



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-96-21-T  
Date: 26 September 1996  
Original: English and French

**IN THE TRIAL CHAMBER**

**Before:** Judge Gabrielle Kirk McDonald, Presiding  
Judge Ninian Stephen  
Judge Lal C. Vohrah

**Registrar:** Mrs. Dorothee de Sampayo Garrido-Nijgh

**Decision of:** 26 September 1996

**PROSECUTOR**

v.

**ZEJNIL DELALIĆ**  
**ZDRAVKO MUCIĆ** also known as "PAVO"  
**HAZIM DELIĆ**  
**ESAD LANDŽO** also known as "ZENGA"

**DECISION ON THE MOTION BY THE ACCUSED ZEJNIL DELALIĆ  
FOR THE DISCLOSURE OF EVIDENCE**

**The Office of the Prosecutor:**

Mr. Eric Ostberg

Ms. Teresa McHenry

**Counsel for the Accused:**

Ms. Edina Rešidović, for Zejnir Delalić  
Mr. Branislav Tapušević, for Zdravko Mucić  
Mr. Salih Karabdić, for Hazim Delić  
Mr. Mustafa Braković, for Esad Landžo

## I. INTRODUCTION

Pending before 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 Former Yugoslavia since 1991 (“the International Tribunal”) is a Motion for the Disclosure of Evidence (“the Motion”) filed on behalf of the accused Zejnil Delalić on 10 June 1996, together with an oral request by counsel for the accused for a determination of the parameters of Sub-rule 66(B) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”). The Motion was responded to by the Office of the Prosecutor (“the Prosecution”) on 28 June 1996. The parties presented oral arguments with regard to the Motion on 23 July 1996.

**THE TRIAL CHAMBER, HAVING CONSIDERED** the written submissions and the oral arguments of the parties,

**HEREBY ISSUES ITS DECISION.**

## II. DISCUSSION

### A. The Pleadings

1. The request for guidelines from the Trial Chamber for the application of Rule 66 is a recurring one. The issue first arose during the status conference of 29 May 1996, during which counsel for Zejnil Delalić orally invoked Sub-rule 66(B) with a request that the Prosecution submit to the Defence all of the documents in its possession. Counsel for Zejnil Delalić at that time also acknowledged her responsibility to allow the Prosecution to review the evidence that the Defence intends to use at trial as required by Sub-rule 67(C). On 10 June 1996, counsel for Zejnil Delalić filed a written submission reiterating her request to be permitted to inspect all books, documents, statements and other tangible objects in the Prosecution's custody and control. The Prosecution responded on 28 June 1996 noting that, other than a specific request that had already been addressed by the Trial Chamber<sup>1</sup>, counsel for Zejnil Delalić had not specified any evidence material to the preparation of the Defence that had not been supplied by the Prosecution. The Prosecution also noted that the accused was given a copy of the material which accompanied the request for confirmation of the indictment at the time of his initial appearance and, within three days, at the request of the accused, the Registrar translated all the supporting material into the language of the accused. The accused also received from the Prosecution a copy of the video-tape of his interview with its investigators and the transcript of the interview in Serbo-Croatian. An English transcript was to be completed on 28 June 1996. At a status conference held on 23 July 1996, the parties indicated that although they had engaged in extensive discussions about this and other pre-trial matters since the last status conference, questions remained regarding the limitation of evidence material to the preparation of the Defence and by whom the determination of materiality is to be made.

2. During a status conference held on 24 July 1996 with Hazim Delić and Esad Landžo, Zejnil Delalić's co-accused, a similar issue arose. Counsel for Esad Landžo and the Prosecution

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<sup>1</sup> The Defence requested from the Prosecution a copy of the interview of a co-accused, Zdravko Mucić. The Prosecution asked for a delay in the production, which the Defence refused. The dispute was then brought before the Trial Chamber, which granted a fourteen-day delay.

stated their different interpretations of Sub-rule 66(A) and indicated a desire to have judicial guidance with regard to Sub-rule 66(B). It has become clear to the Trial Chamber that, because of the opposing positions regarding the meaning of these Sub-rules, there is a general need for their interpretation.

