the seven-page statement is attached in confidential Annex A to the Tenth Motion.

¹² Tenth Motion, para. 15.

¹³ Response to the Tenth Motion, para. 2.

¹⁴ Response to the Tenth Motion, paras. 2-3.

¹⁵ Response to the Tenth Motion, para. 3.

¹⁶ Decision on Third, Fourth, Fifth, and Sixth Motions, para. 47; Decision on Accused's Seventh and Eighth Motions for Finding of Disclosure Violations and for Remedial Measures, 18 August 2020, para. 22 ("Decision on Seventh and Eighth Motions").

¹⁷ Decision on Third, Fourth, Fifth, and Sixth Motions, para. 47; Decision on Seventh and Eighth Motions, para. 22.

locate the few remaining Rule 66(A)(ii) items with respect to its witnesses” and provides more detail about the four additional measures it has implemented.¹⁸

11. The first additional measure involves the completion of 292 additional searches of the Prosecution’s documentary evidence collection through its Information Support Unit (“ISU”) with “specific search criteria geared to capture remaining Rule 66(A)(ii) materials”.¹⁹ The Prosecution states that it has completed these searches and associated review with respect to the first 83 witnesses in the current witness calling order (which includes all Sarajevo witnesses) and that disclosure relating to the first 52 of these witnesses has been “largely completed”.²⁰ It has estimated that “completion of the remaining searches will take approximately until the end of October 2010” with the resulting disclosure “carried out on a rolling basis as the search results are received”.²¹

12. The second additional measure is the cross-checking of Rule 66(A)(ii) materials that have been disclosed in other cases which have common witnesses to the present one.²² The Prosecution states that this process of cross-checking has been completed with respect to the first 65 witnesses to be brought at trial and a further 60 witnesses in the current witness calling order.²³ It indicates that the cross-checking for the remaining witnesses will be completed by approximately the third week of September 2010, and that the associated disclosure will be completed within two weeks of that date.²⁴

13. The third additional measure is said to be a re-review of the Prosecution’s internal spreadsheet which lists all Rule 66(A)(ii) material relating to Prosecution witnesses in this case.²⁵ The Prosecution states that it has fully completed this review and that the disclosure of documents found following implementation of this measure has been also been completed.²⁶

14. The fourth additional measure involves the completion of full-text searches of documents on the Prosecution’s internal computer network. The Prosecution states that these

¹⁸ Additional Measures Report, para. 1.

¹⁹ Additional Measures Report, para. 2.

²⁰ Additional Measures Report, para. 2.

²¹ Additional Measures Report, paras. 4-5.

²² Additional Measures Report, para. 6.

²³ Additional Measures Report, para. 6.

²⁴ Additional Measures Report, para. 6.

²⁵ Additional Measures Report, para. 8.

²⁶ Additional Measures Report, para. 8.

searches have been completed for all witnesses and provides an assurance that the disclosure of any documents found following a review of these search results “will be completed shortly”.²⁷

II. Applicable Law

15. Rule 66(A)(ii) of the Rules 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*”.

16. 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.

III. Discussion

A. Ninth Motion

17. Having reviewed the first five documents referred to in the Ninth Motion, the Trial Chamber considers that these documents are statements which fall within the scope of Rule 66(A)(ii).²⁸ It follows that they should have been disclosed in accordance with the 7 May 2009 deadline set by the pre-trial Judge.²⁹ While the first document is dated 12 May 2009, and thus post-dates the 7 May 2009 deadline, it should have been disclosed as soon as possible after it came into the Prosecution’s possession, and certainly well before 27 July 2010. Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of these five documents.

18. While the sixth document is also a statement which should have been disclosed pursuant to Rule 66(A)(ii), the Chamber recognises that the Prosecution required authorisation from the Rule 70 provider prior to its disclosure to the Accused. The Chamber notes that the original disclosure letter from the Prosecution did not state that this document required Rule 70 authorisation but merely noted that, “[t]his item is recently produced material relating to the

²⁷ Additional Measures Report, paras. 8-11.

²⁸ See *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 for the definition of “witness statement”.

