



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-09-92-T
Date: 26 June 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 26 June 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON SUBMISSIONS RELATIVE TO THE
PROPOSED "EDS" METHOD OF DISCLOSURE**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. BACK GROUND

1. On 19 September and 1 November 2011, the Prosecution filed its first and second reports on pre-trial preparations, which contained its planned procedure for the disclosure of exculpatory materials to the Defence through the Tribunal's Electronic Disclosure System ("Disclosure Procedure" and "EDS", respectively).¹ The Prosecution submits that this procedure complies with its obligations pursuant to Rule 68 (i) and (ii) of the Tribunal's Rules of Procedure and Evidence ("Rules") and the Appeals Chamber's decisions in the cases of *Prosecutor v. Karemera et al.* and *Prosecutor v. Bralo* ("Karemera Decision" and "Bralo Decision", respectively).² The Prosecution's Disclosure Procedure comprises:

- A) The placement of its evidence collection on the EDS in a searchable "General EDS Collection", which contains sub-collections of related documents with a corresponding index.³ As to documents located in the General EDS Collection and which are identified as disclosable, the Prosecution will inform the Defence in writing of the documents' existence and identify them with the Evidence Record Number ("ERN").⁴
- B) The creation of a "Case Specific EDS Collection", which contains additional documents not available in the General EDS Collection, but which are disclosable in the present case.⁵ This Collection is searchable in the same manner as the General EDS Collection.⁶ Within this Collection, certain documents are placed into searchable topical indices to allow the Defence to include or exclude them during searches of the Collection.⁷ Indices to which documents are later added, due to the ongoing Rule 68 (i) disclosure obligations or being newly discovered, will be denoted with an asterisk and written correspondence will be sent to the Defence identifying new additions.⁸
- C) In order to assist the Defence in navigating the two Collections, the Prosecution will provide a Microsoft Word Excel spreadsheet ("Spreadsheet"), containing a) each document

¹ First Prosecution Report on Pre-Trial Preparations, 19 September 2011 (Confidential with Confidential Annexes A and B) ("First Pre-Trial Report"), paras 7-15; Second Prosecution Report on Pre-Trial Preparations, 1 November 2011 (Confidential with Confidential Annexes A to C) ("Second Pre-Trial Report"), paras 12-17.

² *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006; *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006.

³ First Pre-Trial Report, para. 12.

⁴ First Pre-Trial Report, para. 13.

⁵ First Pre-Trial Report, para. 14.

⁶ Ibid.

⁷ Second Pre-Trial Report, para. 14.

⁸ Second Pre-Trial Report, para. 17

disclosed, b) the date of disclosure, c) the ERN of the document, and 4) other information.⁹
The Spreadsheet is also, in itself, searchable.¹⁰

- D) The Prosecution will copy the documents in the Case Specific Collection onto a hard drive provided by the Defence (“Hard Drive”), which it considers to be a courtesy to the Defence in facilitating its preparations and not an obligation under the Rules.¹¹
- E) As to the timing of disclosure during the pre-trial stage of the case, the Prosecution discloses documents on a monthly basis (“Major Disclosure Packages”).¹² The Major Disclosure Packages are placed on the Case Specific EDS and copied onto the Hard Drive.¹³ Additionally, the Defence is provided with a searchable index which identifies the Rule and/or witness pursuant to which the document was disclosed.¹⁴

2. On 10 November 2011, at a status conference, the Chamber invited the Defence to file a submission, if it wished, within seven days in relation to the Disclosure Procedure and, if a submission were made, for the Prosecution to respond within one week.¹⁵ On 17 November 2011, the Defence filed a motion, objecting to the Prosecution’s Disclosure Procedure as not being fully compliant with the *Karemera* and *Bralo* Decisions, but not requesting any specific relief.¹⁶ On 2 December 2011, the Prosecution responded, outlining improvements made in response to the Defence concerns and requesting that the Chamber declare its Disclosure Procedure compliant with the Tribunal’s jurisprudence.¹⁷

3. On 8 December 2011, at a status conference and after an earlier discussion at the Rule 65 *ter* meeting of 5 December 2011, the Chamber invited the Defence to file a reply by 22 December 2011 and for the Prosecution to file a sur-reply in its next pre-trial report.¹⁸ On 22 December 2011, the

⁹ First Pre-Trial Report, para. 14.

