



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: 7 July 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: 7 July 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S FIFTY-FIRST AND FIFTY-SECOND 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 “Fifty-First Motion for Finding of Disclosure Violation and to Postpone Testimony of Nebojša Ristić”, filed publicly with confidential annex on 20 June 2011 (“Fifty-First Motion”) and the Accused’s “Fifty-Second Motion for Finding of Disclosure Violation and for Sanctions: Rule 66(A)(ii)” filed on 21 June 2011 (“Fifty-Second Motion”), and hereby issues its decision thereon.

I. Submissions

A. Fifty-First Motion

1. In the Fifty-First Motion, the Accused argues that the Office of the Prosecutor (“Prosecution”) has violated Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) in relation to the disclosure in June 2011 of material pertaining to the upcoming witness Nebojša Ristić.¹ He observes that he “received 99 items of disclosure under Rule 68 in the past week, consisting mostly of recorded interviews” conducted by the Prosecution which amounts to over one thousand pages of transcript and dozens of hours of un-transcribed video recordings (“Disclosed Material”).²

2. The Accused indicates that while his team has only been able to conduct a cursory review of the Disclosed Material, they have identified material which indicates Rule 68 violations with respect to Ristić, who was a member of the Accused’s security detail.³ The Accused further submits that interviews with other members of his security detail were also recently disclosed even though they were conducted in February 2009 (“Interviews”).⁴ The Accused points to examples in these Interviews, which in his submission contradict the allegations that he “had effective control over the Army at Srebrenica and SDS in Prijedor” and are thus exculpatory.⁵ He goes on to suggest that he would be prejudiced if he was required to cross-examine Ristić without having an opportunity to review the Interviews and incorporate them into his approach to cross-examination.⁶

¹ Fifty-First Motion, para. 1.

² Fifty-First Motion, para. 2.

³ Fifty-First Motion, para. 3.

⁴ Fifty-First Motion, para. 4.

⁵ Fifty-First Motion, para. 8.

⁶ Fifty-First Motion, para. 9.

3. The Accused seeks an express finding from the Chamber that the Prosecution violated Rule 68 of the Rules by failing to disclose the Interviews as soon as practicable and that Ristić's testimony be postponed until after the summer recess as a remedy.⁷ He reiterates that given the recent and repeated violations of Rule 68 by the Prosecution, it is "unsafe to continue the trial under these conditions" and as a result the trial proceedings should be suspended and a special master appointed as suggested by the "Fiftieth Motion for Finding of Disclosure Violation and Motion for Seventh Suspension of Proceedings", filed on 3 June 2011.⁸

4. On 21 June 2011, the Prosecution filed the "Prosecution Response to Fifty-First Motion for Finding of Disclosure Violation and to Postpone Testimony of Nebojša Ristić" ("Response to Fifty-First Motion"). It acknowledges that the Interviews contain potentially exculpatory material and should have been disclosed to the Accused earlier but had been missed due to "oversight".⁹ However, it submits that the Accused had sufficient time to review the Interviews and that therefore the requested postponement of Ristić's testimony should not be granted.¹⁰ In support of its submission that the Accused's ability to cross-examine Ristić has not been prejudiced, the Prosecution observes that as of the date of their response, the Accused has been in possession of the Interviews for ten days, and that it is obvious from the Fifty-First Motion that he had already reviewed them.¹¹ In any event it observes that given the length of the Interviews, even if the Accused seeks to re-review the material it should take one person, less than one day to do so and that therefore the "length of the requested postponement is inapposite".¹²

5. The Prosecution concludes that given the absence of demonstrated prejudice to the Accused, the suggested extraordinary remedies of appointing a special master and ordering a suspension of trial are inappropriate and that the Fifty-First Motion should be dismissed.¹³ It also observes that the disclosure of the Interviews "demonstrates that the Prosecution addressed a minor defect in the systematic review process as efficiently as possible".¹⁴

⁷ Fifty-First Motion, paras. 10-11.

⁸ Fifty-First Motion, paras. 12-15.

⁹ Response to Fifty-First Motion, paras. 1, 3.

¹⁰ Response to Fifty-First Motion, para. 1.

¹¹ Response to Fifty-First Motion, para. 4.

¹² Response to Fifty-First Motion, para. 5.