## B. Analysis

3. This Decision is concerned with Rule 66, which is entitled *Disclosure by the Prosecutor*. It provides:

(A) The Prosecutor shall make available to the defence, as soon as practicable after 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 or from prosecution witnesses.

(B) The Prosecutor shall on request, subject to Sub-rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his 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.

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-rule (B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

A request by the Defence pursuant to Sub-rule 66(B) triggers Sub-rule (C) of Rule 67, which is entitled *Reciprocal Disclosure*:

(C) If the defence makes a request pursuant to Sub-rule 66(B), the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

4. On 24 July 1996, the Prosecution indicated that it does not read Sub-rule 66(A) as requiring the disclosure of every statement obtained from every person regardless of whether or not that person will be a witness. Instead, it construes Sub-rule 66(A) as requiring it to turn over all supporting material as well as prior statements of only those witnesses that the Prosecution intends to call at trial. This interpretation is correct. Sub-rule 66(A) requires the disclosure of three types of material. The first, “copies of supporting material which accompanied the indictment”, is very clear and does not leave room for debate. This proviso includes all of the supporting material, including any witness statements, that was given to the confirming Judge. The second type of material is “all prior statements obtained by the Prosecutor from the accused”. This part of the Rule requires the Prosecution to disclose all statements of the accused that it has in its possession. This is a continuing obligation. The final component of this Sub-rule provides that the Prosecution must reveal to the Defence “all prior statements obtained by the Prosecutor . . . from prosecution witnesses.” Accordingly, once the Prosecution makes a determination that it intends to call an individual as a witness at trial, it is obliged to disclose, “as soon as practicable”, any statement taken prior to the time that the witness testifies at trial. This obligation on the Prosecution is also continuing and, as the Prosecution decides on each witness, it must disclose the prior statements of that witness. In summary, Sub-rule 66(A) requires the Prosecution to disclose to the Defence all supporting material that accompanied the indictment at confirmation, all prior statements obtained by the Prosecution from the accused, and all prior statements obtained by the Prosecution from those whom it intends to present at trial.

5. The Defence contends that there is confusion surrounding the meaning of Sub-rule 66(B), which provides that the Prosecution must, on the Defence’s request, allow the Defence access to “any books, documents, photographs and tangible objects in his custody or control” that fit into three categories: (1) those that are material to the preparation of the defence; (2) those that are intended for use by the Prosecution as evidence at trial; and (3) those that were obtained from or belonged to the accused. At the status conference on 23 July 1996, the Trial Chamber indicated - with the parties’ implicit agreement - that the Prosecution clearly has the responsibility to turn over for inspection all evidence in the third category. In regard to the second category, the Prosecution indicated that it was in the process of providing the Defence with material that it intends for use at trial, and agreed that this is a continuing obligation. Thus,

the remaining dispute is concerned with, as it was framed at the status conference, the range of evidence that is “material to the preparation of the defence”.

6. The Rules provide no guidance regarding the process of determining the materiality of evidence. However, Sub-rule 66(B) is substantially similar to Rule 16(a)(1)(C) of the United States’ Federal Rules of Criminal Procedure, which provides:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant’s defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belonged to the defendant.

Accordingly, interpretations of the United States rule as well as a review of its application will provide some guidance in analysing Sub-rule 66(A).

7. The significant jurisprudence in the United States federal courts on the scope of “materiality” demonstrates that it is generally accepted that to be material, the requested information must have “more than . . . [an] abstract logical relationship to the issues.” *See, e.g. United States v. Ross*, 511 F.2d 757, 762 (U.S. Ct. App. 5th Cir.), *cert. denied* 423 U.S. 836 (U.S. Supreme Court 1975). The requested evidence must be “significantly helpful to an understanding of important inculpatory or exculpatory evidence”; it is material if there “is a strong indication that . . . it will ‘play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.’” *United States v. Jackson*, 850 F. Supp. 1481, 1503 (U.S. Dist. Ct. D. Kan. 1994), *quoting United States v. Lloyd*, 992 F.2d 348, 351 (U.S. Ct. App. D.C. Cir. 1993). In the British system, the test of materiality was adopted by the Court of Appeal in *R v. Keane*, 99 CR. App. R. 1, which similarly defines disclosable matter as

that which can be seen on a sensible appraisal by the prosecution;

(1) to be relevant or possibly relevant to an issue in the case;

- (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
- (3) to hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2).

