



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-PT
Date: 1 October 2009
Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 1 October 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

Public

DECISION ON ACCUSED'S MOTION TO SET DEADLINES FOR DISCLOSURE

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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 “Motion to Set Deadlines for Disclosure”, filed publicly on 9 September 2009 (“Motion”), and hereby issues this decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to issue an order setting deadlines for the Office of the Prosecutor (“Prosecution”) to: 1) complete its disclosure of evidence pursuant to Rules 66(A)(ii), 66(B), and 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”); 2) file a “final, realistic exhibit list” pursuant to Rule 65*ter*; 3) file a motion, or motions, for the admission of documentary evidence from the bar table; and 4) file a witness list with the order of appearance of Prosecution witnesses.¹ The Accused further submits that, if the Chamber issues the requested order, the Prosecution should be required to show good cause before being allowed to use any material not disclosed by the appropriate deadline, and the Chamber should consider precluding the testimony of any witness affected by late disclosure.²

2. Also on 9 September 2009, the Chamber issued its Order Following Status Conference (“Order Following Status Conference”), inviting the parties, *inter alia*, to make submissions on all aspects of the procedure to be followed during trial by 28 September 2009.

3. On 17 September 2009, the Prosecution filed the “Prosecution’s Response to Karadžić’s Motion to Set Deadlines for Disclosure” (“Response”) opposing the Motion as partly premature, and stating that it is not in conformity with the Rules, or with the Tribunal’s practice and jurisprudence.³ Regarding the Accused’s request to set a deadline for disclosure pursuant to Rule 66(A)(ii), the Prosecution argues that this is unnecessary as the Chamber already ordered such disclosure to be completed by 7 May 2009, which deadline was complied with by the Prosecution, with the exception of few instances based on “valid reasons”.⁴ The Prosecution also argues that setting a deadline for Rule 66(B) disclosure is unworkable due to the fact that the Accused has requested “a considerable amount of materials related to a huge variety of issues which may be of importance in his defence case, but which appear to be only remotely relevant, at best, to the

¹ Motion, paras. 1–8.

² Motion, para. 9.

³ Response, para. 1.

⁴ Response, para. 2, referring to Order Following on Status Conference and Appended Work Plan, 6 April 2009, para. 7(1).

Prosecution case”, and that, “[a]lthough the Prosecution is working expeditiously on these disclosure requests, it can only provide materials on a rolling basis”.⁵ The Prosecution further adds that the Accused’s request for a deadline to be imposed for all Rule 68 disclosure is “contrary to appellate jurisprudence and established practice”, as Rule 68 disclosure is a continuous obligation, and cannot be subject to a deadline.⁶ The Prosecution additionally argues that there is no numerical limitation on its proposed exhibit list, and that the exhibit list it has provided is proportionate. It also opposes the setting of a deadline for the filing of a bar table motion or motions, and argues that it cannot be required, before or at the beginning of the trial, to file a list of all of its witnesses in the order of their appearance, covering the entire trial period.⁷

4. On 22 September 2009, the Accused filed his “Motion for Leave to Reply and Reply Brief: Motion to Set Deadlines for Disclosure” (“Reply”), seeking leave to reply to the Response “so that the disputed issues can be crystallized before the Trial Chamber decides them”.⁸ The Accused argues that the Response is a “demonstration of why this case is not ready for trial and why it is unreasonable to expect [the Accused] to be able to effectively participate in a trial which would commence on 19 October”,⁹ and that “the [P]rosecution cannot be ready for trial until it has fulfilled its disclosure obligations”.¹⁰

5. In particular, the Accused argues that he has received more than 1,500 documents (totalling more than 6,000 pages) after 7 May 2009, i.e. the date set as deadline by the Chamber for the completion of disclosure under Rule 66(A)(ii).¹¹ Furthermore, the Accused argues that Rule 66(B) items are needed for him to review and decide what to include in his opening statement, and for the cross-examination of Prosecution witnesses, and that he cannot prepare until the Prosecution has fulfilled its obligation to disclose “all items in its possession which are material to the preparation of his defence”,¹² thus, the trial should not commence until he has had a fair opportunity to receive and review all such material.¹³ Additionally, the Accused states that disclosure of material under Rule 68 “is fundamental to the fairness of proceedings before the Tribunal” and “as important as the obligation to prosecute”,¹⁴ and that the Prosecution has not completed its search for and

⁵ The Prosecution adds that it is intending to make submissions on the modalities of Rule 66(B) disclosure by September 28, 2009; Response, para. 4.