¹⁰ Ibid.

¹¹ First Pre-Trial Report, para. 15.

¹² Second Pre-Trial Report, para. 21; See also First Pre-Trial Report, para. 16.

¹³ First Pre-Trial Report, paras 15, 17.

¹⁴ First Pre-Trial Report, para. 21.

¹⁵ T. 99-100.

¹⁶ Defence Submission Relative to Proposed “EDS” Method of Disclosure, 17 November 2011 (Public with Confidential Annex A) (“17 November 2011 Motion”), para. 21. On 18 November 2011, the Prosecution, via an informal communication, requested that the status of the 17 November 2011 Motion be changed from public to confidential for various reasons. On 5 December 2011, at a Rule 65 *ter* meeting, the Pre-Trial Judge, on behalf of the Chamber, invited the Defence to file a change of status notification. T. 140. On 8 December 2011, the Defence filed a change of status request. See Defence Request to Change Status of Filing, 8 December 2011. On that same day, the Registry changed the status of the filing to “Confidential with Confidential Annex A”.

¹⁷ Prosecution Response to Defence Submission Relative to Proposed EDS Method of Disclosure, 2 December 2011 (Confidential) (“2 December 2011 Response”), para. 22. On 25 November 2011, the Prosecution, through an informal communication, indicated that it had inadvertently missed the one week response deadline and would file its response before the next Rule 65 *ter* meeting.

¹⁸ T. 130. See also transcript of 5 December 2011 Rule 65 *ter* meeting T. 141-143 (Confidential).

Defence filed its reply¹⁹ and, on 6 January 2012, the Prosecution sur-replied.²⁰ On 9 February 2012, the Defence filed a further submission, requesting that the Chamber issue an order compelling the Prosecution to re-disclose all previously disclosed materials with Meta-data included, and to vacate the trial date until the Prosecution cures, in the Defence view, its deficient disclosure.²¹ On 10 February 2012, the Prosecution responded to the Defence further submission, requesting that the Defence requests for relief be denied.²²

4. On 23 February 2012, at a status conference, the Chamber informed the parties that it aimed to issue a decision on the matter in the near future.²³ At that same status conference, the Prosecution requested that any decision be delayed as negotiations were ongoing between the parties,²⁴ and the Defence agreed.²⁵ In response, the Chamber instructed the parties to report to it by the following week if a decision was still needed and, if so, to indicate which outstanding issues remained unresolved.²⁶ On 2 March 2012, the Defence filed a report, listing the ongoing unresolved issues with the Disclosure Procedure,²⁷ and maintaining its prior requests for relief.²⁸ On 16 March 2012, the Prosecution responded to the report, indicating its position in relation to the unresolved issues.²⁹ The report and response were discussed at a Rule 65 *ter* meeting of 26 March 2012.³⁰ As of the 29 March 2012 status conference, in relation to all of the prior submissions, including the updates

¹⁹ Defence Reply as to Submission on EDS Disclosure Method, 22 December 2011 (Confidential).

²⁰ Fourth Prosecution Report on Pre-Trial Preparations, 6 January 2012 (Confidential with Confidential Annexes A to C) (“Fourth Pre-Trial Report”).

²¹ Amended Defence Submission Pursuant to Instruction from Chambers, and Motion Relative to Problems with Disclosure that Prevent Trial Preparations, 9 February 2012 (Public with Confidential Annexes “Exhibit A” and “Exhibit B”), p. 5. On 26 January 2012, the Defence had sent a letter to the Prosecution and copying the Chamber, which raised continuing concerns with the Disclosure Procedure. On 27 January and again on 8 February 2012, the Chamber, via an informal communication, instructed the Defence to file its correspondence. On 9 February 2012, the Defence initially filed “Defence Submission Pursuant to Instruction from Chambers, and Motion Relative to Problems with Disclosure that Prevent Trial Preparations”, which did not contain Annex B. On that same day, the Defence filed its amended submission with Annex B attached.

