



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: 17 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: 17 November 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S TWENTY-SEVENTH DISCLOSURE VIOLATION MOTION

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 “Twenty-Seventh Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential annex on 3 November 2010 (“Twenty-Seventh Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Twenty-Seventh Motion, the Accused makes reference to the disclosure by the Prosecution of a witness statement from KDZ155 (“KDZ155 Statement”) on 1 November 2010, that is, after the 7 May 2009 deadline for disclosure of all material that falls within Rule 66(A)(ii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) that was set by the pre-trial Judge.¹ The Accused submits that, in addition to being disclosed well after the 7 May 2009 deadline, the disclosure of this document also missed the 1 October 2010 deadline set by the Chamber for the provision of all outstanding Rule 66(A)(ii) material in the possession of the Prosecution to him.²

2. The Accused argues that the Prosecution’s need to seek consent to disclose the KDZ155 Statement pursuant to Rule 70 from the relevant provider, prior to the Statement’s disclosure,, does not excuse the substantial delay in its disclosure to him.³ In support of this submission he notes that the KDZ155 Statement dates back to 1995, has been in the possession of the Prosecution for a long time, and that the “[r]equest for consent to disclose the statements could and should have been made long before the deadline of 1 October 2010”.⁴ In addition, the Accused submits that the KDZ155 Statement should not have been obtained subject to Rule 70(B) provisions as that Rule was meant to apply to material “used solely for the purpose of generating new evidence” and that the KDZ155 Statement does not fall into this category as KDZ155 was an eyewitness to events in Srebrenica relevant to the Third Amended Indictment (“Indictment”).⁵

¹ Twenty-Seventh Motion, paras. 1-2. A copy of the KDZ155 Statement was attached in Confidential Annex B to the Twenty-Seventh Motion.

² Twenty-Seventh Motion, para. 3. The 1 October 2010 deadline for all outstanding Rule 66(A)(ii) material was set in the Chamber’s Decision on Accused’s Ninth and Tenth Motions for Finding of Disclosure Violations and for Remedial Measures, 26 August 2010, para. 23 (“Decision on Ninth and Tenth Motions”), as referred to by the Accused.

³ Twenty-Seventh Motion, para. 5.

⁴ Twenty-Seventh Motion, para. 5.

⁵ Twenty-Seventh Motion, para. 6.

3. The Accused thus requests the Chamber to make a finding that the Prosecution has violated Rule 66(A)(ii) by failing to disclose the KDZ155 Statement by 7 May 2009.⁶ In addition, given the absence of any justification by the Prosecution for not disclosing the KDZ155 Statement even by the 1 October 2010 deadline, the Accused requests that the Chamber exclude KDZ155's testimony from the trial.⁷

4. On 8 November 2010, the Prosecution filed the "Prosecution's Response to Karadžić's Twenty-Seventh Motion for Finding of Disclosure Violation and for Remedial Measures" ("Response to Twenty-Seventh Motion"). It submits that the KDZ155 Statement was indeed identified as a result of the additional measures it implemented following the Chamber's order to search for and disclose all remaining Rule 66(A)(ii) material by 1 October 2010, and that it had not been identified or disclosed previously due to oversight on its part.⁸

5. The Prosecution notes that in its Notice of Compliance with the Chamber's order to search for and disclose all remaining Rule 66(A)(ii) material it had identified four items, including the KDZ155 Statement, which could not be disclosed by the 1 October 2010 deadline due to pending Rule 70 clearance.⁹ The Prosecution states that it sought clearance to disclose the KDZ155 Statement on 4 October 2010, received clearance on 28 October 2010, and disclosed it to the Accused on 1 November 2010.¹⁰ In addition, the Prosecution argues that the Accused wrongly claims that the KDZ155 Statement should not have been obtained under Rule 70(B).¹¹ It refers to its previous submissions on the issue made in the "Prosecution Response to Karadžić's Twenty-Second Motion for Finding of Disclosure Violation and for Remedial Measures", filed on 21 October 2010 ("Response to Twenty-Second Motion").¹²

6. The Prosecution also submits that the Accused has not demonstrated any prejudice with respect to the late disclosure of the KDZ155 Statement, and his failure to do so precludes the granting of a remedy by the Chamber.¹³ In support of this submission, the Prosecution argues that KDZ155 is a "reserve witness in relation to whom the Accused does not need to prepare at

⁶ Twenty-Seventh Motion, para. 6.

⁷ Twenty-Seventh Motion, para. 6.

⁸ Response to the Twenty-Seventh Motion, para. 2.

⁹ Response to the Twenty-Seventh Motion, para. 2. The Prosecution refers to the Prosecution Notice of Compliance with Trial Chamber's Decision Concerning Rule 66(A)(ii) Disclosure, 1 October 2010 ("Notice of Compliance").

¹⁰ Response to the Twenty-Seventh Motion, para. 2.

¹¹ Response to the Twenty-Seventh Motion, para. 4.

¹² Response to the Twenty-Seventh Motion, para. 4. The Prosecution refers to the Prosecution Response to Karadžić's Twenty-Second Motion for Finding of Disclosure Violation and for Remedial Measures, 21 October 2010, para. 4.

