UNITED NATIONS

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: 29 March 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: **29 March 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S THIRTY-SEVENTH TO FORTY-SECOND DISCLOSURE VIOLATION MOTIONS WITH PARTIALLY DISSENTING OPINION OF JUDGE KWON

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

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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 "Thirty-Seventh Motion for Finding of Disclosure Violation and for Remedial Measures", filed publicly with a confidential annex on 7 February 2011 ("Thirty-Seventh Motion"), "Thirty-Eighth Motion for Finding of Disclosure Violation and for Remedial Measures", filed publicly with confidential annexes on 8 February 2011 ("Thirty-Eighth Motion"), "Thirty-Ninth Motion for Finding of Disclosure Violation and for Remedial Measures", filed publicly with confidential annexes on 9 February 2011 ("Thirty-Ninth Motion"), "Fortieth Motion for Finding of Disclosure Violation and for Remedial Measures", filed publicly on 10 February 2011 ("Fortieth Motion"), "Forty-First Motion for Finding of Disclosure Violation", filed publicly with confidential annexes on 11 February 2011 ("Forty-First Motion"), and "Forty-Second Motion for Finding of Disclosure Violation and for Remedial Measures", filed publicly with confidential annexes on 16 February 2011 ("Forty-Second Motion") (together "Motions"), and hereby issues its decision thereon.

I. Submissions

A. Thirty-Seventh Motion

1. In the Thirty-Seventh Motion, the Accused submits that the Office of the Prosecutor ("Prosecution") violated Rule 68 of the Tribunal's Rules of Procedure and Evidence ("Rules") by failing to disclose to him, as soon as practicable, two documents.[1] The first document is a report of interview with a member of a Serb paramilitary group conducted by the Prosecution in 2000 ("Report of Interview") and the second document is a United Nations memorandum concerning a meeting attended by Momčilo Krajišnik in March 1994 ("UN Memorandum"). The Accused argues that these documents were not disclosed "as soon as practicable" given that they were not provided to him until 31 January 2011, even though they would likely have been in the Prosecution's possession for several years.[2]

2. The Accused submits that the documents contain information which tends to contradict a number of allegations in the Third Amended Indictment, including the allegations that he planned, instigated and ordered the taking of UN military observers and peacekeepers as hostages, that the Bosnian Serb leadership unreasonably obstructed the movement of humanitarian convoys and, that the Bosnian Serb leadership exercised control over the VRS at

[1] Thirty-Seventh Motion, para. 1.
[2] Thirty-Seventh Motion, paras. 1-2, 11.

all times.[3] He also suggests that the Report of Interview is mitigating as it tends to show that the Bosnian Serb leadership participated in the alleged hostage-taking after it was a *fait accompli* and that the exculpatory nature of the documents was demonstrated by their disclosure by the Prosecution pursuant to Rule 68.[4] In addition, the Accused argues that he was prejudiced by this late disclosure as he could not assess the documents in preparing for trial and developing his overall defence strategy, and he could not use the documents and/or introduce them during his cross-examination of witnesses who have already testified including the "hostages" witnesses and KDZ450.[5] He thus requests the Chamber to make a finding that the Prosecution has violated Rule 68 by failing to disclose the two documents as soon as practicable and to suspend the trial for three months before the commencement of the Prosecution's case dealing with the alleged takeover of municipalities in Bosnia and Herzegovina.[6] He submits that this would allow the Prosecution to "complete its compliance with Rule 68" so that he is not forced to cross-examine future witnesses "without the benefit of the disclosure to which he is entitled".[7] Finally, the Accused requests that the UN Memorandum be admitted from the bar table to ameliorate the prejudice caused by its late disclosure.[8]

3. On 14 February 2011, the Prosecution filed the "Prosecution's Response to Karadžić's Thirty-Seventh, Thirty-Eighth and Thirty-Ninth Motions for Finding of Disclosure Violation and for Remedial Measures with Appendix A" ("Response to Thirty-Seventh to Thirty-Ninth Motions"). It submits that the Thirty-Seventh Motion should be dismissed as the documents do not fall within the ambit of Rule 68(i) and that these documents were provided to the Accused "because they may be relevant to issues related to the defence case" even if they did not strictly fall within the ambit of Rule 68(i).[9]

4. The Prosecution presents distinct arguments as to why neither of the documents "suggest the innocence or mitigate the guilt of the Accused or undermine the case presented by the Prosecution at trial" or contradict evidence already presented in the case.[10] It argues that, even if the Chamber does find that the Prosecution has violated its disclosure obligations, the Accused has failed to demonstrate any prejudice.[11] The Prosecution argues that there was no reason why the Accused was prevented from pursuing the allegedly exculpatory issues raised in these

