



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-98-32/1-T

Date: 3 November 2008

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Christine Van den Wyngaert
Judge Pedro David

Registrar: Mr. Hans Holthuis

Decision of: 3 November 2008

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON MILAN LUKIĆ'S MOTION TO
SUPPRESS TESTIMONY FOR FAILURE OF TIMELY
DISCLOSURE WITH CONFIDENTIAL ANNEXES A
AND B**

The Office of the Prosecutor

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TRIAL CHAMBER III (“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 “Milan Lukic’s Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B”, filed on 30 September 2008 (“Motion”).

A. Introduction

1. On 25 September 2008, during the testimony of witness Zehra Turjačanin, the Defence for Milan Lukić (“Defence”) submitted that the Prosecution had failed to properly disclose a statement consisting of notes of an interview conducted with the witness in December 2000 (“Interview Notes”),¹ which the Defence had itself located on the Electronic Disclosure System (“EDS”).² The Prosecution responded in court that the Interview Notes had been properly disclosed to the Defence; a redacted version of the document had originally been disclosed in March 2004 and it had been placed on the EDS.³ The Prosecution asserted that witness Zehra Turjačanin had not been able to give any formal statement at the time of the interview.. In addition, the Prosecution stated that a videotaped interview conducted with the witness by an investigative judge in 1993 was also disclosed.⁴

2. The Motion further both elaborates on the submissions made by the Defence and the Prosecution in court on 25 September 2008 regarding the disclosure of the Interview Notes and raises further allegations of late disclosure of a police report and related materials concerning one of the incidents in the Indictment to which this witness has testified, namely, the fire in Bikavac.⁵

B. Submissions

3. In the Motion, the Defence submits that the Interview Notes were first provided to it by the Prosecution on Monday, 22 September 2008 as part of “Batch 40” materials.⁶ It argues that: (a) the Interview Notes “characterize key information of a crime by an alleged witness”; (b) the Prosecution has been in possession of the Interview Notes for eight years and there is no reason for them not to have been disclosed earlier; (c) the Interview Notes were not included in the materials

¹ Motion, annex A.

² Hearing, 25 September 2008, T. 2322.

³ Hearing, 25 September 2008, T. 2322 – 2323, 2324, 2348.

⁴ Hearing, 25 September 2008, T. 2322 – 2323.

⁵ Motion, annex B.

⁶ Motion, para. 2.

relating to witness Zehra Turjačanin that were disclosed in mid-July 2008, although they were placed on the EDS.⁷

4. The Defence further submits that the Interview Notes should have been disclosed pursuant to Rule 66(A)(ii) of the Tribunal's Rules of Procedure and Evidence ("Rules"), and notes that the Prosecution listed the Interview Notes as a Rule 66(A)(ii) document in the "Batch 40 Index", which was supplied with the materials given to the Defence on Monday, 22 September 2008.⁸ The Defence also submits that if the Prosecution did not consider the Interview Notes to be Rule 66 material, they should have been treated as Rule 68 material.⁹ In that regard, it was not sufficient for the Prosecution to only put the Interview Notes on the EDS.¹⁰

5. With respect to the police report about the fire in Bikavac, the Defence argues that this was improperly disclosed on the evening of Wednesday, 24 September 2008, because it relates to witness Zehra Turjačanin but was disclosed as part of a package relating to Witness VG-119.¹¹ The Defence further questions the whereabouts of a "report from a doctor who examined Turjačanin", which is referred to in the police report but was not disclosed.¹²

6. The Defence submits that the disclosure of the Interview Notes and the police report must be seen in the context of disclosures that have taken place during the trial.¹³ It states that 24 batches of material consisting of thousands of pages of documents were disclosed in July, August and September 2008, nine of which were disclosed in September alone, and that, as a consequence of this "dumping of disclosure", the documents relating to witness Zehra Turjačanin "were disclosed and subsequently got swallowed in the sea of papers regarding the other witnesses for that week."¹⁴

7. According to the Defence, the pattern of disclosures has had a prejudicial impact on its ability to investigate properly matters relating to witness Zehra Turjačanin and to prepare an adequate defence. Therefore, it requests the Trial Chamber to: (a) suppress the testimony of witness Zehra Turjačanin; (b) take notice of "the late and untimely disclosures by the Prosecution and factor into the prior request for a recess between the Prosecution and Defence cases; (c) "[d]ictate whatever actions reasonable and necessary to ensure timely disclosures of all future witnesses."