²² Prosecution Response to Defence Submission and Motion Relative to Problems with Disclosure and Trial Preparations, 10 February 2012 (Public with Confidential Annex A) (“10 February 2012 Response”), paras 12-13. On 7 February 2012, the Prosecution responded, in an informal communication, to the Defence correspondence of 26 January 2012. On 8 February 2012, the Chamber, via an informal communication, instructed the Prosecution to file its correspondence. The Defence filed its correspondence of 26 January 2012 on the next day; however, that filing differed from the content of the original correspondence. See *Supra* fn. 9. The Prosecution informed the Chamber, via an informal communication, that it would file its response correspondence, but would amend it prior to filing so as to respond to the new portions of the Defence’s 9 February 2012 submission.

²³ T. 200.

²⁴ T. 201-202.

²⁵ T. 202.

²⁶ *Ibid.*

²⁷ Defence Report on Progress of Disclosure Issues, Pursuant to Chamber Instruction Issued at Status Hearing of 23 February 2012, 2 March 2012 (Public with Confidential Exhibit A) (“2 March 2012 Defence Submission”), paras 10-13, 21-22.

²⁸ 2 March 2012 Defence Submission, para. 31.

²⁹ Prosecution Response to Defence Report on Progress on Disclosure Issues, Pursuant to the Chamber’s Instruction Issued at the Status Hearing of 23 February 2012, 16 March 2012.

³⁰ Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 294-314 (Confidential).

contained in the report and response of 16 March 2012, and the discussions at the Rule 65 *ter* meeting, the status of the unresolved issues and the parties' respective positions were as follows:³¹

- A) Identifying Meta-Data for documents placed on the EDS: The Prosecution takes the position that this is not required under the Rules, but that it has and is continuing to input this information into the Case Specific Collections on the EDS so as to facilitate the Defence preparations.³² The Prosecution also notes that the Spreadsheets provided on Hard Drive do contain Meta-data for the documents.³³ The Defence asserts that, while it cannot identify a specific Rule that requires providing Meta-data, the lack thereof renders its ability to process documents difficult.³⁴
- B) Summary Information in the short description of the Case Specific Collection indices: The Defence asserts that the indices descriptions are insufficient for it to determine which documents are contained in various Collections.³⁵ The Prosecution submits that it has already renamed the short descriptions to better reflect the content contained therein, and that this issue will be fully resolved once all the material has been added to each collection because, due to technical reasons, the indices cannot be finalized until that point.³⁶ The Prosecution further submits that, once an index is opened, an "information box" appears which gives more detailed information about the contents of the Collection and the rule under which it was disclosed.³⁷ The Prosecution argues that this "information box" provides sufficient information to the Defence.³⁸
- C) Disclosure of documents on the Hard Drive in TIFF and PDF format: The Defence asserts that certain documents were not disclosed on the Hard Drive in TIFF or PDF format, thereby

³¹ In relation to the then unresolved issue of Mr Mladić's access to the EDS at the UNDU, this issue was subsequently confirmed to be resolved by OLAD in an informal communication of 19 April 2012. The Chamber will therefore not address this matter. In relation to the issue of the slow speed of the EDS via remote access, the parties agreed that this is not within the Prosecution's control and that the EDS is significantly slower via remote access than within the Tribunal. See T. 259; Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 305-308 (Confidential). The Prosecution offered to explore with the Defence and Registry the possibility of the Defence using a secure office in its Belgrade Field Office. See T. 259-260; Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 307-308 (Confidential). The Chamber referred this matter to the Registry for further exploration and will therefore not further address this matter. See T. 259.

³² T. 255-256; Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 299-305 (Confidential).

³³ Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 302-303 (Confidential).

³⁴ T. 255; Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 301 (Confidential).

³⁵ Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 308 (Confidential).