⁶ Response, para. 6.

⁷ See Response, paras. 7–12.

⁸ Reply, para. 1.

⁹ Reply, para. 2.

¹⁰ Reply, para. 9.

¹¹ Reply, paras. 3, 5.

¹² Reply, para. 10.

¹³ Reply, para. 11.

¹⁴ Reply, para. 18.

disclosure of such material currently in its possession.¹⁵ He submits that, simply because the obligation under Rule 68 is a continuing one, this does not relieve the Prosecution from the “duty to search for and produce Rule 68 material in a timely manner”,¹⁶ and without having received all of the exculpatory material in the current possession of the Prosecution he cannot be expected to make his opening statement or to cross-examine Prosecution witnesses.¹⁷ The Accused slightly modifies his position in relation to the provision by the Prosecution of a final exhibit list, and states that the Chamber should impose a deadline on the Prosecution for filing its revised exhibit list once its decision under Rule 73 *bis* has been made. Similarly, he states that the Chamber should set a deadline for the filing of bar table motions once issues on the admission of written evidence and the scope of trial have been determined by the Chamber.¹⁸ Finally, in relation to the order of witnesses, the Accused argues that, given the fact that the Prosecution “has not provided the slightest clue of the order of its . . . witnesses”, even a tentative list, which would be subject to change, would be useful to the Accused, and that there is no prejudice to the Prosecution from being required to share this information.¹⁹

6. On 28 September 2009, the Prosecution filed its “Prosecution Motion for Leave to File Sur-Reply and Sur-Reply to Karadžić Reply to Prosecution’s Response to Motion to Set Deadlines for Disclosure” (“Sur-Reply”) seeking leave to respond to the Reply in view of the fact that the Accused “makes additional requests in paragraph 6 and provides incorrect details in paragraphs 3 and 23.”²⁰

II. Applicable Law

A. Disclosure pursuant to Rules 66 and 68

7. Rules 66 and 68 establish certain disclosure obligations of the Prosecution *vis-à-vis* the Accused, and are fundamental to a fair trial.²¹ Rule 66(A)(ii) provides that the Prosecution shall “make available to the defence” (a) copies of all statements of the witnesses whom it intends to call to testify at trial; and (b) copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*, within the time-limit prescribed by the Trial Chamber or pre-trial judge. Under Rule 66(B), “the Prosecutor shall, on request, permit the defence to

¹⁵ Reply, para. 14.

¹⁶ Reply, para. 11.

¹⁷ Reply, para. 14.

¹⁸ Reply, paras. 20-21.

¹⁹ See Reply, paras. 20-25.

²⁰ Sur-Reply, para. 1.

²¹ *Prosecutor v. Lukić et al.*, Case No. I-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 (“*Lukić Decision*”), para. 15.

inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control" which: (i) are material to the preparation of the defence, or (ii) are intended for use by the Prosecution as evidence at trial, or (iii) were obtained from or belonged to the accused.

8. Rule 68(i), subject to the provisions of Rule 70, places an independent obligation upon the Prosecution to disclose to the defence, "as soon as practicable ... 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".

9. 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.

B. Lists of Prosecution Witnesses and Exhibits pursuant to Rule 65 *ter*

10. Rule 65 *ter* (E)(ii) and (iii) provides that the pre-trial Judge shall order the Prosecution, within a time-limit set by the pre-trial Judge and no less than six weeks before the Pre-Trial Conference, to file: (i) the list of witnesses the Prosecution intends to call, and (ii) the list of exhibits the Prosecution intends to offer, and serving on the defence copies of the exhibits so listed.

