



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-05-87-T

Date: 29 September 2006

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 29 September 2006

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

**DECISION ON OJDANIĆ MOTION FOR DISCLOSURE OF WITNESS STATEMENTS
AND FOR FINDING OF VIOLATION OF RULE 66(A)(ii)**

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Mr. John Ackerman and Mr. Aleksander Alekšić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 seized of “General Ojdanić’s Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)”, filed on 9 August 2006 (“Motion”), and hereby renders its decision thereon.

BACKGROUND

1. On 10 July 2006, during the testimony of witness Sandra Mitchell, the first of the witnesses of the Office of the Prosecutor (“Prosecution”) in the case, it became public that the Prosecution was in the possession of thousands of statements and interviews taken by the Organization for Security and Co-operation in Europe (“OSCE”) and the International Crisis Group (“ICG”), and that at least twelve of the persons who had given such statements and interviews were on the Prosecution’s witness list for this trial.¹ The Prosecution subsequently provided some of those witnesses’ statements during Ms. Mitchell’s testimony.²

2. On 11 July 2006, the Ojdanić Defence explained that seven of these statements had been disclosed for the first time on 10 July, and that the remainder had already been disclosed, before commencement of the trial, in forms prepared by the ICG.³

3. On 7 August 2006, during the examination-in-chief of witness Fuad Haxhibeqiri, the Ojdanić Defence raised questions concerning the disclosure of all written statements in possession of the Prosecution. A discussion arose between the parties and the Chamber as to whether the OSCE, ICG, and Human Rights Watch (“HRW”) interview forms in the possession of the Prosecution should be disclosed to the Defence. The Chamber commented that the statements of persons whom the Prosecution does not intend to call to testify at trial were not statements within the meaning of Rule 66(A)(ii) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), but might fall within Rule 66(B).⁴

4. On 9 August 2006, the Ojdanić Defence submitted the Motion requesting the Trial Chamber (1) to clarify the Prosecution’s obligation under Rule 66(A)(ii) to disclose all witnesses statements in its possession, (2) to order the disclosure of such statements, and (3) to find the Prosecution in

¹ *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87-T (“*Milutinović et al.*”), T. 509–515 (10 July 2006).

² T. 640–642 (11 July 2006).

³ T. 640–642 (11 July 2006).

⁴ T. 1093–1098 (7 August 2006).

violation of Rule 66(A)(ii) for disclosing seven of the OSCE interviews of Prosecution witnesses only after commencement of the trial.⁵

5. On 11 August 2006, the Milutinović Defence filed the “Submission by Mr. Milutinović to join General Ojdanić’s Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii) and to join Sreten Lukić’s Second Supplemental Submission Relating to Inadmissibility of ‘As Seen as Told’”, by which it adopted and joined in the Motion.⁶

6. On 23 August 2006, the Prosecution submitted the “Prosecution’s Response to Ojdanić and Milutinović Defence’s Motions for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)” (“Prosecution Response”), in which it requested the Trial Chamber to dismiss the Motion.⁷

SUBMISSIONS OF PARTIES

7. In support of the Motion, the Ojdanić Defence argues that “Rule 66(A)(ii) obligates the Prosecution to disclose all statements of its witnesses in its possession, regardless of who took the statement”⁸ and that “this interpretation of Rule 66(A)(ii) is supported by the jurisprudence of this Tribunal, the ICTR and the Special Court for Sierra Leone”.⁹

8. The Prosecution opposes the Motion, arguing that the refugee interview records collected by the OSCE, ICG, and HRW do not constitute “witness statements” within the meaning of Rule 66(A)(ii). The Prosecution argues that “statements” under Rule 66(A)(ii) are “proof of the evidence that a witness will provide in court, taken by a competent judicial authority or by a party to judicial proceedings for the purpose of litigation”.¹⁰ Because the records in question were not prepared for the purpose of litigation, the interviews, as argued by the Prosecution, do not fall under the disclosure requirement of Rule 66(A)(ii).¹¹

⁵ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, General Ojdanić’s Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 9 August 2006, para 14.

⁶ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Submission by Mr. Milutinović to Join General Ojdanić’s Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii) and to Join Sreten Lukić’s Second Supplemental Submission Relating to Inadmissibility of “As Seen as Told”, 11 August 2006.