³⁶ Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 308-309 (Confidential). The Chamber instructed the Prosecution to file a report at the end of April 2012, the then date for the completion of Rule 68 (i) disclosure, indicating whether the indices descriptions had been augmented and, if not, providing a timeline for when it would be complete. See T. 260-261; Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 311 (Confidential). On 26 April 2012, the Chamber granted an extension of the deadline for Rule 68 (i) disclosure from 30 April 2012 to 8 June 2012. See T. 348. On 1 May 2012, the Prosecution provided a timeline for completion of the Case Specific Collection indices, in which it indicated that the organization of the Case Specific Collection indices could be finalized approximately seven weeks after the Rule 68 (i) disclosure deadline. See Eighth Prosecution Report on Pre-Trial Preparations, 1 May 2012, paras 23-25.

³⁷ 2 December 2011 Response, para. 12.

³⁸ 2 December 2011 Response, para. 13.

impeding its search abilities.³⁹ The Prosecution confirms that it is possible that some of the earlier Major Disclosure Packages were uploaded onto the Hard Drive in a different format, but most were provided in PDF or TIFF format.⁴⁰ The Prosecution states that it is willing to provide alternative formats of already disclosed documents to facilitate the Defence work, but maintains that this is not required by the Rules and is only done as a “courtesy”.⁴¹

5. In relation to the requested relief, the Defence renews its prior requests, in particular those contained in its 9 February 2012 further submission, to wit: 1) re-disclosure of all documents disclosed on the Hard Drive in either PDF or TIFF format; and 2) postponement of the trial until all Meta-data issues have been resolved (“Defence Consolidated Requests for Relief”).⁴² The Prosecution renews its request that the Chamber “affirm” its Disclosure Procedure as being in compliance with the Appeals Chamber’s *Bralo* and *Karemera* Decisions (“Prosecution Certification Request”).⁴³

II. APPLICABLE LAW

6. Rule 68 of the Rules, in relevant part, provides:

- (i) the Prosecutor shall, as soon as practicable, 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;
- (ii) without prejudice to paragraph (i), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically.

7. The Prosecution has a positive and continuous obligation to disclose potentially exculpatory materials under Rule 68 (i) of the Rules.⁴⁴ With respect to placing documents on the EDS, Rule 68 (ii) allows the Prosecution to do so “without prejudice to paragraph (i)”. The EDS does not make Rule 68 (i) documents “reasonably accessible as a general matter” to the Defence, nor does it allow the Prosecution to assume that the Defence knows about all material included therein, to the extent that the Prosecution could be relieved of its Rule 68 (i) obligations.⁴⁵ The Appeals Chamber has suggested that the Prosecution should “either separate a special file for Rule 68 material or draw the

³⁹ See 2 March 2012 Defence Submission, para. 29.

⁴⁰ T. 266.

⁴¹ 10 February 2012 Response, Annex A

⁴² T. 263-265.

⁴³ T. 277-279.

⁴⁴ *Bralo* Decision, para. 29.

⁴⁵ *Bralo* Decision, para. 35, citing *Karemera* Decision, para. 15.

attention of the Defence to such material in writing and permanently update the special file or the written notice".⁴⁶

III. DISCUSSION

8. The Chamber considers that it is not appropriate to issue a "certification" or to "affirm" the Disclosure Procedure as being in compliance with the Tribunal's case law as set out in the *Bralo* and *Karemera* Decisions. In this respect, the issue is whether or not documents are, in fact, disclosed to the Defence in accordance with the Tribunal's jurisprudence, not the Prosecution's wishes. Therefore, the Chamber declines to affirm the Disclosure Procedure as requested in the Prosecution Certification Request.

9. The Defence alleges that the Prosecution has not met its disclosure obligations in relation to three issues: 1) providing Meta-data; 2) the short descriptions of the Case Specific Collection indices; and 3) in disclosing documents on the Hard Drive in a format other than TIFF or PDF. All these complaints relate to the issue of whether the Prosecution's EDS disclosure makes documents reasonably accessible to the Defence, specifically whether the Defence can efficiently conduct its own searches on the disclosed material.

10. Neither Rule 68 nor the Tribunal's case law require the Prosecution to provide Meta-data, to further augment the short description of the Case Specific Collection indices, or to provide a second parallel disclosure of documents on Hard Drive. Accordingly, in relation to the three issues raised, the Chamber finds that the Defence has not shown that the Prosecution is not in compliance with its disclosure obligations.