¹³ Response to Fifty-First Motion, paras. 8-9.

¹⁴ Response to Fifty-First Motion, para. 8.

6. On 21 June 2011, the Chamber asked the Accused's legal adviser, Peter Robinson, whether he could "identify, with more specificity, the volume of material which the Accused will have to review which he contends pertain to the testimony of Nebojša Ristić, and how much time he actually needs to review that material".¹⁵ Mr. Robinson replied that the review could be completed within two or three hours.¹⁶

B. Fifty-Second Motion

7. The Accused requests a finding that the Prosecution violated Rule 66(A)(ii) of the Rules by failing to disclose two witness statements of Ristić ("Witness Statements") until 21 June 2011, which was after the 7 May 2009 deadline set by the pre-trial Judge and the final 1 October 2010 deadline set by the Chamber.¹⁷ He requests that Ristić's testimony be excluded as a sanction for the failure to meet these deadlines and to "rectify the earlier disclosure violations".¹⁸ He submits that the remedy of exclusion is warranted given the Prosecution has repeatedly failed to disclose Rule 66(A)(ii) statements in its possession despite the repeated warnings given by the Chamber that it should improve its disclosure practices.¹⁹ Mr. Robinson submitted that it was "completely unfair for a trial to be conducted in this manner" given that the burden is placed on the Accused and his team to interrupt their preparation, even though "the Prosecution is responsible entirely for unjustified and inexcusable violations of the rules of disclosure".²⁰

8. On 21 June 2011, the Prosecution filed the "Prosecution Response to Fifty-Second Motion for Finding of Disclosure Violation and for Sanction: Rule 66(A)(ii)" ("Response to Fifty-Second Motion"). It acknowledges that the Witness Statements, which were obtained by the Prosecution in 2006 and 2007, should have been disclosed earlier pursuant to Rule 66(A)(ii), but submits that the Accused should not be granted any remedy as he fails to demonstrate any prejudice.²¹ It further submits that given the "brevity and the nature of [the Witness Statements'] content, it is obvious that the Accused has not suffered any prejudice arising from the timing of their disclosure and indeed he makes no such claim".²²

¹⁵ Hearing, T. 15033 (21 June 2011).

¹⁶ Hearing, T. 15033-15034 (21 June 2011).

¹⁷ Fifty-Second Motion, paras. 1-3, 7.

¹⁸ Fifty-Second Motion, para. 4.

¹⁹ Fifty-Second Motion, paras. 5-6.

²⁰ Hearing, T. 15073-15074 (21 June 2011).

²¹ Response to Fifty-Second Motion, paras. 1-2; Response to Fifty-First Motion, para. 2.

²² Response to Fifty-Second Motion, para. 2.

9. The Prosecution observes that the Chamber has previously held that in the absence of demonstrated prejudice “there is no justification for the extraordinary remedy of exclusion of the testimony of a witness”.²³ It also stresses that given the Witness Statements are limited to 19 pages which can be reviewed in less than one hour and are “irrelevant to events during the Indictment period”, postponing Ristić’s testimony for two months would be an “entirely disproportionate and unnecessary remedy”.²⁴

II. Applicable Law

10. 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 in this case was 7 May 2009.²⁵

11. 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”.²⁶ 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.²⁷

12. The Chamber reiterates that regardless of the Prosecution’s internal practices, there is a clear obligation to disclose potentially exculpatory material “as soon as practicable” and that the “ongoing nature of the obligation relates only to the fact that as new material comes into the possession of the Prosecution it should be assessed as to its potentially exculpatory nature and disclosed accordingly”.²⁸

²³ Response to Fifty-Second Motion, paras. 3-4.

²⁴ Response to Fifty-Second Motion, para. 4; Response to Fifty-First Motion, paras. 2, 7.

²⁵ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

²⁶ 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, Appeals Judgement, 29 July 2004 (“*Blaškić Appeals Judgement*”), para. 267.

²⁷ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez Appeals Judgement*”), para. 179.

²⁸ Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010, para. 11.

13. 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.²⁹

III. Discussion

14. Given the overlap between the issues raised in the Fifty-First Motion and Fifty-Second Motion, they will be dealt with together.