¹³ Response to the Twenty-Seventh Motion, paras. 1, 3.

this point in time” and that the KDZ155 Statement is “not lengthy”.¹⁴ Finally, the Prosecution submits that the request for exclusion of the testimony of the witness should be dismissed as premature.¹⁵

II. Applicable Law

7. Rule 66(A)(ii) of the Rules requires the Prosecution (within a time-limit prescribed by the 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 2009.¹⁶

8. Rule 70(B) provides that if the Prosecution is in possession of information which has been provided to it on “on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information [...]”. The Appeals Chamber has recognised that while the Chamber has the authority to assess whether information has been provided in accordance with Rule 70(B), “such enquiry must be of a very limited nature: it only extends to an examination of whether the information was in fact provided on a confidential basis [...]”.¹⁷

9. 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 a breach of these disclosure obligations.¹⁸

¹⁴ Response to the Twenty-Seventh Motion, para. 3.

¹⁵ Response to the Twenty-Seventh Motion, para. 5.

¹⁶ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

¹⁷ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR 108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 (“Decision on Interpretation of Rule 70”), para. 29.

¹⁸ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

III. Discussion

10. Having reviewed the KDZ155 Statement, the Chamber is of the view that it is a statement which falls within the scope of Rule 66(A)(ii) of the Rules.¹⁹ While the Chamber notes that the KDZ155 Statement relates to a witness who is now listed as a “reserve” witness, this is only relevant to an assessment of whether the Accused has suffered prejudice by its late disclosure.²⁰ As KDZ155 was on the Prosecution’s original Rule 65 *ter* list of witnesses also filed in May 2009, the statement should have been disclosed in accordance with the deadline set by the pre-trial Judge.

11. The Chamber further notes that the KDZ155 Statement is dated 5 September 1995, and was not disclosed to the Accused until 1 November 2010. The Prosecution has not clarified when it came into its possession. In light of this, the Chamber considers it appropriate to presume that the KDZ155 Statement was in the possession of the Prosecution before the 7 May 2009 deadline, and it will proceed on that presumption.

12. The KDZ155 Statement was one of the items the disclosure of which was subject to the consent of the relevant Rule 70 provider.²¹ On 26 August 2010, the Chamber clearly ordered the Prosecution to complete “all searches *and* the resulting disclosure” of any remaining Rule 66(A)(ii) material by 1 October 2010.²² It was thus incumbent upon the Prosecution, as soon as the KDZ155 Statement was identified, to obtain the necessary Rule 70 clearance as a matter of urgency so that it could then be disclosed to the Accused by 1 October 2010. The Chamber, however, accepts that the Prosecution sought and obtained Rule 70 clearance for the disclosure of the KDZ155 Statement immediately upon its discovery.

13. This does not, however, excuse the delay in originally identifying the document and requesting the necessary clearance so that it could be disclosed in accordance with the May 2009 deadline. The Prosecution itself acknowledges that the KDZ155 Statement had not been disclosed earlier due to oversight on its part.²³ Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by failing to disclose the KDZ155 Statement in accordance with the deadline set by the pre-trial Judge.

¹⁹ *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.

²⁰ Decision on Accused’s Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010, para. 35.

²¹ In assessing whether the KDZ155 Statement benefits from the protections afforded by Rule 70(B), the Chamber only needs to be satisfied that it was actually provided on a confidential basis. *See* Decision on Interpretation of Rule 70, para. 29.

²² Decision on Ninth and Tenth Motions, para. 23.

²³ Response to the Twenty-Seventh Motion, para. 2.

14. However, having considered the length of the KDZ155 Statement, and the fact that KDZ155 is a reserve witness in relation to whom the Accused does not require additional time to prepare for cross-examination, the Chamber is not satisfied that the Accused has been prejudiced by its late disclosure. The Chamber recalls that, pursuant to Rule 89(D) of the Rules, it “may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”. It follows that, in the absence of demonstrated prejudice, there is no justification for the exclusion of the testimony of this witness.

15. Notwithstanding the absence of prejudice to the Accused caused by the late disclosure of individual documents, the Chamber has recently expressed its serious concern about the manner in which disclosure has been carried out by the Prosecution in this case.²⁴ The cumulative effect of the Prosecution’s multiple disclosure violations was a significant factor in the Chamber’s decision to suspend the trial proceedings for one month.²⁵ This latest disclosure violation again demonstrates the weaknesses in the Prosecution’s pre-trial disclosure practices. The Chamber has insisted that this pattern of disclosure violations must come to an end and has called on the Prosecutor himself, along with his staff, to “do his utmost to ensure that the progress of this case is not further hindered by late disclosure”.²⁶

IV. Disposition

16. For the foregoing reasons, the Trial Chamber notes the disclosure violation identified above and, pursuant to Rules 54, 66(A)(ii), and 68 *bis* of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

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

[Seal of the Tribunal]

²⁴ Decision on Accused’s Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Violation Motions, 11 November 2010, para. 43 (“Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Motions”).

²⁵ Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Motions, para. 41; 3 November 2010, T. 8907-8908.

²⁶ Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Motions, para. 43.