11. The Chamber highlights that the *Bralo* and *Karemera* Decisions address the Prosecution's responsibilities in relation to the manner of disclosure, pursuant to Rule 68 (i), of potentially exculpatory materials which have been placed on the EDS. Neither the *Bralo* or *Karemera* Decision address the adequacy or lack thereof, of the EDS itself as a Tribunal-wide system in terms of searches by the relevant Defence teams and/or accused of materials disclosed therein. However, the Chamber is cognizant of the practical concerns raised by the Defence in relation to the three issues discussed above, which, in the Defence view, appear to be deficiencies within the Tribunal's EDS that allegedly impede its work. Therefore, though not explicitly required by the Rules or the Tribunal's case law, the Chamber will consider whether, in the interests of justice, it should nonetheless order the Prosecution to provide the requested Meta-data, augment the short

⁴⁶ Ibid.

descriptions, and re-disclose documents on Hard Drive; or to grant additional time to the Defence as an alternative relief.

12. In relation to Meta-data, the Chamber takes into account the fact that Meta-data have been continuously provided in the Spreadsheets on the Hard Drive, that the Prosecution has voluntarily continued to provide parallel Hard Drive disclosure with each Major Disclosure Package, and that the Prosecution has also voluntarily agreed to input the requested Meta-data into the EDS, a project which both parties acknowledge has already begun. In this respect, the Chamber considers that the inconvenience the Defence complains about, i.e. the need to open each document to discover its content, is considerably reduced by the Prosecution's provision of the Spreadsheets with each Hard Drive. In relation to the short descriptions, the Chamber takes into account that the Prosecution has already augmented the short descriptions upon learning of this concern and that each Collection also contains an information box, which provides additional information. The Chamber also considers that the Prosecution has voluntarily taken upon itself to further augment the short descriptions of the Case Specific Collection indices once each collection is finalized. Finally, as to the requested re-disclosure of all previously disclosed materials on the Hard Drive, the Chamber understands this request to relate to the Defence being provided with searchable versions of documents on the Hard Drive in line with Rule 68 (ii) of the Rules. The Chamber considers that by also providing these versions through the EDS, these documents are already available in a searchable format. The Chamber also takes into account that the vast majority of these documents were originally provided on Hard Drive in TIFF or PDF format and that the Prosecution has stated its willingness to re-disclose specific documents on Hard Drive in an alternative format, upon a Defence request. Based on the above considerations, the Chamber finds that there is no need to order the requested relief in the interests of justice.

13. The Chamber has closely followed and encouraged the parties' discussions in terms of resolving any ongoing EDS disclosure concerns, whether of a practical nature or otherwise, during the pre-trial stage. In this respect, the Chamber notes the various accommodations that the Prosecution has voluntarily taken upon itself to provide, upon learning of the Defence concerns. The Chamber clarifies that nothing stated above should be interpreted as the Chamber relieving the Prosecution of those tasks that it has voluntarily undertaken to do in order to facilitate the Defence's work. The Chamber strongly encourages the Prosecution to continue to assist the Defence in terms of accessing and searching the EDS, and considers that it is within the Prosecution's discretion to determine the appropriate allocation of resources for completion of these tasks along with its other obligations.

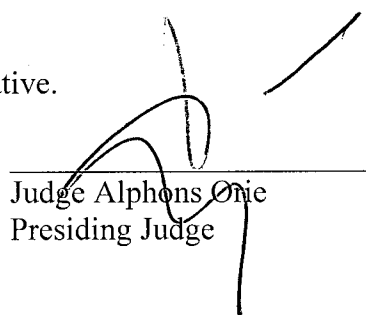
IV. DISPOSITION

14. For the foregoing reasons and pursuant to Rule 68 (i) and (ii) of the Rules, the Chamber

DENIES the Defence Consolidated Requests for Relief; and

DECLINES to affirm the Disclosure Procedure as requested in the Prosecution Certification Request.

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



Judge Alphons Orie
Presiding Judge

Dated this Twenty-sixth day of June 2012
At The Hague
The Netherlands

[Seal of the Tribunal]