



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: 2 November 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: 2 November 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S EIGHTEENTH TO TWENTY-FIRST 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 “Eighteenth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed on 27 September 2010 (“Eighteenth Motion”), “Nineteenth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential annex on 28 September 2010 (“Nineteenth Motion”), “Twentieth Motion for Finding of Disclosure Violation and for Remedial Measures” and “Twenty-First Motion for Finding of Disclosure Violation and for Remedial Measures”, both filed publicly with confidential annexes on 5 October 2010 (“Twentieth Motion” and “Twenty-First Motion”, respectively) (together “Motions”) and hereby issues its decision thereon.

I. Background and 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 Rules 66(A)(ii) and 68 of the Rules.

2. On 26 August 2010, the Trial Chamber issued the “Decision on Accused’s Ninth and Tenth Motions for Finding of Disclosure Violations and for Remedial Measures” (“Decision on Ninth and Tenth Motions”), in which it ordered the Prosecution to complete all additional searches for and disclosure of Rule 66(A)(ii) materials by 1 October 2010. On 1 October 2010, the Prosecution filed the “Prosecution Notice of Compliance with Trial Chamber’s Decision Concerning Rule 66(A)(ii) Disclosure” (“Notice of Compliance”). The Prosecution states that it has completed the implementation of the additional measures put in place to identify and ensure the disclosure of “remaining Rule 66(A)(ii) materials” in accordance with the Decision on Ninth and Tenth Motions, with the exception of four items the disclosure of which is pending approval from the Rule 70 provider.¹

A. Eighteenth Motion

3. In the Eighteenth Motion, the Accused makes reference to the disclosure by the Prosecution on 24 September 2010 of a letter from himself to Lord Owen and Thorvald Stoltenberg in July 1993, providing a guarantee of gas re-supply to Sarajevo (“Letter”).² The

¹ Notice of Compliance, p. 1, citing Decision on Ninth and Tenth Motions, para. 47.

² Eighteenth Motion, paras. 1-2. A copy of this letter is attached in Annex A to the Eighteenth Motion.

Accused submits that the Letter is exculpatory and should have been disclosed to him as soon as practicable in accordance with Rule 68 of the Rules. He submits that he was prejudiced by this late disclosure as he could have used the Letter to challenge the testimony of David Harland, an UNPROFOR officer who testified about obstruction to the flow of utilities to Sarajevo by the Bosnian Serbs during his period of service in Sarajevo.³

4. The Accused requests that the Trial Chamber make a finding that the Prosecution has violated Rule 68 by failing to disclose the Letter as soon as practicable, that the Letter be admitted from the bar table, and that the Prosecution be directed to “disclose all documents which tend to show that Bosnian Serbs assisted in maintaining the flow of utilities to Sarajevo”.⁴

5. On 11 October 2010, the Prosecution filed the “Prosecution’s Consolidated Response to Karadžić’s Eighteenth and Nineteenth Motions for Finding of Disclosure Violation and for Remedial Measures” (“Response to the Eighteenth and Nineteenth Motions”). It submits that there has been no violation of Rule 68 with regard to the Letter as it was disclosed as soon as practicable in accordance with the Prosecution’s ongoing disclosure obligations.⁵ The Prosecution characterises the Letter as a Rule 70 document but provides no details as to when clearance for disclosure was sought and received from the Rule 70 provider with respect to this document.⁶

6. The Prosecution further argues that there was no disclosure violation with respect to the Letter because its approach of actively conducting searches of “its enormous evidence collections” to identify Rule 68 materials has been “frequently interrupted by Karadžić’s complex and wide-ranging, often urgent Rule 66(B) requests related to a huge variety of issues”.⁷ The Prosecution makes reference to 48 requests made by the Accused pursuant to Rule 66(B) that cover 162 categories of materials, emphasising the time and resources required for it to expeditiously respond to these requests by conducting “complex contextual searches” and reviewing the identified documents.⁸

7. The Prosecution also submits that the Accused has not demonstrated any prejudice with respect to the disclosure of the Letter, and his failure to do so precludes the granting of a remedy by the Chamber.⁹ In response to the Accused’s request that the Letter be admitted from the bar

³ Eighteenth Motion, para. 4.

⁴ Eighteenth Motion, paras. 5-6.

⁵ Response to the Eighteenth and Nineteenth Motions, para. 3.