C. Admission of Evidence from the Bar Table pursuant to Rule 89

11. Rule 89(C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value", and thus allows generally for admission of evidence from the bar table, without the need to introduce it through a witness.²² A tendered piece of evidence has probative value if it displays sufficient indicia of reliability.²³

III. Discussion

A. Motions for Leave to Reply and Sur-Reply

12. The Trial Chamber considers that the Reply provides additional information which is relevant to that contained in the Response, and finds that it is in the interest of justice to grant leave

²² *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2009, para. 8; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E, 14 May 2007, para. 11.

²³ See *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 20 January 2008, para. 22; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on the Prosecution's Motion for Admission of Exhibits from the Bar Table, Motion to Amend the Bar Table Motion, and Oral Motion for Admission of Additional Exhibit, 14 March 2008, para. 15.

to the Accused to reply to the Response. However, the Chamber reminds the parties that there is no provision in the Rules allowing for sur-replies and that leave to file sur-replies is not granted as a matter of course but exceptionally. The Chamber is not satisfied that exceptional circumstances exist in relation to the Prosecution's proposed Sur-Reply and thus leave for its filing is denied and the Chamber will consequently not consider the information contained therein.

B. Rule 66(A)(ii)

13. The Chamber recognises that it is an essential element of Rule 66(A)(ii) that the disclosure of material falling under this Rule must occur within a specific time limit. In its "Order Following on Status Conference and Appended Work Plan", issued on 6 April 2009 ("6 April Order"), the Chamber issued a Work Plan by which it ordered the Prosecution to disclose all Rule 66(A)(ii) material to the Accused no later than 7 May 2009.²⁴ During a Status Conference held on 6 May 2009, the Prosecution stated it was confident that it would meet the 7 May disclosure deadline with the exception of audio files, for which it requested an extension of time; the Chamber granted an extension of time for ongoing disclosure of said material up until 30 June 2009.²⁵ During the Status Conference held on 3 June 2009, the Prosecution stated that it was on track to conclude the disclosure of audio files within the given deadline.²⁶ However, on 26 June 2009, the Prosecution filed a motion for an extension of time to disclose to the Accused audio files in BCS, and the Chamber granted that extension during a Status Conference held on 1 July 2009.²⁷

14. From the Prosecution Periodic Disclosure Reports filed as of 7 May 2009,²⁸ it appears that the Prosecution has disclosed more than 1,500 Rule 66(A)(ii) items to the Accused after the expiration of the 7 May deadline, many of which are not audio files. The Prosecution, while claiming to have complied with the 7 May deadline for disclosure, has given various reasons why these items were not disclosed on time.²⁹ The Chamber is concerned by the amount of Rule 66(A)(ii) material which was not disclosed until after 7 May. However, it recognises that there are various circumstances which might prevent the timely disclosure of this material, such as statements provided to the Prosecution, or transcripts of testimony given, after the deadline,

²⁴ 6 April Order, para. 7(1).

²⁵ Status Conference, T. 187–188 (6 May 2009). *See also* T. 189, where the Prosecution assured the Chamber that, in relation to disclosure, "everything else [was] on track".

²⁶ Status Conference, T. 266 (3 June 2009).

²⁷ The deadline granted by the Chamber was 10 July 2009; Status Conference, T. 325–326 (1 July 2009).

²⁸ Prosecution Periodic Disclosure Report, 15 June 2009; Prosecution Periodic Disclosure Report, 15 July 2009; Prosecution Periodic Disclosure Report, 17 August 2009; and Prosecution Periodic Disclosure Report, 15 September 2009 (together "Disclosure Reports").