[3] Thirty-Seventh Motion, paras. 4, 7-8.
[4] Thirty-Seventh Motion, paras. 4, 10.
[5] Thirty-Seventh Motion, paras. 1, 5, 9, 11.
[6] Thirty-Seventh Motion, para. 15.
[7] Thirty-Seventh Motion, para. 15.
[8] Thirty-Seventh Motion, para. 17.
[9] Response to Thirty-Seventh to Thirty-Ninth Motions, paras. 1, 4.
[10] Response to Thirty-Seventh to Thirty-Ninth Motions, paras. 4-9.
[11] Response to Thirty-Seventh to Thirty-Ninth Motions, paras. 1, 18-19.

documents with witnesses who have already testified even if he did not have those documents at the time.[12] In support of this submission, it asserts that the Accused already had in his possession documents which relate to the agreement on freedom of movement of convoys and that with respect to the alleged hostage-taking, as a "direct participant, he must be aware of the extent of his role in the events and is able to pursue any apparent defences accordingly".[13] In addition, with respect to the Report of Interview, it submits that the Accused could call the person who gave the statement as a witness in his Defence case if necessary.[14]

B. Thirty-Eighth Motion

5. In the Thirty-Eighth Motion, the Accused submits that the Prosecution has violated Rules 66(B) and 68 of the Rules by the delayed disclosure of one document.[15] The document is a transcript of an intercepted conversation between Momčilo Mandić and Colonel Gagović in May 1992 ("Intercept"). The Accused argues that the Intercept was not disclosed "as soon as practicable" given that it was not provided to him until 31 January 2011, even though it was likely to have been in the Prosecution's possession for several years.[16] The Accused submits that the Intercept, is exculpatory as it contains information which suggests: (i) Muslim forces were shooting towards the Sarajevo airport, (ii) that the shelling of Sarajevo in May 1992 was in response to fire from Bosnian Muslim forces which initiated hostilities, and (iii) tends to contradict the allegation that the Bosnian Serb leadership unreasonably obstructed the movement of convoys.[17]

6. The Accused also submits that the exculpatory nature of the document was demonstrated by its disclosure by the Prosecution pursuant to Rule 68.[18] In addition, the Accused argues that he was prejudiced by this late disclosure as he could not assess the document in preparing for trial and developing his overall defence strategy and he could not use the Intercept during his cross-examination of Momčilo Mandić.[19] He repeats his request that the Chamber make a finding that the Prosecution has violated Rule 68 by failing to disclose the Intercept as soon as practicable and to suspend the trial for three months.[20]

[12] Response to Thirty-Seventh to Thirty-Ninth Motions, paras. 19-20.
[13] Response to Thirty-Seventh to Thirty-Ninth Motions, paras. 19-20.
[14] Response to Thirty-Seventh to Thirty-Ninth Motions, para. 19.
[15] Thirty-Eighth Motion, para. 1.
[16] Thirty-Eighth Motion, paras. 1-2, 9.
[17] Thirty-Eighth Motion, paras. 3-5.
[18] Thirty-Eighth Motion, para. 7.
[19] Thirty-Eighth Motion, paras. 9-10.
[20] Thirty-Eighth Motion, paras. 12-13.

7. In addition, he argues that the failure to disclose the Intercept earlier also violated Rule 66(B) as he had made a request in October 2010 for the inspection of all intercepted conversations and that the Prosecution in November 2010 had "represented that all relevant intercepts had been disclosed".[21] Finally he requests that the Intercept be "marked for identification and admitted from the bar table if later authenticated, in order to ameliorate the prejudice".[22]

8. The Prosecution submits that the Thirty-Eighth Motion should be dismissed as the Intercept does not fall within the ambit of Rule 68(i) and that the document was provided to the Accused as it could be "relevant to issues related to the defence case" even if it did not strictly fall under Rule 68(i).[23] The Prosecution submits that the Intercept does not "suggest the innocence or mitigate the guilt of the Accused or undermine the case presented by the Prosecution at trial".[24] It argues that, in any event, the Accused has failed to demonstrate any prejudice.[25] It argues that the Accused's claim that he would have used the Intercept during his cross-examination of Momčilo Mandić to raise the issue of convoys and the shelling by Muslim forces of the airport is contradicted by his failure to use a contemporaneous intercept of a conversation involving Mandić which contained "almost identical information" about these issues.[26]

9. It states that contrary to the Accused's submission, it had complied with his Rule 66(B) request to inspect "all intercepted conversations" and that he been informed as early as November 2009 and reminded in November 2010 that there was an "Intercepts" folder on the Electronic Disclosure General Collections and that the Intercept could have been found in this folder.[27]

C. Thirty-Ninth Motion

10. In the Thirty-Ninth Motion, the Accused submits that the Prosecution has violated Rule 68 of the Rules by the delayed disclosure of one document.[28] The document is a statement provided by a member of the Forensics Department of the Bosnian Ministry of the Interior to the Prosecution in November 2003 ("Statement"). The Accused argues that the Statement was not