⁶ Response to the Eighteenth and Nineteenth Motions, paras. 1, 6.

⁷ Response to the Eighteenth and Nineteenth Motions, para. 3.

⁸ Response to the Eighteenth and Nineteenth Motions, paras. 3, 5.

⁹ Response to the Eighteenth and Nineteenth Motions, paras. 1-2, 6.

table, the Prosecution argues that the matters discussed can be “put to other witnesses” and the Letter itself can be tendered as an exhibit at that time.¹⁰ It also undertakes to provide the Accused “as soon as practicable” with “all documents which tend to show that the Bosnian Serbs assisted in maintaining the flow of utilities to Sarajevo”.¹¹

B. Nineteenth Motion

8. In the Nineteenth Motion, the Accused refers to the disclosure by the Prosecution, on 27 September 2010, of 42 witness statements relating to 33 witnesses, under Rule 66(A)(ii).¹² The Accused submits that the “vast majority of the statements were made well before the 7 May 2009 deadline set by the Trial Chamber for disclosure of all statements of prosecution witnesses”.¹³

9. The Accused makes reference to his previous disclosure violation motions and argues that the “cumulative nature of these disclosure violations operate to deprive him of a fair trial by constantly requiring him to revise his preparations for prosecution witnesses whose prior statements and prior testimony were all supposed to have been in his hands by May 2009”.¹⁴ He requests a one-month suspension of the trial following the “conclusion of the witness testimony for Sarajevo events, and before commencement of the municipalities’ portion of the case”, to allow him to review the material and incorporate it into his preparation for cross-examination and defence strategy.¹⁵

10. In the “Response to the Eighteenth and Nineteenth Motions”, the Prosecution submits that there has been no disclosure violation with respect to one of the witnesses who is the subject of the Nineteenth Motion, Milenko Todorović (KDZ594), as he “was neither on the Prosecution’s witness list nor the subject of a motion” to be added to the witness list.¹⁶ In addition, the Prosecution notes that there was no material disclosed in the relevant disclosure batch with respect to another of the witnesses, KDZ023, and therefore there has been no disclosure violation with respect to this witness.¹⁷ The Prosecution acknowledges that the remaining items should have been disclosed earlier but had not been due to administrative error

¹⁰ Response to the Eighteenth and Nineteenth Motions, para. 6.

¹¹ Response to the Eighteenth and Nineteenth Motions, para. 7.

¹² Nineteenth Motion, para. 1. Copies of these documents were attached in confidential Annex B. These documents include prior statements, completed questionnaires, witness reports, interview statements, records of interview, information reports/sheets, debriefing notes, audio recordings and transcripts of interviews, transcripts of testimony in other cases, and interview notes.

¹³ Nineteenth Motion, para. 2.

¹⁴ Nineteenth Motion, para. 13.

¹⁵ Nineteenth Motion, para. 14.

¹⁶ Response to the Eighteenth and Nineteenth Motions, para. 8.

or oversight on its part.¹⁸ It repeats its submission that this material was identified as a result of the additional measures it implemented following the Trial Chamber's "Decision on Accused's Second Motion for Finding Disclosure Violations and for Remedial Measures", issued on 17 June 2010 ("Decision on the Second Disclosure Violation Motion").¹⁹

11. The Prosecution also submits that the Accused has not demonstrated any prejudice with respect to the disclosure of the documents in question, and his failure to do so precludes the granting of a remedy by the Chamber and also nullifies any claim of a fair trial violation.²⁰ 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 were provided well in advance of the witnesses' testimony.²¹ These arguments are also used to suggest that there is no basis for the suspension of the trial.²² In addition, the Prosecution notes that seven of the witnesses named in the Nineteenth Motion are reserve witnesses, a further eight are Rule 92 *bis* witnesses, and, therefore, the Accused does not need additional time to prepare for these witnesses.²³

C. Twentieth Motion

12. In the Twentieth Motion, the Accused makes reference to the disclosure by the Prosecution, on 1 October 2010, of 151 witness statements relating to 87 witnesses, under Rule 66(A)(ii).²⁴ The Accused submits that the "vast majority of the statements were made well before the 7 May 2009 deadline set by the Trial Chamber for disclosure of all statements of prosecution witnesses".²⁵

13. The Accused repeats his submission made in the Eighteenth Motion and Nineteenth Motion that the "cumulative nature of these disclosure violations operate to deprive him of a fair trial by constantly requiring him to revise his preparations for prosecution witnesses whose prior statements and prior testimony were all supposed to have been in his hands by May 2009".²⁶ Given the number of alleged disclosure violations referred to in the Twentieth Motion, the

¹⁷ Response to the Eighteenth and Nineteenth Motions, para. 8.