⁷ Motion, para. 7.

⁸ Motion, para. 9.

⁹ Motion, para. 10. Note that in court on 25 September 2008, the Defence submitted at T.2323 that "clearly just from the notations related to the witness's identification of Mitar Vasiljević, his involvement in the evening of the Bikavac fire as well as many other things, [the statement of interview notes] is clearly exculpatory Rule 68 material [...]."

¹⁰ Motion, para. 12.

¹¹ Motion, para. 2.

¹² Motion, para. 2.

¹³ Motion, para. 3.

¹⁴ Motion, paras 3 – 6.

8. The Prosecution responded on 7 October 2008.¹⁵ In the Response, the Prosecution submits that the Interview Notes were available to the Defence on the EDS from 4 July 2008.¹⁶ In addition, the Prosecution disclosed a “courtesy copy” of the Interview Notes on Monday, 22 September 2008.¹⁷ As such, the Prosecution submits that “the Defence of Milan Lukić seeks to hold the Prosecution responsible for the Defence failure to read the document until they finally decided to ‘fish’ the EDS for mentions of Ms. Turjačanin on the morning of her testimony.”¹⁸

9. The Prosecution does not address whether or not the Interview Notes constitute Rule 66 material. However, it rejects the Defence assertion that they fall under Rule 68, submitting that the Defence did not provide *prima facie* evidence in support of this submission.¹⁹ The Prosecution further submits that the Defence has failed to demonstrate that it suffered prejudice and notes that cross-examination of the witness Zehra Turjačanin will continue “after a pause in her testimony of several weeks.”²⁰

10. With regard to the police report, the Prosecution argues that it was properly disclosed in association with Witness VG-119 because it records that the police took a statement from that witness and that they did not take a statement from Zehra Turjačanin. The Prosecution states that it is not in possession of the doctor’s report referred to in the police report or any other “relevant disclosable documents”.²¹ Witness VG-119 testified before the Trial Chamber on 1 and 2 October 2008.

11. The Prosecution submits that the disclosure issues concerning the Interview Notes and the police report should not be seen in the context of the disclosure relating to witnesses Drs Ewa Tabeau and John Clark, and Mirsad Tokača (the other witnesses who testified that week) because these matters have either been the subject of decisions by the Trial Chamber or the time for the Defence to object to any disclosure issues has passed.²² It argues that these Defence submissions “under the guise of providing context for the alleged disclosure issues in relation to Ms. Turjačanin [are] alarming” and should not be taken into consideration.²³ It further submits that the Defence has

¹⁵ See “Prosecution’s Responses to Milan Lukic’s Motion to Suppress Testimony of Zehra Turjačanin for Failure of Timely Disclosure and Request for Reconsideration or Certification to Appeal of 22 September 2008, 7 October 2008 (“Response”).

¹⁶ Note that in court, the Prosecution stated that the Interview Notes were disclosed in March 2004, see Hearing, 25 September 2008, T. 2322 – 2323, 2348. In paragraph 6 of the Response, however, the Prosecution said this had been incorrect.

¹⁷ Response, paras 1, 6.

¹⁸ Response, para. 7.

¹⁹ Response, para. 11.

²⁰ Response, paras 12 – 13.

²¹ Response, paras 8 – 9.

²² Response, paras 15 – 17.

²³ Response, para. 18.