⁷ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Prosecution’s Response to Ojdanić and Milutinović Defence’s Motions for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 23 August 2006, para. 15.

⁸ Motion, para. 7.

⁹ Motion, para. 7.

¹⁰ Prosecution Response, para. 7.

¹¹ Prosecution Response, para. 8.

9. Even though the Prosecution acknowledges that five of the interview forms were not disclosed to the Defence before the commencement of the trial, it argues that this was due to an unintentional administrative oversight, which does not, in any event, constitute a breach of Rule 66(A)(ii), because it is not under the obligation to disclose such material pursuant to the Rule.¹²

10. The Prosecution finally argues that even if this Chamber were to find that Rule 66(A)(ii) had been breached, the Defence's submissions lack merit and should be dismissed, because the Prosecution has already made available to the Defence the relevant questionnaires, and, therefore, the Defence has not shown any prejudice.¹³

APPLICABLE LAW AND DISCUSSION

11. During the oral hearings and in their written submissions, the parties have raised questions concerning the Prosecution's duties to disclose materials related to Prosecution witnesses within the terms of Rule 66 of the Rules. This Trial Chamber considers it helpful to set forth the relevant law governing disclosure by the Prosecution in this area.

12. Rule 66 provides, in relevant part:¹⁴

Rule 66

Disclosure by the Prosecutor

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and

(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

¹² Prosecution Response, para. 14.

¹³ Prosecution Response, paras. 4, 14.

(B) The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

13. Rule 66(A)(ii) imposes on the Prosecution, not only as an organ of the Tribunal, but also as an organ of international criminal justice,¹⁵ the obligation to disclose copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial, and copies of all witness statements taken in accordance with Rule 92 *bis*, as well as copies of the statements of additional Prosecution witnesses when a decision is made to call those witnesses.

14. The Appeals Chamber has held that the term "witness statement", in relation to Rule 66(A)(ii), is to be interpreted as the "account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime".¹⁶ This interpretation, read in the light of the Prosecution obligation stated in paragraph 13 above, 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.

15. This interpretation is also consistent with the Appeals Chamber's interpretation of Rule 66(A)(i), which provides that the Prosecution is under an obligation to make available to the Defence copies of the supporting material which accompanied the indictment when confirmation was sought, as well as all prior statements obtained by the Prosecution from the accused.¹⁷

¹⁴ Rule 66 has been amended as of 15 September 2006; however, the text of the Rule that was in effect at the time of the parties' submissions controls this Decision. See Amendments to the Rules of Procedure and Evidence, No. IT/250, Annex, 15 September 2006.

¹⁵ *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Decision on Communication Between the Parties and Their Witnesses, 21 September 1998, p. 3.

¹⁶ *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. The Chamber notes that the Prosecution's arguments reflected in paragraph 8 above are based upon the same definition provided by the *Blaškić* Appeals Chamber, but considers the Prosecution's definition of a "statement" as being too narrow.

¹⁷ Even though Rule 66(A)(i) refers to supporting materials and to the prior statements of the accused, it is the Chamber's understanding that the same criteria as those identified in respect of the accused's previous statements must apply *mutatis mutandis* to the previous statements of the witnesses indicated in Rule 66(A)(ii). This view has also been adopted by other Trial Chambers of the Tribunal. See *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997 ("Decision on Production of Discovery Materials"), para. 38.

16. The term “supporting materials”, within the meaning of Rule 66(A)(i), has been interpreted to mean the materials upon which the charges are based,¹⁸ and includes all the previous statements of the accused contained in the Prosecution’s files, whether collected by the Prosecution or originating from any other source.¹⁹ This interpretation of the term implies that no distinction should be made between the form or forms which these statements may have, because any other interpretation would restrict the rights of the accused in Article 21 of the Statute of the Tribunal.²⁰

17. In the present case, the OSCE, ICG, and HRW gathered information through the interview forms, which appear to record the actual words of the interviewees, and provided such information to the Prosecution, which then used it as leads. When the Prosecution decided to call as witnesses some of the persons that had previously been interviewed by the OSCE, ICG, and HRW, and included such persons on its witness list, the interview forms became “written statements” within the meaning of Rule 66’s disclosure obligation.