¹⁸ Response to the Eighteenth and Nineteenth Motions, para. 8.

¹⁹ Response to the Eighteenth and Nineteenth Motions, para. 8.

²⁰ Response to the Eighteenth and Nineteenth Motions, paras. 9, 11. The Prosecution sets out when the relevant witnesses are expected to testify and the approximate length of materials disclosed.

²¹ Response to the Eighteenth and Nineteenth Motions, para. 9.

²² Response to the Eighteenth and Nineteenth Motions, para. 11.

²³ Response to the Eighteenth and Nineteenth Motions, para. 10.

²⁴ Twentieth Motion, para. 1. Copies of these documents were attached in confidential Annex B. These documents include prior statements, information reports/ sheets, proofing notes, record of interviews, and investigator notes.

²⁵ Twentieth Motion, para. 2.

²⁶ Twentieth Motion, para. 20.

Accused suggests that a three-month suspension of the trial is required to allow him to “review, re-organize, and re-evaluate the evidence pertaining to the remainder of the prosecution’s case”.²⁷ In addition, he requests that any of the witnesses affected by this batch of late disclosure should not be called in 2010.²⁸

14. Moreover, the Accused submits that it is not clear from the Notice of Compliance whether the Prosecution has “complied with its disclosure obligations as to all of the 141 witnesses whose testimony has been admitted under Rule 92 *bis*”, given his entitlement to disclosure of all Rule 66(A)(ii) material pertaining to these witnesses “at least prior to the date that their testimony was admitted”.²⁹ The Accused refers to the Decision on the Ninth and Tenth Motions and the Trial Chamber’s order that all searches and resulting disclosure be completed by 1 October 2010.³⁰ He requests the Chamber to seek clarification from the Prosecution as to whether disclosure for all Rule 92 *bis* witnesses is complete. If this disclosure is not complete, the Accused requests the Chamber to make an explicit finding that the Prosecution failed to comply with the Decision on the Ninth and Tenth Motions, and to set a deadline for full compliance with Rule 66(A)(ii) with respect to Rule 92 *bis* witnesses.³¹

15. Similarly, the Accused submits that it is not clear from the Notice of Compliance whether the additional searches completed by the Prosecution also included the witnesses who testified prior to 20 August 2010.³² The Accused requests that the Trial Chamber require the Prosecution to clarify whether its searches included these witnesses, and, if not, to make an explicit finding that the Prosecution failed to comply with the Decision on the Ninth and Tenth Motions.³³ In addition, if the disclosure is not complete, the Accused requests that the Trial Chamber set a deadline for full compliance with Rule 66(A)(ii) with respect to all pre-August 2010 witnesses.³⁴

16. On 19 October 2010, the Prosecution filed the “Prosecution’s Consolidated Response to Karadžić’s Twentieth and Twenty-First Motions for Finding of Disclosure Violation and for Remedial Measures” (“Response to the Twentieth and Twenty-First Motions”). The Prosecution acknowledges that the documents referred to in the Twentieth Motion should have

²⁷ Twentieth Motion, para. 22.

²⁸ Twentieth Motion, para. 24.

²⁹ Twentieth Motion, para. 5.

³⁰ Twentieth Motion, para. 4, referring to Decision on the Ninth and Tenth Motions, para. 23.

³¹ Twentieth Motion, para. 6.

³² Twentieth Motion, para. 8.

³³ Twentieth Motion, para. 8.