²⁹ *See* Response, para. 2; Prosecution Periodic Disclosure Report, 15 July 2009, para. 1(b); Prosecution Periodic Disclosure Report, 17 August 2009, para. 1(b), and Prosecution Periodic Disclosure Report, 15 September 2009, para. 1(b).

materials relating to witnesses added to the Prosecution's witness list after the expiration of the deadline, and materials previously subject to delayed disclosure, and it was for this reason that it ordered that the parties should "make all reasonable efforts to adhere to the . . . Work Plan".³⁰ Nevertheless, the Chamber is not sympathetic to the Prosecution's late disclosure of items which "were being processed by other units of the OTP and which the team was not aware of or was not able to disclose for technical reasons".³¹

15. The principal issue for consideration here is whether a further deadline for the Prosecution to complete its Rule 66(A)(ii) disclosure is necessary or desirable. The Chamber is of the view that the disclosure of material falling under this provision should now be complete, with the exception of statements from witnesses who the Prosecution might seek to add to its witness list in the future, and any witness statements that remain subject to delayed disclosure. Indeed, the Prosecution has not submitted that there is any remaining Rule 66(A)(ii) material pending disclosure to the Accused apart from these two latter categories of witness statements. It is not, therefore, necessary nor feasible for the Chamber to impose a deadline for the disclosure of statements of witnesses that the Prosecution might seek to add to its witness list in the future or of witness statements that remain subject to delayed disclosure and that will be disclosed in due time. Consequently, the issue of whether a "penalty" should be imposed upon the Prosecution for failure to meet its disclosure deadlines is premature,³² and will be considered if it becomes a material issue. Nevertheless, the Chamber cannot rule out the possibility of precluding the admission in evidence of all or part of the testimony in relation to a witness whose statement or associated testimony has not yet been disclosed within the relevant Rule 66(A)(ii) material, absent the showing of good cause, which would fall to be determined and decided if the issue arises, and after considering all the relevant circumstances.

C. Rule 66(B) of the Rules

16. In the Motion, the Accused appears to request the Chamber to set a deadline for disclosure not only of Rule 66(B) material that he has already requested from the Prosecution, but for all material falling within the terms of this Rule. It is for the Accused to seek from the Prosecution documents that he believes to be "material to the preparation of the defence" as only he is in a position to know what those documents, or categories of documents, might be. Similarly, it is for the Accused to request to inspect material in the possession of the Prosecution that is intended for

³⁰ Order Following on Status Conference, para. 7(11); *see also* "Prosecution's Response to Karadžić's Motion on the Modalities of Rule 66(A)(ii) Disclosure", 22 April 2009, para. 10.

³¹ *See* Response para. 2.

³² *See* Decision on Motion on Modalities of Rule 66(A)(ii) Disclosure, 27 April 2009, para. 9.

use by the Prosecution as evidence at trial, or which was obtained from or belonged to the Accused. The Chamber clearly cannot set a deadline for the disclosure of material that is yet to be requested by the Accused.

17. With regard to material which the Accused has already requested, the Prosecution argues that, notwithstanding the fact that such material is of a considerable volume and related to a huge variety of issues, it is working expeditiously on these requests. In its “Prosecution’s Submission on Trial Guidelines” filed on 28 September 2009 (“Submission”), the Prosecution adds that it will continue to provide materials requested by the Accused under this Rule “in a timely manner as possible” but that, “in light of the significant requests already made by the Accused to-date, the Accused should indicate to the Prosecution the order of priority of [his] request”.³³ The Chamber is not normally involved in this process of Rule 66(B) disclosure, unless the Accused seeks an order directing the Prosecution to disclose certain requested items. Given that no such order has been sought, it is impossible at this stage for the Chamber to consider either the volume or relevance of the requested Rule 66(B) material, or to determine how onerous the burden placed on the Prosecution by the Accused’s requests may be. Furthermore, the Chamber is satisfied that the Prosecution has shown good faith in making all reasonable efforts to comply with its Rule 66(B) disclosure obligations in a timely matter. However, in relation to material which is subject to Rule 70 conditions, the Chamber encourages the Prosecution to make all necessary efforts to obtain the consent of the relevant Rule 70 providers, as soon as possible, in order to comply with its obligation. It further encourages the Accused, or his legal advisors, to discuss directly with the Prosecution the order of priority of the Rule 66(B) items that he has already requested.