[21] Thirty-Eighth Motion, para. 8.
[22] Thirty-Eighth Motion, para. 15.
[23] Response to Thirty-Seventh to Thirty-Ninth Motions, paras. 1, 4.
[24] Response to Thirty-Seventh to Thirty-Ninth Motions, paras. 4, 10-11.
[25] Response to Thirty-Seventh to Thirty-Ninth Motions, para. 1.
[26] Response to Thirty-Seventh to Thirty-Ninth Motions, para. 21, referring to intercept with Rule 65 *ter* number 31755.
[27] Response to Thirty-Seventh to Thirty-Ninth Motions, paras 15-17.
[28] Thirty-Ninth Motion, para. 1.

disclosed "as soon as practicable" given that it was not provided to him until 31 January 2011, even though it was in the Prosecution's possession since 2003.[29] The Accused submits that the Statement contains information about multiple crimes committed against Serb civilians in Sarajevo by members of the Bosnian Muslim Army, that it "tends to show that Serb shelling was in response to Muslim attacks, that the ABiH falsely accused the Serbs of the same types of crimes" for which he was charged in the Indictment and that military operations in Sarajevo constituted a legitimate military target which "tends to rebut the allegation that the shelling and sniping in civilian areas of Sarajevo was indiscriminate".[30] He repeats his request that the Chamber make a finding that the Prosecution has violated Rule 68 by failing to disclose the Statement as soon as practicable and to suspend the trial for three months.[31]

11. The Prosecution submits that the Thirty-Ninth Motion should be dismissed as the Statement does not fall within the ambit of Rule 68(i) and that the document was provided to the Accused as it could be "relevant to issues related to the defence case" even if it did not strictly fall under Rule 68(i).[32] The Prosecution submits that the Statement does not "suggest the innocence or mitigate the guilt of the Accused or undermine the case presented by the Prosecution at trial".[33] It argues that, in any event, the Accused has failed to demonstrate any prejudice.[34] The Prosecution argues that the Accused was not prevented from pursuing the allegedly exculpatory issues raised in the document with witnesses who have already testified even though he did not have the Statement and that he could also call the person who gave the Statement as a witness in his Defence case if necessary.[35]

D. Fortieth Motion

12. In the Fortieth Motion, the Accused submits that the Prosecution has violated Rules 66(B) and 68 of the Rules by the delayed disclosure of two documents. The first document is a fax sent by Patrick Rechner to the United Nations Civil Affairs Officer in Sarajevo in May 1995 ("Fax") and the second document is an article referring to the attack on the Markale Market on 28 August 1995 ("Markale Report"). The Accused argues that these documents were not disclosed "as soon as practicable" given that they were not provided to him until 3 February 2011, even though they were likely to have been in the Prosecution's possession for several

[29] Thirty-Ninth Motion, paras. 2, 5.
[30] Thirty-Ninth Motion, para. 4.
[31] Thirty-Ninth Motion, paras. 8-9.
[32] Response to Thirty-Seventh to Thirty-Ninth Motions, paras. 1, 4.
[33] Response to Thirty-Seventh to Thirty-Ninth Motions, paras. 4, 12-14.
[34] Response to Thirty-Seventh to Thirty-Ninth Motions, para. 1.
[35] Response to Thirty-Seventh to Thirty-Ninth Motions, para. 22.

years.[36] He submits that the Fax is exculpatory in that it tends to show that the Bosnian Serb leadership was in favour of ending sniping in Sarajevo.[37] In addition, he argues that the failure to disclose the Fax also violated Rule 66(B) as he had made a request in June 2010 for copies of all documents authored by prosecution witnesses and that this had not been disclosed in advance of Rechner's testimony.[38] The Accused submits that the Markale Report, was also exculpatory as it indicates denial of responsibility by Bosnian Serbs for the 28 August 1995 shelling of Markale Market and that Ratko Mladić proposed a joint commission to investigate the incident.[39]

13. The Accused argues that he was prejudiced by this late disclosure as he could not assess the documents in preparing for trial and developing his overall defence strategy and he could not use the Fax and/or introduce it during his cross-examination of Rechner.[40] He repeats his request that the Chamber make a finding that the Prosecution has violated Rules 66(B) and 68 by failing to disclose the documents as soon as practicable and to suspend the trial for three months.[41] Finally he submits that as a remedial measure the two documents should be admitted from the bar table.[42]

14. On 23 February 2011, the Prosecution filed the "Prosecution's Response to Karadžić's Fortieth Motion for Finding of Disclosure Violation with Appendix A" ("Response to Fortieth Motion"). The Prosecution, acknowledges that the documents referred to in the Fortieth motion contain "some material of marginal exculpatory value" but argues that the Accused failed to identify actual prejudice resulting from their disclosure.[43] In support of this submission, the Prosecution argues that the material contained in these documents was "virtually identical" to material already in the Accused's possession, some of which had already been admitted in this case.[44] On this basis it contends that there were no grounds for the Accused's argument that he was unable to assess these documents in "preparing for trial and developing his overall defence strategy".[45] It does not object to the admission of either of the documents from the bar table even though it argues that they add "nothing of any substance to what is already in evidence".[46]

