



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: 26 March 2013

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: 26 March 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR RELIEF FOR DEFENCE
DISCLOSURE VIOLATIONS**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the “Prosecution’s Motion for Relief for Defence Disclosure Violations with Respect to 109 Municipalities and Hostages Witnesses”, filed on 22 February 2013 (“Motion”), and hereby issues its decision thereon.

I. Submissions and Procedural History

1. The Chamber ordered the Accused, by 27 August 2012, to file a summary of the “specific facts” on which each witness he intends to call will testify in accordance with Rule 65 *ter*(G) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ On 27 August 2012, the Accused filed a 65 *ter* witness list which included 579 witnesses.² A revised 65 *ter* witness list was filed on 11 September 2012 (“Revised Witness List”) in which the Accused dropped ten witnesses and added 14 witnesses to be called in the sentencing phase of the case.³

2. On 28 November 2012, after previous failed attempts between the parties to find a workable solution,⁴ the Office of the Prosecutor (“Prosecution”) requested, *inter alia*, that the Accused be ordered to provide all outstanding witness statements for witnesses being called for the municipalities and hostages components of the case by the end of December 2012.⁵ This request was made by the Prosecution due to the alleged failure by the Defence to provide adequate 65 *ter* summaries.⁶

3. The Chamber reviewed the 65 *ter* summaries provided by the Accused in the Revised Witness List and concluded that the list was not in compliance with Rule 65 *ter*(G) given that “a significant number of those summaries do not provide adequate notice regarding the witnesses’ evidence” and were formulaic and general in nature and provided very little information other than the component of the case to which the witness’s evidence relates.⁷ On 4 December 2012, the Chamber expressed its view that the inadequate summaries were a product of a failure to

¹ Scheduling Order on Close of the Prosecution Case, Rule 98 bis Submissions, and Start of the Defence Case, confidential, 26 April 2012, para. 22.

² Annex “A” to Rule 65 *ter* Submission: Defence Witness List, confidential, 27 August 2012.

³ Annex “C” to Rule 65 *ter* Submission: Defence Revised Witness List, confidential, 11 September 2012.

⁴ Status Conference, T. 28807–28808 (3 September 2012); Pre-Defence Conference, T. 28819, 28839–2884 (15 October 2012).

⁵ T. 30523–30530 (28 November 2012). The Prosecution clarified that because most of the Defence witnesses are called pursuant to Rule 92 *ter*, it is not the Prosecution’s intention to make the Defence convert statements which have to be prepared pursuant to Rule 92 *ter* into Rule 65 *ter* summaries. *See* T. 30530 (28 November 2012).

⁶ T. 30524–30528 (28 November 2012).

adequately revise a “very unrealistic and excessive witness list” and that it was concerned that the witness list was compiled without the Accused knowing what the witnesses would testify about.⁸ Accordingly, it ordered the Accused, by the end of January 2013, to provide adequate 65 *ter* summaries for witnesses relating to the municipalities and hostages components of the case.⁹ The Chamber declined to order the Accused to provide witness statements by the end of January 2013 but left the “option open to the parties to agree on should it be more practicable”.¹⁰ A further revised 65 *ter* witness list was filed by the Accused on 31 January 2013 (“Further Revised Witness List”) in which the number of witnesses was reduced to 341.¹¹

4. In the Motion, the Prosecution argues that the Accused has violated the Chamber’s order to provide adequate 65 *ter* summaries by the end of January 2013 for the municipalities and hostages witnesses.¹² The Prosecution contends that there are 109 witnesses (“Witnesses”) pertaining to the municipalities and hostages components of the case for whom there are inadequate 65 *ter* summaries and for which no English version of the witness statement has been disclosed.¹³ In the Prosecution’s submission, the 65 *ter* summaries for the Witnesses in the Accused’s Further Revised Witness List remain deficient and are “formulaic in nature, largely consisting of a brief list of topics and/or sweeping assertions, rather than a summary of the individual facts on which the witnesses are expected to testify”.¹⁴ It further argues that when the Defence has not disclosed an English translation of a witness statement and has only provided deficient 65 *ter* summaries, the Prosecution has no meaningful disclosure for the purposes of properly preparing for cross-examination.¹⁵

5. The Prosecution argues that it would be futile to seek improved 65 *ter* summaries given that the Accused has already violated two orders for the provision of adequate summaries and “asserted that the existing summaries are the best he can provide”.¹⁶ The Prosecution observes that for 54 of the Witnesses in the Further Revised Witness List, the Accused has made no modification to the generic summaries, and for 55 of the Witnesses the summaries in the Further Revised Witness List only have minor modifications consisting of “one or two additional topics,

⁷ T. 30894–30895 (4 December 2012).