18. For the reasons set out above, the Chamber does not consider it necessary to set a deadline for the completion of Rule 66(B) disclosure by the Prosecution, on the understanding that the Prosecution is acting promptly and with diligence to respond to the Accused’s requests. The Chamber will deal separately, in its order on the procedure to be followed during the trial, with the manner in which material such as documents, and audio or video files to be used by the Prosecution in the course of its presentation of evidence, are to be made available to the Accused and the Chamber. All such material listed in the Prosecution’s Rule 65 *ter* exhibit list should already have been provided to the Accused by the 25 May 2009 deadline set out in the 6 April Order, apart from items which the Prosecution subsequently seeks leave to add to its exhibit list, which cannot be anticipated.

³³ Submission, para. 36.

D. Rule 68

19. The Prosecution's obligation to disclose exculpatory material pursuant to Rule 68 is one of its most onerous responsibilities, and is as important as the obligation to prosecute.³⁴ In order to fulfil this duty the Prosecution must, within its own discretion, make an initial fact-based assessment as to whether any materials in its possession are exculpatory as to the accused, and must expeditiously disclose any such materials.³⁵ However, this duty is a continuous obligation, as it remains even after a trial judgement has been rendered, and throughout the appeals proceedings.³⁶ For this reason alone it would be against the practice at the Tribunal, and impractical, to impose a deadline upon the Prosecution to fulfil its obligation of disclosure of exculpatory material.

20. Nevertheless, the Chamber considers it essential that the Prosecution discloses, as soon as possible, all the Rule 68 material currently in its possession, and that it expedites the search for additional exculpatory material which may be contained in its various collections of evidence. Furthermore, the Prosecution shall take reasonable steps to obtain the consent of the relevant Rule 70 providers for disclosure of any such exculpatory material subject to Rule 70 conditions in its possession or, at the minimum, should notify the Accused of the existence of such material.

E. List of Prosecution Exhibits and Admission of Evidence from the Bar Table

21. As stated above, the Accused originally requested the Chamber to issue an order setting deadlines for the Prosecution to file a "final, realistic exhibit list" pursuant to Rule 65*ter* of the Rules, and for the filing of a motion, or motions, for the admission of documentary evidence from the bar table. However, in his Reply he clarified his position by stating that the Chamber should impose a deadline on the Prosecution for filing its revised exhibit list once its decision under Rule 73 *bis* has been made, and that the deadline for the filing of a bar table motion, or motions, should be set once issues on the admission of written evidence and the scope of trial have been determined by the Chamber. In light of the fact that the Accused acknowledges in his Reply that there are other matters to be resolved prior to any decision setting a deadline for a final Prosecution exhibit

³⁴ See for example *Lukić* Decision, para. 16; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 264; *Prosecutor v. Kordić and Čerkez*, Case No. IT-65-14/2-A, Appeal Judgement, 17 December 2004 ("*Kordić* Appeal Judgement"), para. 183; *Prosecutor v. Brđanin*, 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, 7 December 2004 ("*Brđanin* Decision"), p. 3.

³⁵ *Blaškić* Appeal Judgement, para. 264; *Kordić* Appeal Judgement, para. 183; *Brđanin* Decision, p. 3; *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 34; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion, 14 May 2008 ("*Second Karemera* Decision"), para. 9.

³⁶ *Blaškić* Appeal Judgement, para. 267.

list or for the filing of motions for the admission of evidence from the bar table, the Chamber will not consider these issues further at this time.

F. List of Prosecution Witnesses

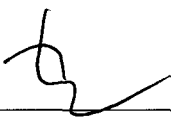
22. As noted above, in its Order following Status Conference, the Chamber invited the parties to make submissions on all aspects of the procedure to be followed during trial by 28 September 2009. Based on these submissions, the Chamber will issue an order on the procedure to be followed during the trial, which will address, among many other things, the procedure for and timing of the submission of lists by the parties setting out the witnesses to be called in the following weeks or months.

IV. Disposition

23. Accordingly, the Trial Chamber, pursuant to Rules 54, 65ter(E), 66(A)(ii), 66(B), 68, and 89(C) of the Rules, hereby:

DENIES the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this first day of October 2009
At The Hague
The Netherlands

[Seal of the Tribunal]