[36] Fortieth Motion, paras. 1-2, 7.
[37] Fortieth Motion, para. 5.
[38] Fortieth Motion, para. 6.
[39] Fortieth Motion, paras. 3-5, 8.
[40] Fortieth Motion, paras. 7, 10.
[41] Fortieth Motion, paras. 12-13.
[42] Fortieth Motion, para. 14.
[43] Response to Fortieth Motion, para. 1.
[44] Response to Fortieth Motion, paras. 3, 5, reference to D1026 and P2289.
[45] Response to Fortieth Motion, paras. 3, 8, 16.
[46] Response to Fortieth Motion, paras. 3, 7, 17.

15. The Prosecution submits that there was no violation of Rule 66(B), given that there is no timing requirement with respect to disclosure of Rule 66(B) material and that it acted in good faith to comply with the specific request for all documents authored by witnesses, but had failed to identify this particular document as its computer-based searches could not identify the name of the witness given the lack of clarity in the hand-written name.[47]

E. Forty-First Motion

16. In the Forty-First Motion, the Accused submits that the Prosecution has violated Rule 68 of the Rules by the delayed disclosure of one document.[48] The document is a transcript of interview with a Republika Srpska Ministry of Interior official in 2005 ("Transcript"). The Accused argues that the Transcript was not disclosed "as soon as practicable" given that it was not provided to him until 10 February 2011, even though it was in the Prosecution's possession since 2005.[49] He submits that the Transcript contains information which suggests that the Bosnian Serb authorities sought to prevent crimes committed by paramilitaries and to have them arrested for those crimes and that this was exculpatory as it tends to refute the allegation that the Accused was part of a joint criminal enterprise with the paramilitary groups and that he is liable for having failed to punish their crimes.[50] The Accused argues that he was prejudiced by this late disclosure as he could not assess the document in preparing for trial and developing his overall defence strategy and could not use the Transcript during his cross-examination of Momčilo Mandić.[51] He repeats his request that the Chamber make a finding that the Prosecution has violated Rule 68 by failing to disclose this document as soon as practicable but does not seek an additional adjournment given the recent six-week adjournment granted by the Chamber.[52]

17. On 23 February 2011, the Prosecution filed the "Prosecution's Consolidated Response to Karadžić's Forty-First and Forty-Second Motions for Finding of Disclosure Violation" ("Response to Forty-First and Forty-Second Motions"). The Prosecution, acknowledges that the Transcript contains "some material of marginal exculpatory value" but argues that the Accused failed to identify actual prejudice resulting from its disclosure.[53] In support of this submission, it argues that exculpatory material pertaining to measures taken against the unlawful behaviour of paramilitaries added nothing new and that other "far more detailed and extensive information

[47] Response to Fortieth Motion, paras. 10-11.
[48] Forty-First Motion, para. 1.
[49] Forty-First Motion, paras. 2, 5.
[50] Forty-First Motion, paras. 3-4.
[51] Forty-First Motion, paras. 4-5.
[52] Forty-First Motion, paras. 9-10.

on this topic" had been in the Accused's possession for a long time.[54] It refutes the suggestion that the Accused was prejudiced by not being able to use the exculpatory information contained in the document during his cross-examination of Momčilo Mandić as his "testimony on the exculpatory topics identified in the Forty-First Motion was consistent" with the Transcript.[55] It also contests the claim that the document contains information that police officers who committed crimes were prosecuted or that the document refutes the allegation that the Accused failed to punish crimes committed by police.[56]

F. Forty-Second Motion

18. In the Forty-Second Motion, the Accused submits that the Prosecution has violated Rule 68 of the Rules by the delayed disclosure of "a diary written by a prominent individual who visited Sarajevo in 1992" ("Diary").[57] The Accused argues that the Diary was not disclosed "as soon as practicable" given that it was not provided to him until 14 February 2011, even though it was in the Prosecution's possession since 2002.[58] He submits that portions of the Diary are exculpatory as they tend to refute the allegation that Bosnian Serb forces were firing indiscriminately and disproportionately at Sarajevo and that the perpetrators were under his control.[59] He argues that he was prejudiced by this late disclosure as he could not assess the document in preparing for trial and developing his overall defence strategy and he could not use the Diary during his cross-examination of a number of witnesses who testified about shelling in Sarajevo in 1992.[60] He repeats his request that the Chamber make a finding that the Prosecution has violated Rule 68 by failing to disclose this document as soon as practicable but does not seek an additional adjournment given the recent six-week adjournment granted by the Chamber.[61]

19. The Prosecution acknowledges that the Diary contains some exculpatory material but disputes the Accused's claim that he was prejudiced by not being able to use the exculpatory information contained in the document during his cross-examination of Prosecution witnesses.[62] In support of this submission, the Prosecution argues that the Accused "has already taken the same position on each of the exculpatory aspects of the Diary during his cross-examinations"