³⁴ Twentieth Motion, para. 9.

been disclosed earlier but had not been due to administrative error or oversight on its part.³⁵ Once again, it submits that this material was identified as a result of the additional measures it implemented following the Decision on the Second Disclosure Violation Motion.³⁶

17. The Prosecution also submits that the Accused has not demonstrated any prejudice with respect to the disclosure of these documents, and his failure to do so precludes the granting of a remedy by the Chamber and nullifies any claim of a fair trial violation.³⁷ In support of this submission, the Prosecution argues that the “materials have been provided well in advance of the witnesses’ testimony and are not lengthy”, the Accused will have sufficient time to consider these additional materials and, therefore, there is no basis to postpone until 2011 the testimony of any of the witnesses, or to suspend the trial for three months.³⁸ In addition, the Prosecution notes that 29 of the witnesses named in the Twentieth Motion are reserve witnesses, a further seven are Rule 92 *bis* witnesses, and, therefore, the Accused does not need additional time to prepare for these witnesses.³⁹

18. In response to the Accused’s request for clarification, the Prosecution submits that in the “Prosecution Submission of Report Concerning Additional Measures Related to Rule 66(A)(ii) Disclosure”, filed on 20 August 2010, it had “indicated the number and categories of witnesses with respect to the additional measures it was undertaking and in relation to which categories of witnesses the additional measures were completed”.⁴⁰ It notes that following the Decision on the Ninth and Tenth Motions, the Accused “made two specific Rule 66(B) requests, seeking that the same search techniques be implemented in relation to Rule 92 *bis* witnesses [...] as well as to witnesses who testified before the additional measures were put in place”.⁴¹ The Prosecution submits that it had expressly indicated that this material “would be provided as soon as practicable” and had informed the Accused that “it would provide the relevant materials on a rolling basis over the next ten weeks in the order of the case component to which they relate”.⁴²

³⁵ Response to the Twentieth and Twenty-First Motions, para. 5.

³⁶ Response to the Twentieth and Twenty-First Motions, para. 5.

³⁷ Response to the Twentieth and Twenty-First Motions, paras. 3, 6, 9.

³⁸ Response to the Twentieth and Twenty-First Motions, paras. 6, 9.

³⁹ Response to the Twentieth and Twenty-First Motions, paras. 7-8.

⁴⁰ Response to the Twentieth and Twenty-First Motions, para. 10.

⁴¹ Response to the Twentieth and Twenty-First Motions, para. 11 referring to the Accused’s “Thirteenth Motion for Finding of Disclosure Violation and for Remedial Measures”, 2 September 2010, paras. 4-5.

⁴² Response to the Twentieth and Twenty-First Motions, paras. 11-12. The Prosecution refers to the “Prosecution’s Consolidated Response to Karadžić’s Thirteenth and Fifteenth Motions for Finding of Disclosure Violations and for Remedial Measures”, 13 September 2010, para. 9, and its email correspondence on 1 October 2010, which was attached in confidential Appendix A to the Response to the Twentieth and Twenty-First Motions.

19. The Prosecution argues that the Accused's claim that it pretended to have complied with the Decision on the Ninth and Tenth Motions is, therefore, "disingenuous and untenable".⁴³ In addition, the Prosecution argues that there is no need for a deadline for the completion of searches for Rule 92 *bis* witnesses and for witnesses who have already testified and that it "was proceeding expeditiously with respect to these searches and will provide the materials on a rolling basis by mid-December 2010".⁴⁴

D. Twenty-First Motion

20. In the Twenty-First Motion, the Accused makes reference to the disclosure by the Prosecution, on 30 September 2010, of the transcripts of interviews with six witnesses recorded by journalists in 1996.⁴⁵ He submits that these transcripts "were presumably in the possession of the prosecution on 7 May 2009, the deadline for disclosure of Rule 66(A)(ii) material".⁴⁶ The Accused reiterates his submission that the jurisprudence of the Tribunal requires the Prosecution to "disclose all statements of prosecution witnesses in its possession, regardless of who took the statement".⁴⁷ He requests the Trial Chamber to order the Prosecution to disclose all other statements made by witnesses to journalists which are in its possession "in the event that the prosecution has been labouring under the misconception that it need not have disclosed such statements".⁴⁸

21. In relation to the failure to disclose these transcripts, the Accused requests the Trial Chamber make a specific finding that the Prosecution has violated Rule 66(A)(ii) and repeats his request for a three-month suspension of trial before the commencement of the presentation of evidence pertaining to the Prosecution's allegations of a joint criminal enterprise to take over municipalities in Bosnia and Herzegovina to allow him to study the voluminous new material and "incorporate it into his cross-examination tools".⁴⁹

22. In the "Response to the Twentieth and Twenty-First Motions", the Prosecution argues that the Tribunal's jurisprudence does not support the Accused's contention that journalists' interviews constitute witness statements within the meaning of Rule 66(A)(ii), citing in support the Appeals Chamber's definition of "witness statement" as "an account of a person's

⁴³ Response to the Twentieth and Twenty-First Motions, para. 13.