“inappropriately persisted in the continual over-use of the workload argument as a broad ranging basis for Defence submissions on other matters.”²⁴

C. Discussion

12. Rules 66(A) and 68 of the Rules establish certain disclosure obligations of the Prosecution vis-à-vis the Defence. Both Rules are fundamental to a fair trial.²⁵ The first part of Rule 66(A)(ii) provides that the Prosecution shall disclose copies of the statements of all witnesses whom it “intends to call to testify at trial” within a time-limit prescribed by the Trial Chamber or the pre-trial Judge. The Appeals Chamber has held that the “usual meaning of a witness statement in trial proceedings is an account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.”²⁶

13. Under Rule 68 of the Rules, “the Prosecution shall, as soon as practicable, disclose to the Defence any material in which the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.” The obligation to disclose exculpatory material is an ongoing one. Subject to supervision by the Trial Chamber, it is incumbent upon the Prosecution to determine in good faith what material meets the Rule 68 disclosure requirements.²⁷

14. Rule 68 *bis* provides that the Trial Chamber may, *proprio motu* or at the request of either party, decide on sanctions to be imposed on either party for failure to comply with its disclosure obligations. The party requesting the sanctions must *inter alia* demonstrate *prima facie* the probable exculpatory nature of the materials.²⁸ With regard to the determination of what constitutes exculpatory material, “the general practice of the [...] Tribunal is to respect the Prosecution’s function in the administration of justice, and the Prosecution’s execution of that function in good faith.” Therefore, “[o]nly where the Defence can satisfy a Chamber that the Prosecution has failed

²⁴ See Response, paras 19 – 25.

²⁵ *Prosecutor v Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera’s interlocutory appeal, 28 April 2006 (“*Karemera Decision*”), para. 7; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on defence objection to Prosecution continued disclosure, 7 May 2004, p. 2.

²⁶ *Prosecutor v Tihomir 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.

²⁷ See for example *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 (“*Bralo Decision*”), para. 30; *Prosecutor v Radoslav Brdanin*, Case No. IT-99-36-A, Decision on appellant’s motion for disclosure pursuant to Rule 68 and motion for an order to the Registrar to disclose certain materials (“*Brdanin Decision*”), 7 December 2004, p. 3; *Prosecutor v Vojislav Šešelj*, Case No. IT-03-67-T, Decision on the Accused’s submission 390 and submission 392, 7 October 2008, para. 10.

²⁸ *Karemera Decision*, para. 13; *Bralo Decision*, para. 31; *Brdanin Decision*, p. 3.

to discharge its obligations should an order of the type sought be contemplated”, and such an order “is one that should only be made by a Chamber in very rare circumstances.”²⁹

15. The Prosecution was required to fulfil its Rule 66(A)(ii) disclosure obligations in respect of witness Zehra Turjačanin 30 days before the commencement of trial.³⁰ The date of 9 July 2008 for the start of trial was announced on 12 June 2008, that is, less than 30 days prior to commencement. Accordingly, all Rule 66(A)(ii) disclosure for Zehra Turjačanin should have been made by the Prosecution as soon as the trial date had been announced.³¹ The Prosecution submits that the Interview Notes were placed on the EDS on 26 July 2005 and were available to the Defence from the time they were informed of the identity of Zehra Turjačanin, which was on 4 July 2008.³²

16. The Interview Notes record Zehra Turjačanin’s recollections regarding events in Bikavac that relate to charges in the Indictment against both Accused, most particularly counts 13, 14, 15, 16 and 17. As such, they clearly fall within the meaning of “witness statement”, as characterised by the Appeals Chamber, under Rule 66(A)(ii). The Trial Chamber consequently holds that the Interview Notes should have been disclosed to the Defence by 9 June 2008. This finding also disposes of any need to address the arguments of the parties in relation to Rule 68.

17. Simply placing the Interview Notes on the EDS was not sufficient for the Prosecution to discharge its positive obligation under Rule 66(A)(ii). Similarly, and quite obviously, the provision of a “courtesy copy” to the Defence three days before Zehra Turjačanin was scheduled to testify was likewise insufficient. Moreover, the Trial Chamber considers that the provision of a courtesy copy cannot be considered as mitigating the Prosecution’s evident failure to comply with its disclosure obligations. The Chamber is of the opinion that the Prosecution’s failure to comply with its obligations is the more surprising in view of the particular importance of Zehra Turjačanin to the Prosecution’s case in relation to the Bikavac incident.