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[53] Response to Forty-First and Forty-Second Motions, para. 1.
[54] Response to Forty-First and Forty-Second Motions, paras. 2, 5-6.
[55] Response to Forty-First and Forty-Second Motions, para. 2.
[56] Response to Forty-First and Forty-Second Motions, paras. 8-9.
[57] Forty-Second Motion, para. 1.
[58] Forty-Second Motion, paras. 1-2.
[59] Forty-Second Motion, para. 3.
[60] Forty-Second Motion, paras. 5-6.
[61] Forty-Second Motion, paras. 8-9.

and that he "had long been in possession of more concrete documentary evidence" on the issues raised in the Diary.[63] The Prosecution concludes that in any event the author of the Diary can be called as a Defence witness.[64]

II. Applicable Law

20. Rule 68 of the Rules imposes a continuing obligation on the Prosecution to "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".[65] In order to establish a violation of this obligation by the Prosecution, the Accused must "present a *prima facie* case making out the probable exculpatory or mitigating nature" of the materials in question.[66] The Trial Chamber has previously outlined the Appeals Chamber's jurisprudence on the scope and application of the obligation to disclose "as soon as practicable" exculpatory material under Rule 68.[67] That discussion will not be repeated here.

21. 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.[68]

22. The Chamber also recalls that Rule 89(C) of the Rules provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value" and thus allows for admission of evidence from the bar table, without the need to introduce it through a witness.[69] Once the requirements of Rule 89(C) are satisfied, the Chamber maintains its discretionary power over the admission of evidence, which includes the ability to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial pursuant to Rule 89(D).[70] In accordance with the Chamber's "Order on Procedure for Conduct of Trial", issued

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[62] Response to Forty-First and Forty-Second Motions, para. 11.

[63] Response to Forty-First and Forty-Second Motions, paras. 11-13, 15.

[64] Response to Forty-First and Forty-Second Motions, para. 19.

[65] Decision on the Accused's Motion to Set Deadlines for Disclosure, 1 October 2009 ("Decision on Deadlines for Disclosure"), para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgement, 29 July 2004 ("*Blaškić* Appeals Judgement"), para. 267.

[66] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeals Judgement"), para. 179.

[67] Decision on Accused's Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 29 September 2010, paras. 14-17.

[68] *Kordić and Čerkez* Appeals Judgement, para. 179; *Blaškić* Appeals Judgement, para. 268.

[69] Decision on Deadlines for Disclosure, para. 10; Decision on Second Prosecution Bar Table Motion for the Admission of Bosnian Serb Assembly Records, 5 October 2010 ("Decision on Second Bar Table Motion"), paras. 5-7.

[70] Decision on Second Bar Table Motion, para. 6.

on 8 October 2009 ("Order"), the party requesting admission of evidence from the bar table is required to:

> (i) provide a short description of the document of which it seeks admission; (ii) clearly specify the relevance and probative value of each document; (iii) explain how it fits into the party's case, and (iv) provide the indicators of the document's authenticity.[71]

III. Discussion

A. Thirty-Seventh Motion

23. Having reviewed the selected pages of the Report of Interview referred to in the Thirty-Seventh Motion,[72] the Chamber finds that the suggestion that one or two UNPROFOR soldiers were captured without authorisation,[73] does not necessarily support the Accused's contention that the Bosnian Serb leadership participated in the alleged hostage-taking of United Nations personnel only after it was "a *fait accompli*".[74] However, it does suggest that in at least one case the capture of UNPROFOR soldiers may have been carried out without authorisation and is thus potentially exculpatory in relation to the allegation that the Accused planned, instigated, and ordered the hostage-taking.

24. While the UN Memorandum does suggest that the Bosnian Serb leadership was using the Freedom of Movement Agreement to strengthen its control over the military, the Chamber is not convinced that this necessarily contradicts evidence "that the Bosnian Serb political leadership at all times exercised control over the VRS".[75] The UN Memorandum does make reference to proposals and promises made by the Bosnian Serb leadership to implement the Freedom of Movement Agreement with respect to the free movement of convoys. While this does not of itself demonstrate that these promises were actually kept or that the proposals were implemented, it can be characterised as potentially exculpatory.

25. It follows that the Report of Interview and UN Memorandum should have been disclosed to the Accused "as soon as practicable". The Prosecution has yet again failed to indicate when the documents came into its possession. In the absence of that clarification, and given that the documents were not recently created, the Chamber considers it appropriate to presume that the Prosecution did not recently acquire these documents and finds that the Prosecution violated its

[71] Order, Appendix A, Part VII, para. R.
[72] Thirty-Seventh Motion, confidential Annex B, pp. 37-39. The motion only refers to pp. 37 and 38.
[73] Thirty-Seventh Motion, confidential annex B, p. 37.
[74] Thirty-Seventh Motion, para. 4.
[75] Thirty-Seventh Motion, para. 8.

obligation under Rule 68 of the Rules to disclose potentially exculpatory material as soon as practicable.