⁴⁴ Response to the Twentieth and Twenty-First Motions, para. 13.

⁴⁵ Twenty-First Motion, para. 1. Copies of the transcripts were attached in confidential annex B. The transcripts are of interviews with Biljana Plavšić, Stjepan Kljuić, Diego Arria, KDZ240, Aleksandar Vasiljević, and David Owen.

⁴⁶ Twenty-First Motion, para. 2.

⁴⁷ Twenty-First Motion, para. 3.

⁴⁸ Twenty-First Motion, para. 5.

⁴⁹ Twenty-First Motion, paras. 4-6.

knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime”.⁵⁰ The Prosecution submits that, since journalists’ interviews do not fall within the scope of Rule 66(A)(ii), there has been no disclosure violation with respect to the transcripts referred to in the Twenty-First Motion.⁵¹ While it submits that it is not under an obligation to do so, the Prosecution undertakes to continue to provide such material in advance of the relevant witnesses’ testimony.⁵²

23. Furthermore, the Prosecution submits that the Accused has not demonstrated any prejudice with respect to the disclosure of these documents, and his failure to do so precludes the granting of a remedy by the Chamber.⁵³ In support of this submission, the Prosecution argues that the “materials have been provided well in advance of the witnesses’ testimony” and they are not voluminous, the Accused will have sufficient time to consider these additional materials, and, therefore, there is no basis for the suspension of the trial for three months.⁵⁴

II. Applicable Law

24. 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*”. The applicable deadline for the disclosure of all material falling within Rule 66(A)(ii) in this case was 7 May 2009.⁵⁵

25. 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”.⁵⁶ 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.⁵⁷ The Trial Chamber has previously outlined the Appeals Chamber’s

⁵⁰ Response to the Twentieth and Twenty-First Motions, para. 14; *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.

⁵¹ Response to the Twentieth and Twenty-First Motions, para. 15.

⁵² Response to the Twentieth and Twenty-First Motions, para. 15.

⁵³ Response to the Twentieth and Twenty-First Motions, para. 16.

⁵⁴ Response to the Twentieth and Twenty-First Motions, paras. 16-17.

⁵⁵ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

⁵⁶ Decision on the Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009, para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 267 (“*Blaškić Appeals Judgement*”).

⁵⁷ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179 (“*Kordić and Čerkez Appeals Judgement*”).

jurisprudence on the scope and application of the obligation to disclose “as soon as practicable” exculpatory material under Rule 68.⁵⁸ That discussion will not be repeated here.

26. 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.⁵⁹

27. Finally, with regard to relief requested by the Accused in the Eighteenth Motion, the Chamber also recalls that Rule 89(C) of the Rules provides that “[a] Chamber may admit any relevant evidence which it deems to have probative value” and thus allows for admission of evidence from the bar table, without the need to introduce it through a witness.⁶⁰ Once the requirements of Rule 89(C) are satisfied, the Chamber has the discretionary power over the admission of evidence, which includes the ability to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial pursuant to Rule 89(D).⁶¹ In accordance with the Chamber’s “Order on Procedure for Conduct of Trial”, issued on 8 October 2009 (“Order”), the party requesting admission of evidence from the bar table is required to:

- (i) provide a short description of the document of which it seeks admission; (ii) clearly specify the relevance and probative value of each document; (iii) explain how it fits into the party’s case, and (iv) provide the indicators of the document’s authenticity.⁶²

III. Discussion

28. In the following section, the Chamber will determine whether the Prosecution has violated its disclosure obligations pursuant to Rules 66(A)(ii) and 68 as asserted by the Accused. It will address the Motions in turn.

A. Eighteenth Motion

29. Having considered the substance of the Letter that is the subject of the Eighteenth Motion, the Trial Chamber notes that it relates to the supply of utilities to Sarajevo and, most pertinently, the Accused’s knowledge of and involvement in the supply of utilities. The

⁵⁸ Decision on Accused’s Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 29 September 2010, paras. 14-17.