15. On 22 June 2011, having heard the submissions of the parties and considered the written filings relating to the Fifty-First Motion and Fifty-Second Motion, the Chamber held that, given the limited length and volume of the Disclosed Material and Witness Statements, and Mr. Robinson's estimate of the time that would be required to review the Disclosed Material which pertains to Ristić's testimony, it was satisfied that the Accused would have sufficient time to consider the newly disclosed material, and incorporate it, if necessary, into his cross-examination of the affected witness.³⁰ The Chamber found that considering the length and content of this material, it was "not convinced that the Accused has been prejudiced by this late disclosure, although it once again reflects very badly on the disclosure practices of the Prosecution".³¹ In these circumstances the Chamber concluded that the requested postponement or exclusion of Ristić's testimony was unwarranted.³²

16. The Prosecution acknowledges that the Interviews referred to in the Fifty-First Motion contain potentially exculpatory material and should have been disclosed to the Accused earlier. Having conducted its own review of the relevant portions of the Interviews, the Chamber concludes that they are potentially exculpatory and that the Prosecution has violated its obligation under Rule 68 of the Rules by failing to disclose these two documents as soon as practicable given that they were only disclosed to the Accused in June 2011 and there is no suggestion that they were recently received by the Prosecution. The Chamber expresses its concern with the adequacy of the Prosecution's explanation that the Interviews were missed due to "oversight". The Prosecution has been recently ordered to furnish a report to the Chamber

²⁹ *Kordić and Čerkez* Appeals Judgement, para. 179; *Blaškić* Appeals Judgement, para. 268.

³⁰ Hearing, T. 15147 (22 June 2011).

³¹ Hearing, T. 15147 (22 June 2011).

³² Hearing, T. 15147 (22 June 2011).

which specifically addresses the issue of why interviews as a category documents were not exhaustively reviewed.³³

17. With respect to the Witness Statements referred to in the Fifty-Second Motion, the Chamber finds that given they have been in the Prosecution's possession since 2006 and 2007 respectively, the Prosecution has violated Rule 66(A)(ii) of the Rules by their late disclosure. The Chamber repeats its observation that "with the exception of newly created material, or material which has recently come into the Prosecution's possession, there should be no further disclosure of Rule 66(A)(ii) material".³⁴ The failure by the Prosecution to even offer an explanation as to why the Witness Statements were not identified and disclosed earlier is unacceptable.

18. While the Prosecution violated its disclosure obligations under Rules 68 and 66(a)(ii), the Chamber concluded that the Accused suffered no prejudice as a result of this late disclosure.³⁵ In reaching this conclusion, the Chamber reviewed the relevant portions of these documents and observed that their content is not of such significance or so voluminous that their late disclosure has had a detrimental impact on the Accused's overall preparation for trial or the approach to his defence. The Chamber was also mindful that the Witness Statements are of limited length and were not relevant to events in the Indictment. Given the absence of demonstrated prejudice, there is no basis to grant the other remedies sought by the Accused, namely the suspension of the trial and appointment of a special master. The Chamber has already denied the requested postponement of or exclusion of Ristić's testimony.³⁶

IV. Disposition

19. For the foregoing reasons, the Trial Chamber, pursuant to Rules 54, 66(A)(ii), 68, and 68 *bis* of the Rules, hereby:

- a) **GRANTS**, by majority, Judge Kwon dissenting³⁷, the Fifty-First Motion and Fifty-Second Motion in part, and finds that the Prosecution has violated Rule 68 of the Rules with respect to the late disclosure of the Interviews, and violated Rule 66(A)(ii) of the Rules with respect to the late disclosure of the Witness Statements; and

³³ Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011, para. 54(v).

³⁴ Decision on Accused's Forty-Sixth Disclosure Violation Motion, 20 April 2011, para. 8.

³⁵ Hearing, T. 15147 (22 June 2011).

³⁶ Hearing, T. 15147 (22 June 2011).

³⁷ Judge Kwon refers to his Partially Dissenting Opinion in the Decision on Accused's Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon, 29 March 2011. While Judge Kwon agrees with the majority that there have been violations of Rule 68 and Rule 66(A)(ii) of the Rules, in the absence of prejudice to the Accused, he considers that the motions should be dismissed in their entirety.

b) **DENIES**, the Fifty-First Motion and Fifty-Second Motion in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this seventh day of July 2011
At The Hague
The Netherlands

[Seal of the Tribunal]