26. However, having reviewed the selected pages of the Report of Interview referred to in the Thirty-Seventh Motion and the UN Memorandum, the Chamber is not convinced that the documents are of such significance that the Accused's development of his overall defence strategy was adversely affected or that he was prejudiced by their late disclosure. It follows that in the absence of demonstrated prejudice the requested remedy of suspension of proceedings is unwarranted.

27. In relation to the Accused's request for the admission of the UN Memorandum from the bar table, while it may be relevant and have probative value with respect to issues in this case, "it is incumbent on the party tendering any document from the bar table to explain how it fits into its case" in order to ensure that the document is properly contextualised.[76] The Chamber is not satisfied that the Accused has met this requirement in this instance, and will, therefore, deny the admission into evidence of the UN Memorandum from the bar table. The Chamber notes that this does not prevent the Accused from tendering this document through an appropriate witness in court or in a future bar table motion.

B. Thirty-Eighth Motion

28. Having reviewed the Intercept referred to in the Thirty-Eighth Motion, the Chamber finds that the Accused has failed to "present a *prima facie* case making out the probable exculpatory or mitigating nature" of this document.[77] While there is a reference in the transcript to Bosnian Muslim forces shooting towards the airport, the Chamber is not convinced that the content of the transcript "confirms that the Muslims had initiated hostilities as of 28 May 1992 around the airport". [78] Similarly the reference to arrangements for the transport of food from Kiseljak does not of itself contradict the allegation that the Bosnian Serb leadership prevented humanitarian convoys from entering Sarajevo. However, it does suggest that the Bosnian Serb leadership had arranged for the transport of food from Kiseljak in May 1992 and made attempts to inform UNPROFOR thereof. The Chamber therefore finds that in that limited sense, the Intercept is potentially exculpatory, and should have been disclosed to the Accused "as soon as practicable". Given that the Intercept was not recently created, the Chamber considers it appropriate to presume that the Prosecution did not recently acquire this document and finds that

[76] Decision on Accused's Eighteenth to Twenty-First Motions, para. 32, citing Decision on Prosecution's Bar Table Motion for Admission of Bosnian Serb Assembly Sessions, 22 July 2010, para. 11; Decision on the Prosecution's First Bar Table Motion, 13 April 2010, para. 15.

[77] *Kordić and Čerkez* Appeals Judgement, para. 179.

the Prosecution violated its obligation under Rule 68 of the Rules to disclose potentially exculpatory material as soon as practicable.

29. However, having reviewed the Intercept, considering its short length, and the Prosecution's submission that the Accused failed to use a contemporaneous intercept of a conversation involving Mandić which contained "almost identical information"[79] about these issues during his cross-examination, the Chamber is not convinced that the document is of such significance that the Accused's development of his overall defence strategy was adversely affected or that he was prejudiced by its late disclosure. It follows that in the absence of demonstrated prejudice the requested remedy of suspension of proceedings is unwarranted.

30. In relation to the Accused's request for the Intercept to be marked for identification and admitted from the bar table if later authenticated, the Chamber reiterates that while the document may be relevant and have probative value with respect to issues in this case, "it is incumbent on the party tendering any document from the bar table to explain how it fits into its case" in order to ensure that the document is properly contextualised.[80] The Chamber is not satisfied that the Accused has met this requirement in this instance, and will, therefore, not mark the Intercept for identification to allow for its later admission from the bar table. The Chamber notes that this does not prevent the Accused from tendering this document through an appropriate witness in court or in a future bar table motion which clearly addresses the specific requirements for the admission of evidence from the bar table.[81]

31. In addition the Chamber finds that there was no contravention of Rule 66(B) with respect to the Accused's request to inspect "all intercepted conversations". The Chamber is satisfied that the Prosecution complied with its obligation under Rule 66(B) given that the Accused had been informed as early as November 2008 and reminded in November 2010 that all intercepts were available to him in a specific folder in the Electronic Disclosure General Collections.

C. Thirty-Ninth Motion

32. Having reviewed the Statement referred to in the Thirty-Ninth Motion, the Chamber finds that the Accused has failed to "present a *prima facie* case making out the probable

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[78] Thirty-Eighth Motion, Annex A.

[79] Response to Thirty-Seventh to Thirty-Ninth Motions, para. 21, referring to intercept with Rule 65 *ter* number 31755.

[80] Decision on Accused's Eighteenth to Twenty-First Motions, para. 32, citing Decision on Prosecution's Bar Table Motion for Admission of Bosnian Serb Assembly Sessions, 22 July 2010, para. 11; Decision on the Prosecution's First Bar Table Motion, 13 April 2010, para. 15.