⁵⁹ *Kordić and Čerkez* Appeals Judgement, para. 179; *Blaškić* Appeals Judgement, para. 268.

⁶⁰ Decision on Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009, para. 10; Decision on Second Prosecution Bar Table Motion for the Admission of Bosnian Serb Assembly Records, 5 October 2010 (“Decision on Second Bar Table Motion”), paras. 5-7.

⁶¹ Decision on Second Bar Table Motion, para. 6.

⁶² Order, Appendix A, Part VII, para. R.

Chamber finds, therefore, that the Letter does contain material which is potentially exculpatory. It follows that this document should have been disclosed to the Accused “as soon as practicable” pursuant to Rule 68. While the Chamber recognises that Rule 68 necessarily imposes a continuing obligation on the Prosecution, it will assess whether the Letter was, in fact, disclosed “as soon as practicable”, taking into consideration the date when it came into the Prosecution’s possession and the date of its provision to the Accused, in addition to any other relevant circumstances.

30. The Letter is dated 24 July 1993 and it was not disclosed to the Accused until 24 September 2010. However, the Prosecution did not state when the Letter came into its possession. In light of this lack of clarification by the Prosecution and the date of the Letter, the Chamber considers it appropriate to presume that the Letter was in the possession of the Prosecution before the 7 May 2009 deadline, and it will proceed on that presumption. The Prosecution argues that the delay in disclosing the Letter was a result of having to deal with the Accused’s Rule 66(B) requests. While the Trial Chamber appreciates the burden placed on the Prosecution by the Accused’s multiple Rule 66(B) requests, the obligation to disclose potentially exculpatory material pursuant to Rule 68 is independent of that burden, and the Chamber does not accept that compliance with the Rule 66(B) requests is a satisfactory explanation for delay in disclosing Rule 68 material.

31. Furthermore, according to the Prosecution, disclosure of the Letter was subject to the consent of the Rule 70 provider. In this regard, the Prosecution’s disclosure obligation under Rule 68 is subject to Rule 70, although any necessary delay in obtaining Rule 70 clearance does not excuse the delay in originally identifying the relevant document and requesting that clearance. In the case of the Letter, the Prosecution provides no details as to when clearance for disclosure was sought and received by the Rule 70 provider. In light of the paucity of information, the Chamber cannot take into consideration how Rule 70 consent may have been a potential barrier to timely disclosure of this document when determining whether a violation has occurred. On the basis of the above, the Chamber finds that there was a violation of Rule 68 with respect to the late disclosure of this Letter.

32. In relation to the Accused’s request for the admission into evidence of the Letter from the bar table, the Trial Chamber is satisfied that, as it is concerned with the Accused’s knowledge of the supply of utilities in Sarajevo, it is relevant and has probative value to this case. However, as set out clearly in the Order, it is incumbent on the party tendering any

document from the bar table to explain how it fits into its case.⁶³ This is a different and additional requirement than describing the relevance and probative value of the document to the case overall, and is essential for ensuring that the document is properly placed in context. The Chamber is not satisfied that the Accused has met this requirement in this instance, and will, therefore, deny the admission into evidence of the Letter at this stage. The Chamber notes that this does not prevent the Accused tendering the Letter through an appropriate witness in court or in a future bar table motion.

33. Given that the Prosecution has already undertaken to provide “all documents which tend to show that the Bosnian Serbs assisted in maintaining the flow of utilities in Sarajevo”⁶⁴ as soon as practicable, there is no need for the Chamber to direct it to do so.

B. Nineteenth Motion

34. Having reviewed the 42 documents referred to in the Nineteenth Motion, the Chamber is of the view that they are statements which fall within the scope of Rule 66(A)(ii) of the Rules. The Chamber notes that 40 of these documents were in existence, and, again despite the lack of clarification provided by the Prosecution, were presumably in the possession of the Prosecution, in May 2009. Therefore, they should have been disclosed in accordance with the deadline set by the pre-trial Judge. Two of the remaining documents post-date the 7 May 2009 deadline, and they should have been disclosed as soon as possible after they came into the Prosecution’s possession, and certainly well before the actual date of disclosure on 27 September 2010.