18. Nevertheless, while the Trial Chamber does not condone the Prosecution’s failure, the sanction requested by the Defence, that is, to suppress Zehra Turjačanin’s testimony, is not warranted in the circumstances of this case. At the same time, and also as a consequence of this witness’s importance to the Prosecution case, it is vital that the Defence have access to all her

²⁹ *Bralo* Decision, paras 31, 34 citing *Prosecutor v Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 262 and *Prosecutor v Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 45.

³⁰ Confidential Decision on Prosecution motion for protective measures, 5 November 2007. Note that the protective measure of delayed disclosure was not altered by the Trial Chamber’s subsequent decision regarding protective measures for Zehra Turjačanin: Confidential decision on Prosecution’s third motion for protective measures, 14 February 2008.

³¹ The date for trial was set during the Status Conference held on 12 June 2008, see T. 190. See also T.192, where the Prosecution confirmed that “within the next day or two we’ll meet our [disclosure] obligation as soon as possible.”

³² Response, paras 1, 6.

witness statements to enable it to adequately prepare its case in relation to her. The Trial Chamber considers that the most appropriate course of action would be to recall the witness after allowing sufficient time for the Defence to prepare and enable her to be cross-examined. However, in the circumstances, formally recalling Zehra Turjačanin is unnecessary; as she was unable to complete her testimony, she will be returning to the Tribunal in the week commencing 3 November 2008. The Trial Chamber notes that this has provided the Defence with approximately one month of additional time from when it became aware of the Interview Notes. The Trial Chamber considers this to be sufficient time in order to undertake any additional preparation that may be required and that cure any prejudice the Defence may have suffered due to the late disclosure.

19. With regard to the police report, the report mentions Zehra Turjačanin's name as a witness to the Bikavac fire and notes a report from a doctor who examined her. However, it also records VG-119 as a witness to the fire and states that the police took a statement from this witness. Given the type of information contained in the police report, the Trial Chamber considers that the Prosecution was justified in deciding to disclose the report in relation to Witness VG-119. Not all documents that refer to a specific witness are subject to disclosure under Rule 66 (A)(ii). The Trial Chamber is not seized of any complaint with respect to disclosure in relation to Witness VG-119 and therefore presumes the document to have been disclosed in a timely manner with regard to that witness. As such, the inclusion of the police report in "Batch 42", which was provided to the Defence on 24 September 2008, does not constitute "late disclosure".

20. The Defence also submits that as a result of receiving the police report a day before Zehra Turjačanin testified, it did not have time to investigate whether the doctor's report existed. The Defence has previously drawn to the attention of the Trial Chamber the obstacles that it considers it is facing in preparing an adequate defence for Milan Lukić. Where valid, the Trial Chamber has responded to those concerns. However, in this instance, the Trial Chamber is not convinced that the lack of time for investigation as perceived by the Defence can be seen to arise from the inclusion of the police report in Batch 42. As noted above, the Prosecution was not required to disclose the police report with other materials relating to witness Zehra Turjačanin and, in the absence of any submissions to the contrary, the Trial Chamber presumes that the police report has been available on the EDS system for some time.

21. With regard to the remaining Defence requests, the Trial Chamber recalls its scheduling order of 9 October 2008, in which the Trial Chamber ordered that the presentation of Sredoje Lukić's case will start on 20 November 2008, effectively two weeks from the anticipated close of the Prosecution case, and found that the revised schedule sufficiently addressed the concerns of the Defence of Milan Lukić regarding time to prepare its case. The Trial Chamber considered issues of

disclosure as raised by the Defence when reaching that conclusion. Therefore, the Trial Chamber considers that, when brought to its attention, it has taken notice of and acted upon any allegations of improper disclosure by the Prosecution and will continue to do so.

D. Disposition

22. For the foregoing reasons and pursuant to Rules 66, 68, and 68 *bis* of the Rules, the Trial Chamber hereby denies the Motion.

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



Judge Patrick Robinson
Presiding

Dated this third day of November 2008

At The Hague

The Netherlands

[Seal of the Tribunal]