18. Once the Prosecution decided to call the witnesses to testify, it was bound, under Rule 66(A)(ii), to provide the Defence with all their statements in the Prosecution’s custody or control regardless of whether such statements were obtained by it or from other sources.²¹ And the fact that in the present case the witness statements of persons on the Prosecution’s witness list were originally obtained through interview forms by the OSCE and ICG does not affect the Prosecution’s obligation to disclose them to the Defence.

19. The Prosecution argues that the interview records collected by the OSCE do not constitute “witness statements” within the meaning of Rule 66(A)(ii), but that they could fall under the terms of Rule 66(B).²² The Chamber finds this assertion to be valid only with respect to the thousands of interview forms taken by the OSCE, ICG, and HRW, which are in the Prosecution’s possession and which are from people who are not on the Prosecution’s witness list. However, the Chamber does not find this assertion valid with respect to the statements of persons that are now on the Prosecution’s Rule 65 *ter* list.

¹⁸ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14-PT, Order on Motion to Compel Compliance by Prosecution with Rule 66(A) and 68, 26 February 1999, p. 3.

¹⁹ *Prosecutor v. Blaškić*, Decision on Production of Discovery Materials, para. 37. See also *Prosecutor v. Tadić*, Case No. IT-96-1-T, T. 5673; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnir Delalić for the Disclosure of Evidence, 26 September 1996, para. 4.

²⁰ *Prosecutor v. Blaškić*, Decision on Production of Discovery Materials, paras. 34, 37.

²¹ See *Prosecutor v. Mpambara*, Case No. ICTR-2001-65-I, Decision (Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures), 28 February 2002, paras. 22–23.

²² Prosecution Response, para. 9.

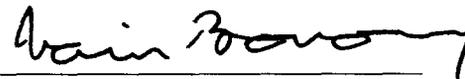
DISPOSITION

20. The Defence has requested the Chamber to clarify the Prosecution's obligations under Rule 66(A)(ii) to disclose all of the statements and interviews of Prosecution witnesses in its possession, to order the disclosure of such statements, and to find the Prosecution in violation of Rule 66(A)(ii) for not disclosing some of the statements before commencement of the trial.²⁴

21. The Trial Chamber notes that, in the present case, the Prosecution has provided to the Defence the relevant statements in its possession of the persons that are on the Prosecution's witness list, but that this was done long after it was obligated to do so, and, therefore, it violated Rule 66(A)(ii). Although there is no indication that the Prosecution acted with bad faith, there still has been a violation of Rule 66; nevertheless, the Defence has suffered no undue prejudice from the late disclosure. As a result, the Chamber agrees with the Defence that it is not appropriate to impose any sanctions upon the Prosecution in this particular instance.²⁵

22. For these reasons, pursuant to Rules 54 and 66 of the Rules, the Trial Chamber hereby **DISMISSES** the Motion as moot.

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



Judge Iain Bonomy
Presiding

Dated this twenty-ninth day of September 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁴ Motion, para. 14.

²⁵ Cf. *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, paras. 153, 199–200 (“The Defence has not established any such prejudice from the delayed disclosures by the Prosecution. The Appeals Chamber does, however, find that the Prosecution did not meet its obligations under the Rules.”), 211–215 (“Rule 68bis in particular is specific to disclosure obligations, and provides the Tribunal with a broad discretionary power to impose sanctions on a defaulting party, *proprio motu* if necessary. The Appeals Chamber notes that the Prosecution has already described in some detail why certain materials were not disclosed.... While the disclosure practices of the Prosecution in this case have on occasion fallen short of its obligations under the applicable Rules, the Appeals Chamber is unable to determine whether the Prosecution deliberately breached its obligations. In light of the absence of material prejudice to the Defence in this case, the Appeals Chamber does not issue a formal sanction against the Prosecution for its breaches of its obligations under Rule 68. The Appeals Chamber is persuaded that, on the whole, the Prosecution acted in good faith in the implementation of a systematic disclosure methodology.... The Appeals Chamber will not tolerate anything short of strict compliance with disclosure obligations, and considers its discussion of this issue to be sufficient to put the Office of the Prosecutor on notice for its conduct in future proceedings.”).