



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: 11 January 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: 11 January 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S TWENTY-NINTH 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-Ninth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential annexes on 2 December 2010 (“Twenty-Ninth Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In a decision issued on 2 November 2010, the Chamber emphasised that the pre-trial disclosure obligations of the Office of the Prosecutor (“Prosecution”) under Rule 66(A)(ii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) required it to disclose witness statements of all its witnesses, including Rule 92 *bis* witnesses whose written evidence was admitted *in lieu* of oral testimony, in accordance with the deadlines set by the pre-trial Judge.¹ Given the failure of the Prosecution to meet the 7 May 2009 deadline set by the pre-trial Judge, the Chamber ordered the Prosecution to complete by 30 November 2010 “all searches for and resulting disclosure of Rule 66(A)(ii) statements which relate to Rule 92 *bis* witnesses”.²

2. In the Twenty-Ninth Motion, the Accused argues that there have been violations of Rule 66(A)(ii) of the Rules by the Prosecution in relation to the disclosure of material to him on 30 November 2010 and 1 December 2010. Specifically, the Accused makes reference to the disclosure by the Prosecution of 86 additional statements of 52 Rule 92 *bis* witnesses, 10 additional statements of nine Prosecution witnesses “who are scheduled to give live testimony” and one additional statement of witness Tomasz Blaszczyk who has already testified in this case.³ The Accused requests a finding that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of these 97 statements.⁴

3. The Accused asserts that the failure by the Prosecution to comply with the 7 May 2009 deadline “for disclosure of all witness statements was deficient, and its representation that it was ready for trial in September 2009 was gravely in error”.⁵ He argues that the newly disclosed statements from the 52 Rule 92 *bis* witnesses will need to be reviewed by his defence team to determine whether they contain additional information which would form a basis to seek reconsideration the Chamber’s decisions to admit this evidence pursuant to Rule 92 *bis*, to

¹ Decision on Accused’s Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010 (“Decision on Eighteenth to Twenty-First Disclosure Violation Motions”), para. 35.

² Decision on Eighteenth to Twenty-First Disclosure Violation Motions, para. 45.

³ Twenty-Ninth Motion, paras. 1-3.

⁴ Twenty-Ninth Motion, paras. 1-3.

request calling the affected witnesses for cross-examination, or to interview the witnesses to obtain supplemental statements.⁶ According to the Accused, this task will be difficult given the ongoing demands of preparing for upcoming witnesses.⁷ To allow his team to complete this review, he requests a one-month suspension of the trial “after the completion of the Sarajevo and hostages components, and before the commencement of the municipalities component”, on the basis that the “vast majority” of the affected witnesses pertain to the municipalities component of the case.⁸

4. In addition, the Accused seeks the exclusion of the testimony of seven of the nine witnesses affected by this late disclosure who are scheduled to give *viva voce* testimony, on the basis that there have been multiple prior disclosure violations with respect to these witnesses.⁹ He also seeks the exclusion of Ibro Osmanović’s (KDZ230) testimony on the basis that the recently disclosed material pertaining to him is a 141-page transcript of prior testimony given in 1995. The Accused states that there is “no excuse for failing to disclose this testimony and for burdening the defence with voluminous new disclosure in the middle of the trial”.¹⁰ He also repeats his submission that the volume of statements “missed” by the Prosecution and the number of affected witnesses demonstrates that the scope of the case is unmanageable and “violates his right to a fair trial”.¹¹

5. On 17 December 2010, the Prosecution filed the “Prosecution Response to Karadžić’s Twenty-Ninth Motion for Finding of Disclosure Violation and for Remedial Measures” (“Response to Twenty-Ninth Motion”). It submits that the Twenty-Ninth Motion should be dismissed on the basis that one of the statements, that belonging to KDZ477, had been previously disclosed on 9 May 2009, and that the Accused has failed to demonstrate any prejudice with respect to the late disclosure of the other 96 statements.¹² The Prosecution acknowledges that these 96 statements were identified after the implementation of additional measures to locate and disclose Rule 66(A)(ii) material, upon the order of the Chamber, and that they should have been disclosed earlier but “were missed due to administrative error or to oversight”.¹³

⁵ Twenty-Ninth Motion, para. 6.

⁶ Twenty-Ninth Motion, para. 6.

⁷ Twenty-Ninth Motion, para. 6.

⁸ Twenty-Ninth Motion, para. 8.

⁹ Twenty-Ninth Motion, paras. 9-11. The affected witnesses are Evert Albert Rave, KDZ155, Jose Barayabar, KDZ080, KDZ477, Momir Nikolić, and Paul Groenewegen.

¹⁰ Twenty-Ninth Motion, para. 12.

¹¹ Twenty-Ninth Motion, para. 13.

¹² Response to Twenty-Ninth Motion, paras. 1-2.

¹³ Response to Twenty-Ninth Motion, para. 3.