8. The Advisory Committee notes to the United States rule which reflect the discussion of the drafters of the rule are also instructive. The notes indicate that the first category - items “material to the preparation of the defence” - creates a residual classification that requires a preliminary showing of materiality. However, the Committee noted that some items are nearly always material without a special showing:

[L]imiting the rule to situations in which the defendant can show that the evidence is material seems unwise. . . . For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant.

Advisory Committee’s Notes on United States Fed. Rule Crim. Proc. 16, 18 U.S.C.A. p. 762. As with the United States rule, it is obvious that the Prosecution has the role of giving the evidence that falls within the second and third categories of Sub-rule 66(B) to the Defence on request. There is little room for speculation regarding that which the Prosecution intends to use at trial and that which was taken from the accused. As outlined above, however, this responsibility is not clearly delineated for those items deemed material to the preparation of the Defence, thus raising the issue of the responsibility for making the determination of materiality. A United States District Court Judge aptly framed the issue as follows:

The phrase “material to the preparation of the defendant’s defense” is one that causes practical problems on both sides of the discovery equation. On the one hand, a defendant’s counsel cannot know in most cases the precise nature of all the documents that should be available, but the defence counsel is going to be hard pressed to specifically argue materiality of individual documents. On the other hand, it is equally clear that the discovery rules do not require “open file” discovery with the defendant being allowed to browse at will through the prosecution files. [Citation omitted.] Moreover, a good deal of inculpatory evidence will have already been turned over as evidence that the government will be using in its case-in-chief. The problem here is to define “materiality” in such a way that it does not merely duplicate other discovery information definitions. Rule 16(a)(1)(C) was not intended to impose a completely redundant discovery obligation.

*United States v. Liquid Sugars, Inc. & Mooney*, 158 F.R.D. 466 (U.S. Dist. Ct. E.D. Cal. 1994).

9. As articulated in the British rule (*see* ¶ 7 *supra*), as a threshold matter, the Prosecution is initially the party responsible for deciding what evidence it has in its possession that may be material to the preparation of the Defence, by virtue of the simple fact that it is the party with possession of the evidence. If the Defence believes that the Prosecution has withheld evidence material to its preparation, it can challenge the Prosecution by reasserting its right to the evidence. At that point, there are three alternatives for the Prosecution. The Prosecution can: (1) hand over the requested evidence; (2) deny that it has the requested evidence in its possession; or (3) admit that it has the evidence but refuse to allow the Defence to inspect it. Only if there is a dispute as to materiality should the Trial Chamber become involved and act as a referee between the parties in order to make this determination. When presenting this issue to the Trial Chamber, the Defence should be guided by the above definitions of materiality. The Defence, however, may not rely on conclusory allegations or a general description of the information, but must make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecution. *See United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990).

10. In this case, the Defence has noted its desire to have access to *all* documents and other objects within the Prosecution's custody and control having to do with the accused or Čelebići camp on the basis that they are all material to its preparation. In its response to the Motion, the Prosecution indicated that it has fully complied with the provisions of Rule 66 and intends to continue to do so. The Defence has failed to identify specific material that the Prosecution has within its custody and control to which it has not given the Defence access. Given the absence of a specific identification of material evidence that the Defence alleges the Prosecution has withheld, it is inappropriate for the Trial Chamber to intervene at this time.

11. The principles set out in this Decision shall apply to all disclosure to be made in this matter in respect of all four accused.

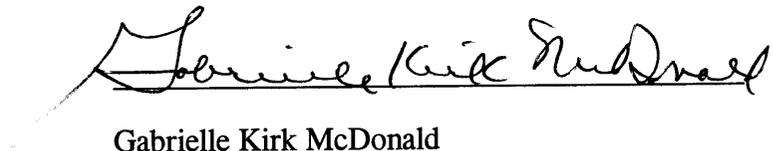
### III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Defence and

**PURSUANT TO RULE 54,**

**HEREBY DENIES THE MOTION** for discovery under Sub-rule 66(B).

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



Gabrielle Kirk McDonald

Presiding Judge

Dated this twenty-sixth day of September 1996

At The Hague

The Netherlands

[Seal of the Tribunal]