⁸ T. 30896 (4 December 2012).

⁹ T. 30897 (4 December 2012).

¹⁰ T. 30897 (4 December 2012).

¹¹ Defence Further Revised Rule 65 *ter* Witness List, 31 January 2013.

¹² Motion, para. 1.

¹³ Motion, para. 2 and Confidential Annex A.

¹⁴ Motion, paras. 1, 5–12 and Confidential Annex A.

¹⁵ Motion, para. 2.

¹⁶ Motion, para. 3.

and/or a few sweeping factual assertions”.¹⁷ In the Prosecution’s submission these summaries continue not to satisfy the requirements of Rule 65 *ter* of the Rules as they do not contain a sufficiently detailed summary of the facts to allow it to prepare for cross-examination.¹⁸

6. The Prosecution highlights that the 65 *ter* summary for the Accused is also deficient as it simply states that he will “offer a point by point refutation of the charges against him”.¹⁹ As a remedy, the Prosecution requests that the Accused produce an adequate 65 *ter* summary for his own testimony by 31 March 2013.²⁰

7. The Prosecution seeks an order that the Accused be precluded from calling the Witnesses, with the exception of the Accused himself, until 30 days following the disclosure of an English translation of the witness’s statement.²¹ The Prosecution submits that it has been prejudiced by the inadequate 65 *ter* summaries as it needs “reasonably-detailed” summaries in order to prepare for cross-examination and that its preparations have also been prejudiced by the absence of witness statements.²² The Prosecution submits that a 30 day preparation period following the disclosure of an English statement of a particular witness is reasonable and appropriate given that the Accused has failed to disclose the required information for nearly six months.²³ In the Prosecution’s submission, apart from the exclusion of evidence, this additional preparation period would be the only remedy to alleviate the prejudice it has suffered.²⁴

8. The Prosecution acknowledges that the Chamber had previously declined to order the Accused to provide witness statements as a remedy for the violation of Rule 65 *ter*(G) given the content of the “Order on the Procedure for the Conduct of Trial” issued on 8 October 2009 (“Order”).²⁵ This previous request sought the disclosure of all municipalities and hostages witness statements by a set deadline, while the Prosecution now only seeks a rolling disclosure of witness statements, which in its submission is consistent with the Order that required amalgamated statements to be prepared “well in advance of the witness arriving in The Hague to testify”.²⁶

¹⁷ Motion, paras. 7–8.

¹⁸ Motion, para. 8.

¹⁹ Motion, para. 11.

²⁰ Motion, para. 18.

²¹ Motion, para. 4.

²² Motion, paras. 13–14.

²³ Motion, para. 15.

²⁴ Motion, para. 17.

²⁵ Motion, para. 16.

²⁶ Motion, para. 16.

9. On 4 March 2013, the Accused filed the “Response to Prosecution Motion for Relief from Disclosure Violations” (“Response”). The Accused submits that there have been no disclosure violations given that the details of the expected testimony of the Witnesses are not yet known to the Defence and that the summaries have been prepared based on the “best information available to him at the time”.²⁷ He further contends that the Prosecution has not been prejudiced by the “perceived deficiencies” in the summaries, given that it receives a detailed statement in advance of the witness’s testimony and that he has always agreed to postpone a witness if the Prosecution “does not reasonably believe it had sufficient time to prepare”.²⁸ The Accused also notes that a “large number” of Defence witnesses have already been interviewed by the Prosecution or testified at the Tribunal and that the Chamber has allowed the Prosecution the opportunity to interview any Defence witness prior to their testimony.²⁹

10. The Accused also contends that he would have liked to have interviewed all witnesses prior to the commencement of his Defence case but that the Chamber rejected his request for his case to commence in March 2013, which would have enabled him to do so.³⁰ He notes that he would have no problem with the Chamber granting the Motion but that it would likely result in “intermittent periods where no witnesses would be available to testify”.³¹

11. The Accused also declines to provide a summary of his own testimony and contends that the Prosecution has not provided authority for the request.³² The Accused argues that he retains a privilege against self-incrimination until he takes the oath and that in any event he has not decided whether he would testify on his own behalf.³³ He concludes that requiring a summary of his testimony would be unnecessarily burdensome and that the Prosecution “cannot seriously claim that it is not prepared to cross examine” him 18 years after he was indicted without being first told what he would say.³⁴

²⁷ Response, paras. 3–4.