6. The Prosecution submits, however, that the failure by the Accused to demonstrate prejudice with respect to this late disclosure precludes the granting of any remedy and also means that the Accused cannot claim that there has been a fair trial violation.¹⁴ In support of this submission the Prosecution argues that the Accused does not yet need to prepare for the cross-examination of 54 of the affected witnesses given that 49 of them are Rule 92 *bis* witnesses, four are Rule 92 *quater* witnesses and one is a reserve witness.¹⁵ In addition, it submits that the materials disclosed are not lengthy, with a total length of approximately 648 pages, and that, therefore, there is no basis to suspend the trial for one month.¹⁶

7. The Prosecution also submits that while Tomasz Blaszczyk has already testified, he will be called to testify again which will give the Accused the opportunity to cross-examine him on the three-page additional statement if required.¹⁷ In relation to the remaining eight witnesses who will give *viva voce* evidence, the Prosecution submits that the material disclosed was not lengthy, with a total of approximately 123 pages, and was “disclosed well in advance of the witnesses’ testimony”.¹⁸

8. The Prosecution further argues that the Accused’s request for the exclusion of the testimony of eight of the witnesses should be dismissed on the basis that he has not suffered prejudice and “the extreme remedy of exclusion of probative evidence would be pre-mature, disproportionate, unnecessary and contrary to the interests of justice”.¹⁹ It stresses that the evidence of each of the witnesses is probative and relevant, necessary for its case against the Accused and can assist the Chamber.²⁰ Of the witnesses whose testimony the Accused seeks to exclude, the Prosecution notes again that there was no disclosure violation with respect to KDZ477, KDZ155 is a reserve witness, and of the remaining witnesses in the current witness calling order the earliest is scheduled to be the 118th witness to testify.²¹ In addition, the Prosecution notes that the materials disclosed are not lengthy.²²

¹⁴ Response to Twenty-Ninth Motion, para. 4.

¹⁵ Response to Twenty-Ninth Motion, para. 6.

¹⁶ Response to Twenty-Ninth Motion, paras. 6, 11.

¹⁷ Response to Twenty-Ninth Motion, para. 5.

¹⁸ Response to Twenty-Ninth Motion, para. 7. The affected witnesses are 149th, 201st, 118th, 189th, 72nd, 215th, 197th and 173rd in the current witness calling order. Note that this does not include the statement of KDZ477 whose statement had already been disclosed by the Prosecution in May 2009.

¹⁹ Response to Twenty-Ninth Motion, para. 8.

²⁰ Response to Twenty-Ninth Motion, para. 9.

²¹ Response to Twenty-Ninth Motion, para. 10. The Chamber notes that in January 2011 the Prosecution is scheduled to call witnesses who are 48th to 58th in the current witness calling order.

²² Response to Twenty-Ninth Motion, para. 10.

II. Applicable Law

9. 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 2009.²³

10. 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.²⁴

III. Discussion

11. The Chamber has already emphasised that the Prosecution’s obligation to disclose all Rule 66(A)(ii) material “clearly extends to the witness statements of Rule 92 *bis* witnesses, whose written evidence is admitted *in lieu* of oral testimony” and to “reserve witnesses”.²⁵

12. It follows that the statements referred to in the Twenty-Ninth Motion should have been disclosed in accordance with the 7 May 2009 deadline set by the pre-trial Judge, or, if they post-date that deadline, as soon as possible after they came into the Prosecution’s possession. Therefore, with the exception of the one statement which had already been disclosed to the Accused by the Prosecution in May 2009, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of the documents referred to in the Twenty-Ninth Motion.²⁶

13. The Chamber has consistently recognised the additional burden placed on the Accused and his team as a consequence of the failure by the Prosecution to maintain an efficient and effective system for the timely review and disclosure of materials in accordance with the

²³ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

²⁴ *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, Appeals Judgement, 29 July 2004, para. 268.

²⁵ Decision on Eighteenth to Twenty-First Disclosure Violation Motions, paras. 35, 45. The Prosecution was ordered to complete the search for and disclosure of this material by 30 November 2010.

²⁶ While the Prosecution only received clearance from the Rule 70 provider to disclose two of those documents on 1 December 2010, that does not excuse the original delay in identifying these documents and seeking consent for their disclosure: Decision on Accused’s Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures, 20 July 2010, para. 28 (“Decision on Third to Sixth Motions”).

Rules.²⁷ Conscious of that burden, the Chamber has taken steps to ensure that this does not impact on the Accused's right to a fair trial. In that regard, the Prosecution has been ordered to take concrete measures to ensure that the pattern of disclosure violations is brought to an end,²⁸ and the Chamber has suspended the trial to allow the Accused and his team time to review large volumes of material which have been disclosed to him where it was considered necessary.²⁹

14. While the Accused and his team have a legitimate interest in being able to review the recently disclosed statements from Rule 92 *bis*, Rule 92 *quater* and reserve witnesses, the Accused does not require additional time to specifically prepare for the cross-examination of these witnesses. Indeed, the Chamber has already held that the review of additional statements of Rule 92 *bis* and reserve witnesses is not time critical and does not warrant a suspension of proceedings before the commencement of the aspect of the Prosecution's case dealing with the alleged takeover of municipalities in Bosnia and Herzegovina.³⁰ The Chamber is also satisfied that the Accused and his team can conduct and complete their review of this batch of documents with a total length of 648-pages on a rolling basis and incorporate them if necessary into his ongoing trial preparation without the need for a further suspension of the proceedings.