[81] Order, Appendix A, Part VII, para. R.

exculpatory or mitigating nature" of this document.[82] While the Statement contains detailed information about crimes committed by Bosnian Muslim forces against Serbs in and around Sarajevo, the Accused has not demonstrated how the information in the Statement contradicts the allegation that the shelling and sniping conducted by Bosnian Serbs was indiscriminate, or how it supports the suggestion that the "ABiH falsely accused the Serbs of the same types of crimes" for which the Accused is charged.

33. While the Accused refers to a passage of the Statement which suggests that on or about 17 October 1993, "the latest Sarajevo shelling incident had been caused by the 10th Mountain Brigade" and that in response Bosnian Serb forces shelled Sarajevo, the Chamber is not convinced that this statement of itself is exculpatory or would mitigate the guilt of the Accused. The Chamber therefore finds that the Statement is not potentially exculpatory, and there was no violation of Rule 68 of the Rules with respect to its disclosure.

D. Fortieth Motion

34. The Prosecution does not contest that the two documents referred to in the Fortieth Motion contain "some material of marginal exculpatory value".[83] It follows that the documents should have been disclosed to the Accused "as soon as practicable". In the absence of clarification from the Prosecution as to when the documents came into its possession, and given that the documents were not recently created, the Chamber considers it appropriate to presume that the Prosecution did not recently acquire them and finds that the Prosecution violated its obligation under Rule 68 of the Rules to disclose potentially exculpatory material as soon as practicable.

35. However, having reviewed the documents, considering their short length, and the Prosecution's submission that the material contained in these documents was "virtually identical" to material which was already in the Accused's possession, the Chamber is not convinced that the documents are of such significance that the Accused's development of his overall defence strategy was adversely affected or that he was prejudiced by their late disclosure. It follows that in the absence of demonstrated prejudice the requested remedy of suspension of proceedings is unwarranted.

36. While the Prosecution does not oppose the Accused's request for admission of these documents from the bar table, it does note that they add "nothing of any substance to what is

[82] *Kordić and Čerkez* Appeals Judgement, para. 179.
[83] Response to Fortieth Motion, para. 1.

already in evidence".[84] The Chamber repeats its observation that, "it is incumbent on the party tendering any document from the bar table to explain how it fits into its case" in order to ensure that the document is properly contextualised.[85] The Chamber is not satisfied that the Accused has met this requirement in this instance, and will, therefore, deny the admission into evidence of the documents referred to in the Fortieth Motion. The Chamber notes that this does not prevent the Accused from tendering these documents through an appropriate witness in court or in a future bar table motion which clearly specifies its relevance and probative value and how it fits into his case.

37. The Fax referred to in the Fortieth Motion falls within the scope of the Accused's Rule 66(B) request made in June 2010 for all documents authored by prosecution witnesses. However, the Chamber is satisfied that the Prosecution acted in good faith and the failure to identify the document earlier was due to technological limitations which prevented its computer-based searches from recognising the witness's hand-written name on the Fax. Given the absence of a strict deadline for compliance with Rule 66(B) requests, the Chamber finds that there was no violation of Rule 66(B) with respect to the disclosure of this document.

E. Forty-First Motion

38. The Prosecution does not contest that the Transcript referred to in the Forty-First Motion contains "some material of marginal exculpatory value".[86] It follows that the document should have been disclosed to the Accused "as soon as practicable". Given that the document was in Prosecution's possession since 2005, the Chamber finds that the Prosecution violated its obligation under Rule 68 of the Rules to disclose potentially exculpatory material as soon as practicable.

F. Forty-Second Motion

39. The Prosecution does not contest that the Diary referred to in the Forty-Second Motion contains exculpatory material. It follows that the document should have been disclosed to the Accused "as soon as practicable". Given that the Diary was in Prosecution's possession since 2002 the Chamber finds that the Prosecution violated its obligation under Rule 68 of the Rules to disclose potentially exculpatory material as soon as practicable.

[84] Response to Fortieth Motion, paras. 3, 7, 17.

[85] Decision on Accused's Eighteenth to Twenty-First Motions, para. 32, citing Decision on Prosecution's Bar Table Motion for Admission of Bosnian Serb Assembly Sessions, 22 July 2010, para. 11; Decision on the Prosecution's First Bar Table Motion, 13 April 2010, para. 15.

[86] Response to Forty-First and Forty-Second Motions, para. 1.

IV. Disposition

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

a) **GRANTS** by majority, Judge Kwon dissenting, the Forty-First Motion and Forty-Second Motion and finds that the Prosecution has violated Rule 68 of the Rules with respect to these motions;

b) **GRANTS** by majority, Judge Kwon dissenting, the Thirty-Seventh Motion, Thirty-Eighth Motion and Fortieth Motion in part, and finds that the Prosecution has violated Rule 68 of the Rules with respect to these motions; and

c) **DENIES** the remainder of the Motions.