35. While the Chamber notes that some of the documents disclosed pertain to Rule 92 *bis* and reserve witnesses, this is only relevant to an assessment of whether the Accused suffered prejudice. Pursuant to Rule 66(A)(ii), the Prosecution’s pre-trial disclosure obligations required the full disclosure of the witness statements of “all witnesses whom the prosecution intends to call to testify” by 7 May 2009. As such, this obligation clearly extends to the witness statements of Rule 92 *bis* witnesses, whose written evidence is admitted *in lieu* of oral testimony. Furthermore, the witnesses who are now identified as “reserve witnesses” were on the original Rule 65 *ter* list of witnesses who the Prosecution intended to call.⁶⁵ It follows that the Prosecution was under an obligation to disclose all Rule 66(A)(ii) material relating to these witnesses by the deadline set by the pre-trial Judge. Therefore, the Chamber finds that, with the

⁶³ See Decision on Prosecution’s Bar Table Motion for Admission of Bosnian Serb Assembly Sessions, 22 July 2010, para. 11; Decision on the Prosecution’s First Bar Table Motion, 13 April 2010, para. 15.

⁶⁴ Response to the Eighteenth and Nineteenth Motions, para. 7.

⁶⁵ Prosecution’s Submission Pursuant to Rule 65 *ter* (E)(i)-(iii), 18 May 2009, Confidential Appendix II.

exception of the statements relating to Milenko Todorović and KDZ023, the Prosecution has violated Rule 66(A)(ii) by its late disclosure of the documents referred to in Nineteenth Motion.

C. Twentieth Motion

36. Having reviewed the 151 documents referred to in the Twentieth Motion, the Chamber considers that they are statements which fall within the scope of Rule 66(A)(ii). The Chamber notes that the majority of these documents were in existence and, again, in the absence of contrary information, were presumably within the possession of the Prosecution in May 2009, and should therefore have been disclosed in accordance with the deadline set by the pre-trial Judge. While a few of the documents post-date the 7 May 2009 deadline, those documents should have been disclosed as soon as possible after they came into the Prosecution's possession, and certainly well before the actual date of disclosure on 27 September 2010. There is only one document which can be considered to have been recently created, namely the document dated 13 September 2010.

37. Some of these 151 documents pertain to Rule 92 *bis* and reserve witnesses. The Chamber has addressed the issue of the disclosure of Rule 66(A)(ii) materials pertaining to these categories of witnesses in paragraph 35 above. On the basis of its finding on the Prosecution's Rule 66(A)(ii) disclosure obligations vis-à-vis Rule 92 *bis* and reserve witness materials, the Chamber finds that with the exception of the one document dated 13 September 2010, the Prosecution has violated Rule 66(A)(ii) by its late disclosure of the documents referred to in the Twentieth Motion.

38. The Chamber notes that the Accused was aware that the Prosecution had not completed its "additional measures" to search for and disclose Rule 66(A)(ii) material with respect to Rule 92 *bis* witnesses and witnesses who had already testified before the "additional measures" were implemented, and had made Rule 66(B) requests for access to this material. However, the Decision on the Ninth and Tenth Motions was unequivocal that "all searches and the resulting disclosure" must be completed by 1 October 2010 and that there should be no further violations of the Prosecution's disclosure obligations under Rule 66(A)(ii) after 1 October 2010.⁶⁶ Given that the Prosecution's pre-trial obligation to disclose Rule 66(A)(ii) material extends to Rule 92 *bis* witnesses and to witnesses called before the implementation of the "additional measures", the late disclosure of material which relates to those witnesses amounts to disclosure violations.

⁶⁶ Decision on the Ninth and Tenth Motions, paras. 22-23. Emphasis added.

39. In relation to the undertaking by the Prosecution to provide this material on a rolling basis over the next ten weeks, the Chamber considers that the Prosecution does not give due weight to the importance of the proper fulfilment by the Prosecution of its disclosure obligations and the need for compliance with the pre-trial deadline set for disclosure of Rule 66(A)(ii) material, a matter consistently reiterated by the Chamber in its various decisions dealing with the disclosure violations that have been committed by the Prosecution in this case to date. The Chamber therefore expects that all searches for and resulting disclosure of statements which relate to Rule 92 *bis* witnesses and witnesses who testified before the implementation of the “additional measures” will be complete by 30 November 2010.