15. The Chamber has always maintained that it would consider imposing penalties on the Prosecution, including the exclusion of testimony, if its failure to meet the deadlines for disclosure became a "material issue"³¹ and if there was "demonstrable prejudice to the Accused".³² Under Rule 89 of the Rules, the Chamber "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial".³³ It has been recognised that

²⁷ Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010, para. 12 ("Reconsideration Decision"); Decision on Accused's Motion to Set Deadlines for Disclosure, 1 October 2009, para. 14 ("Deadlines for Disclosure Decision"); Decision on the Accused's Motion for Postponement of Trial, 26 February 2010, para. 30; Decision on Accused's Seventh and Eighth Motions for Finding of Disclosure Violations and for Remedial Measures, para. 22 ("Decision on Seventh and Eighth Motions"); 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").

²⁸ Decision on Accused's Second Motion for Finding Disclosure Violation and for Remedial Measures, 17 June 2010, paras. 15 ("Decision on Second Motion"); Decision on Third to Sixth Motions, paras. 45-47; Decision on Accused's Ninth and Tenth Motions for Finding of Disclosure Violation, 26 August 2010, para 23.

²⁹ Hearing, T. 8907 (3 November 2010); Decision on Accused's Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 29 September 2010 para. 7, citing the Chamber's oral decision, 13 September 2010, T. 6593-T. 6594; Decision on Modalities of Rule 66(A)(ii) Disclosure, 27 April 2009, para. 9.

³⁰ Decision on Eighteenth to Twenty-First Disclosure Violation Motions, para. 44.

³¹ Decision on Second Motion, paras. 13, 17; Deadlines for Disclosure Decision, para. 13.

³² Decision on Accused's Eleventh to Fifteenth Motions for Finding of Disclosure Violation and for Remedial Measures, 24 September 2010, para. 45

³³ Decision on Second Motion, para. 16; Decision on Seventh and Eighth Motions, para. 17.

the exclusion of relevant evidence “is at the extreme end of a scale of measures available to the Chamber in addressing prejudice caused to an accused in the preparation of his defence”.³⁴

16. The Chamber is aware of the volume of documents involved in a case of this size and scale. While the Accused has a legitimate right to have access to these documents in accordance with the Rules, when a breach of those disclosure Rules has been found, it is a question of whether he has an adequate opportunity to review these documents and incorporate them, where necessary, into his ongoing preparation for the trial.³⁵ Having considered the volume of material disclosed in this batch of disclosure, the timing of the last suspension in proceedings from 6 November to 6 December 2010, and the fact that the trial was in recess from 17 December 2010 to 13 January 2011, the Chamber is satisfied that the Accused and his team will have had sufficient time to review this material and that he has not been prejudiced by its late disclosure. It follows that in the absence of demonstrated prejudice there is no basis on which to exclude the evidence of the eight witnesses identified by the Accused.³⁶ The Chamber will continue to be vigilant in ensuring that this pattern of disclosure violations is brought to an end, that future violations do not cause prejudice to the Accused or compromise in any way his right to a fair trial, and that any delays in this case which are the product of the Prosecution’s inadequate disclosure regime are documented.

17. With regard to the witnesses affected by this late disclosure who are scheduled to appear to give their evidence *viva voce* or for cross-examination pursuant to Rule 92 *ter*, the Chamber considers it appropriate to order that they should not be called to testify before 1 April 2011. This is in the interests of ensuring that the Accused has sufficient time to review the disclosed material, and incorporate it, if necessary, into his cross-examination strategy and approach for the affected witnesses.

IV. Disposition

18. For the foregoing reasons, the Trial Chamber notes the disclosure violations identified above, pursuant to Rules 54, 66(A)(ii), and 68 *bis* of the Rules, and hereby **GRANTS** the Motion **IN PART**, and:

³⁴ *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-T, Decision on Defence Motion for Exclusion of Evidence and Delineation of the Defence Case, 26 March 2010, para. 9.

³⁵ Decision on Second Motion, para. 8; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution’s Motion to Amend Rule 65 *ter* Witness List and on Related Submissions, 22 April 2008, para. 16.

³⁶ Decision on Twenty-Second, Twenty-Fourth and Twenty Sixth Motions, para. 28; Decision on Accused’s Twenty-Seventh Disclosure Violation Motion, 17 November 2010, para. 14; *Prosecutor v. Lukić and Lukić*. Case No. IT-98-32/1-T, Decision on Milan Lukić’s Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B, 3 November 2008, para. 18.

- a) **ORDERS** that none of the witnesses affected by the late disclosure referred to in the Twenty-Ninth Motion should be called to testify before 1 April 2011;
- b) **DENIES** the Twenty-Ninth Motion in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this eleventh day of January 2011
At The Hague
The Netherlands

[Seal of the Tribunal]