Judge Kwon appends his partially dissenting opinion.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-ninth day of March 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

PARTIALLY DISSENTING OPINION OF JUDGE KWON

1. With all due respect, I do not agree with the majority in granting the Motions, in whole or in part,[1] and proceeding to issue a finding in the Disposition that the Prosecution has violated Rule 68 of the Rules, when the Accused has suffered no prejudice due to these violations.

2. I do agree with the majority that the documents referred to in those Motions[2] have long been in the Prosecution's possession, contain potentially exculpatory material and should have been disclosed to the Accused as soon as practicable, and that, accordingly, the Prosecution violated its obligation under Rule 68 of the Rules. However, with respect to the Thirty-Seventh Motion, Thirty-Eighth Motion and Fortieth Motion, the majority specifically finds that, notwithstanding the Prosecution's respective disclosure violations, the Accused was not prejudiced by their late disclosure.[3] With respect to the Forty-First Motion and Forty-Second Motion, while the majority does not make a specific finding on the Accused's allegation that he was prejudiced by these late disclosures, it is clear from the record that the Accused was not prejudiced given that he had already in his possession more detailed, concrete and extensive information on the topic as submitted by the Prosecution. Moreover, the Accused does not seek any specific relief with respect to these two motions other than the declaratory finding that the Prosecution has violated Rule 68.

3. If the Accused suffers prejudice due to any disclosure violation by the Prosecution, the Trial Chamber will make sure that he is given proper remedies so that his right to a fair trial is not jeopardised. Such remedies would include, for example, postponing the testimony of a witness whose evidence is affected by the late disclosure, recalling a witness for further cross-examination based on the material belatedly disclosed, adjourning the proceedings to allow the defence to review the newly disclosed material and incorporate that material into their ongoing preparation for trial, or in extreme cases, excluding the evidence of specific witnesses.

4. However, when the Accused does not suffer any prejudice resulting from the Prosecution's violation of Rule 68, as in this case, it is unnecessary, moot or even frivolous to issue a declaratory finding that the Prosecution has violated Rule 68 of the Rules. It serves no purpose.

[1] Specifically, the majority grants the Forty-First Motion and Forty-Second Motion in whole, and the Thirty-Seventh Motion, Thirty-Eighth Motion and Fortieth Motion in part.

[2] With the exception of the Thirty-Ninth Motion.

[3] Paras 26, 29 and 35.

5. The jurisprudence clearly states that "if the Defence satisfies the Tribunal that there has been a failure by the Prosecution to comply with Rule 68, the Tribunal […] will examine whether or not the Defence has been prejudiced by that failure to comply before considering whether a remedy is appropriate,"[4] Accordingly, in the absence of prejudice, the Accused will not be given any remedy, including a declaration that the Prosecution has violated Rule 68.

6. Moreover, issuing such a declaratory finding when the Accused was not prejudiced by the late disclosure of Rule 68 material is inconsistent with this Trial Chamber's practice. In its previous decisions, while noting that the Prosecution has violated Rule 68 in the reasoning, the Trial Chamber denied the motions in their entirety based on the lack of prejudice to the Accused, without issuing a declaration of Rule 68 violation in the Disposition.[5]

7. In a trial of this size and scope, where hundreds of witnesses are being called and tens of thousands of pages of documents are being tendered, it is unwarranted to seek a declaratory finding of disclosure violation every time that a potentially exculpatory document is belatedly disclosed in violation of Rule 68 without demonstrating any prejudice on the part of the Accused. Otherwise, it would only encourage the Accused to continue filing unnecessary motions.

[4] *Prosecutor v. Radislac Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 153.

[5] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Thirty-Second, Thirty-Third, Thirty-Firth and Thirty-Sixth Disclosure Violation Motions, 24 February 2011; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Thirtieth and Thirty-First Disclosure Violation Motions, 3 February 2011; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Twenty-ninth Disclosure Violation Motion. 11 January 2011; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Seventeenth Bis and Twenty-Eighth Disclosure Violation Motions, 16 December 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Twenty-Seventh Disclosure Violation Motion, 17 November 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Violation Motions, 11 November 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 29 September 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eleventh to Fifteenth Motions for Finding of Disclosure Violations and for Remedial Measures, 24 September 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Ninth and Tenth Motions for Finding of Disclosure Violations and for Remedial Measures, 26 August 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Seventh and Eighth Motions for Finding of Disclosure Violations and for Remedial Measures, 18 August 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Third, Fourth, Fifth and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures, 20 July 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Second Motion for Finding Disclosure Violation and for Remedial Measures, 17 June 2010.

8. In conclusion, in the absence of demonstrated prejudice, the Accused's request for a declaration that the Prosecution has violated its Rule 68 disclosure obligations is to be denied. For these reasons, I would deny the Thirty-Seventh Motion, Thirty-Eighth Motion, Fortieth Motion, Forty-First Motion and Forty-Second Motion in their entirety.

Judge O-Gon Kwon

Dated this twenty-ninth day of March 2011
At The Hague
The Netherlands

[Seal of the Tribunal]