D. Twenty-First Motion

40. Having reviewed the six transcripts of interviews referred to in the Twenty-First Motion, the Chamber is of the view that these documents are not “statements” which fall within the scope of Rule 66(A)(ii). The jurisprudence of this Tribunal and the International Criminal Tribunal for Rwanda has acknowledged that the definition of Rule 66(A)(ii) “is broad enough to include statements taken by humanitarian organisations for the purpose of recording allegations of human rights abuses, when these are passed to the Prosecution in order to assist it in identifying potential lines of inquiry which then result in the persons who gave the original statements becoming witnesses in Tribunal proceedings”⁶⁷ and statements “taken by national authorities in the course of other judicial proceedings”.⁶⁸ However, despite the broad conception of what constitutes a “statement”, the Chamber considers that it is not so broad as to encompass a transcript of an interview given to a journalist for the purpose of making a documentary, as is the case here, as such a document cannot be considered “an account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime”. It follows that there was no obligation on the Prosecution to disclose this material and therefore there was no violation of Rule 66(A)(ii) by the disclosure of these six transcripts.⁶⁹

E. General Remarks and Requested Suspension of Proceedings

41. The documents referred to in the Nineteenth Motion and Twentieth Motion were identified and disclosed as a result of the additional measures and searches which the

⁶⁷ *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.

⁶⁸ *Prosecutor v. Gatete*, Case No. ICTR-2000-61-PT, Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial, 13 October 2009, para. 19.

⁶⁹ The Chamber notes that in any event the Prosecution has undertaken to provide and continue to provide such material in advance of the witnesses’ testimony even though the material does not fall under Rule 66(A)(ii).

Prosecution was instructed to implement to ensure belated compliance with its disclosure obligations.⁷⁰ While the Accused and the Chamber should be able to rely on the Notice of Compliance as an indication that there will be no further disclosure violations by the Prosecution, this does not excuse the number of disclosure violations that have occurred in the lead up to 1 October 2010. The Chamber reiterates that the additional measures “were only implemented and deemed necessary given the serious concerns [of the Trial Chamber] about [the Prosecution’s] internal mechanisms and the completeness of its disclosure during the pre-trial phase of this case”.⁷¹

42. The Chamber has actively taken steps to protect the Accused’s fair trial rights when necessary, including by ordering the Prosecution to take measures to ensure that the pattern of disclosure violations was brought to an end by 1 October 2010, and, on one occasion, suspending the trial to allow the Accused and his team to review a large volume of potentially exculpatory material.⁷²

43. Having considered the Accused’s submissions, the Chamber recognises that the cumulative effect of this stream of disclosure violations by the Prosecution is likely to have placed a strain on the resources of the Accused in the preparation of his defence. As a consequence and to ensure that the Accused does not suffer any prejudice due to the Prosecution’s disclosure violations, the Chamber will order that none of the witnesses referred to in the Nineteenth Motion and Twentieth Motion and affected by the untimely disclosure may be called to testify before 31 January 2011. This will 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.

44. With respect to the documents referred to in the Motions that relate to Rule 92 *bis* and reserve witnesses, the Chamber notes that the Accused does not require additional time to prepare for the cross-examination of these witnesses, who will either not testify *viva voce* or are expected not to give evidence at all. Therefore, the Chamber is not convinced that a suspension of the trial before the commencement of the aspect of the Prosecution’s case dealing with the alleged takeover of municipalities in Bosnia and Herzegovina is warranted.

⁷⁰ Decision on Accused’s Ninth and Tenth Motions, para. 19.

⁷¹ Decision on Accused’s Ninth and Tenth Motions, para. 23

IV. Disposition

45. For the foregoing reasons, the Trial Chamber notes the disclosure violations identified above and, pursuant to Rules 54, 66(A)(ii), 68, and 68 *bis* of the Rules, hereby **GRANTS** the Motion **IN PART**, and:

- a) **ORDERS** that none of the witnesses affected by the disclosure violations found in relation to the Nineteenth Motion and Twentieth Motion shall be called to testify before 31 January 2011;
- b) **ORDERS** the Prosecution to complete by 30 November 2010 all searches for and resulting disclosure of Rule 66(A)(ii) statements which relate to Rule 92 *bis* witnesses and witnesses who testified before the implementation of the “additional measures”; and
- c) **DENIES** the Motions in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this second day of November 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

⁷² Decision on Accused’s Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 29 September 2010 para. 7, citing the Chamber’s oral decision, T. 6593-T. 6594, 13 September 2010.