²⁹ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

witness”.³⁰ The Prosecution states that such authorisation was received on 6 July 2010, but gives no indication of when they sought the authorisation from the Rule 70 provider and also fails to explain why there was a three-week delay between receiving this authorisation and the disclosure of the document to the Accused on 27 July 2010. While the statement is dated 8 April 2010 and clearly post-dates the 7 May 2009 deadline, the Chamber considers that it should have been disclosed by the Prosecution as soon as possible after it received the required authorisation under Rule 70, which it should have sought on 8 April 2010 or very shortly thereafter. The Trial Chamber considers that, at the very least, the statement was not disclosed expeditiously following receipt of the required authorisation under Rule 70 and, therefore, the Prosecution has violated Rule 66(A)(ii) by its late disclosure of this document.

19. Having considered the number, length and subject matter of the six statements, and the time available to the Accused to consider them before the relevant witnesses 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. It notes in addition that, given its previous expression of serious concern about the late disclosure to the Accused of a number of documents, it instructed the Prosecution to implement additional measures to ensure the identification and disclosure of all material in its possession which should already have been disclosed to the Accused. As a result of the implementation of these additional measures, a number of documents have recently been found and provided to the Accused, amongst which are the first five documents that are the subject of the Ninth Motion. While the Chamber remains concerned that these documents were not disclosed earlier to the Accused, it was to be expected that a limited number of documents would be identified and disclosed by the Prosecution as a result of the additional measures put in place, and that this will continue until the implementation of those measures is completed. Should there continue to be disclosure violations by the Prosecution following that completion, the Chamber will determine whether sanctions are merited.

B. Tenth Motion

20. Having reviewed the document referred to in the Tenth Motion, the Trial Chamber is of the view that it is a statement which falls within the scope of Rule 66(A)(ii) and should have been disclosed in accordance with the deadline set by the pre-trial Judge.³¹ Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) in relation to the late disclosure of the one document referred to in the Tenth Motion.

³⁰ Letter dated 27 July 2010, Disclosure Batch 329, p. 2. A copy of this letter is attached in confidential Annex A to the Ninth Motion.

³¹ See *supra*, fn. 28 for references to the definition of “witness statement”.

21. Once again, taking into consideration the length and subject matter of the statement, and the time available to the Accused to consider 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. It notes, in addition, that the document which is the subject of the Tenth Motion was also identified and disclosed as a result of the additional measures being implemented by the Prosecution, at the Chamber's direction, to ensure compliance with its disclosure obligations.

C. Additional Measures Report

22. The Trial Chamber is mindful that over two months have elapsed since 17 June 2010, when the Prosecution was required to implement additional mechanisms to address the concerns of the Chamber about the Prosecution's repeated violations of its disclosure obligations.³² While the Additional Measures Report indicates that more rigorous search procedures have been implemented in an effort to identify Rule 66(A)(ii) material already in the possession of the Prosecution, the Chamber is concerned by the Prosecution's estimate that these searches will not be fully completed until the end of October 2010, and the implication that Rule 66(A)(ii) disclosure to the Accused could continue for some, unspecified time, after that. This position fails to give due weight to the importance that the Chamber has consistently ascribed to the Prosecution's disclosure obligations and the need for compliance with the deadline set for disclosure of Rule 66(A)(ii) material.³³

23. Continued violations by the Prosecution of its disclosure obligations may pose a disruption to the trial schedule and the expeditious conduct of the proceedings in this case, and thus must cease. While the Chamber recognises that the searches outlined in the Additional Measures Report will take time to complete, it reminds the Prosecution that these additional measures were only implemented and deemed necessary given the serious concerns about its internal mechanisms and the completeness of its disclosure during the pre-trial phase of this case.³⁴ The Chamber is of the view that the recent suspension of proceedings for a period of two weeks provides additional time in which the Prosecution should devote resources to expediting the implementation of the additional mechanisms. Consequently, the Chamber expects that all searches and the resulting disclosure will be complete by 1 October 2010 and that there will be

³² Decision on Accused's Second Motion for Finding Disclosure Violation and for Remedial Measures, 17 June 2010, para. 15 ("Decision on Second Motion").

³³ Decision on Third, Fourth, Fifth, and Sixth Motions, para. 24; Decision on the Accused's Motion to Set Deadlines for Disclosure, 1 October 2009, para. 13; Decision on Second Motion, para. 14; Decision on Seventh and Eighth Motions, para. 22.

³⁴ Decision on Second Motion, para. 15.

no further violations of the Prosecution's disclosure obligations under Rule 66(A)(ii) after this date.³⁵

IV. Disposition

24. 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 twenty-sixth day of August 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁵ Decision on Accused's Motion for Suspension of Proceedings, 18 August 2010, para. 6.