²⁸ Response, para. 5.

²⁹ Response, para. 6.

³⁰ Response, para. 7.

³¹ Response, para. 8.

³² Response, para. 9.

³³ Response, para. 9.

III. Discussion

12. Having reviewed the revised 65 *ter* summaries for the Witnesses, with the exception of that for the Accused, the Chamber finds that the Accused has failed to comply with the Chamber's order to provide adequate summaries for all witnesses pertaining to the municipalities and hostages components of the case by the end of January 2013. The Chamber observes that the 65 *ter* summaries for the Witnesses have either not been amended at all, or the additions are so general or minimal that they do not provide adequate notice about the facts on which each witness will testify. The Chamber's original concerns that a significant number of the summaries are formulaic, general in nature and provide very little information other than the component of the case which the witness will testify about, remain unaddressed.³⁵

13. While the Chamber declined to order the Accused to provide witness statements by the end of January 2013 it left the "option open to the parties to agree on should it be more practicable".³⁶ It has now become clear that the Accused remains unable to provide adequate witness summaries given that, in his own words, the details of the expected testimony of the witnesses on the Further Revised Witness List who have yet to be interviewed by the Accused's investigators "are not known to the defence".³⁷ This is not an adequate explanation and stems again from what remains a very unrealistic, excessive and ultimately speculative witness list given that there remain witnesses on the list who will testify about matters which the Accused himself does not know about. The Chamber repeats its observation that this is unfair to the Prosecution and goes against the spirit of the Rules.³⁸

14. Given the continuing inadequacy of the Accused's 65 *ter* summaries provided in the Further Revised Witness List, the Chamber finds that it is now appropriate to provide the Prosecution with a reasonable time to prepare for cross-examination following disclosure of the English translation of a particular witness's statement. The Chamber considers that two weeks is a sufficient period of time and orders that the Accused should not call any of the Witnesses, with the exception of the Accused, until two weeks after the disclosure to the Prosecution of the English version of the draft witness statement sought for admission pursuant to Rule 92 *ter*. This does not affect the ability of the Accused to incorporate corrections to the statement following the arrival of the witness in The Hague and to disclose a final Rule 92 *ter* statement up

³⁴ Response, para. 10.

³⁵ T. 30894–30896 (4 December 2012).

³⁶ T. 30897 (4 December 2012).

³⁷ Response, para. 3.

³⁸ T. 30896 (4 December 2012).

to 48 hours prior to the witness's testimony.³⁹ This two week disclosure requirement has become warranted due to the repeated failure of the Accused to provide adequate and meaningful 65 *ter* summaries despite the Chamber's successive warnings. The Accused and his team should prioritise their work and take measures to ensure that this requirement does not affect the smooth conduct of trial and does not lead to situations where witnesses are not available to testify. If any of the Witnesses, with the exception of the Accused are not available to testify due to the Accused's failure to provide an English version of the draft witness statement sought for admission pursuant to Rule 92 *ter* within two weeks of that witness's testimony, unless good cause is shown, the Chamber will deduct any lost court time from the time allocated to the Accused to present his case.

15. With respect to the Prosecution's request that the Accused produce an adequate 65 *ter* summary for his own testimony by 31 March 2013, the Chamber considers that it would not be a productive exercise to order the Accused to provide such a summary. Given the amount of time which has elapsed since the commencement of the trial and the Defence phase of the case, the Prosecution has been sufficiently informed about the general nature of the Defence case, which the Chamber considers is sufficient for the purposes of Rule 65 *ter*(G) with respect to the possible testimony of the Accused. The Chamber therefore denies the Prosecution's request for a deadline for the provision of a 65 *ter* summary for the Accused's own testimony. In addition since the Accused has indicated that if he chooses to testify in his case he will do so as a *viva voce* witness, there is no need for the Accused to disclose a statement to the Prosecution.

IV. Disposition

16. For the foregoing reasons, the Trial Chamber, pursuant to Rules 54 and 65 *ter*(G) of the Rules, hereby:

- a) **GRANTS** the Motion in part;
- b) **ORDERS** the Accused not to call any of the Witnesses (with the exception of the Accused himself) to testify until two weeks after disclosing to the Prosecution the English version of the draft witness statement sought for admission pursuant to Rule 92 *ter*;

³⁹ In accordance with the Order on the Procedure for the Conduct of Trial, 8 October 2009, para. L.

- c) **DECIDES** that if any of the Witnesses (with the exception of the Accused himself) are not available to testify due to the Accused's failure to provide an English version of the draft witness statement sought for admission pursuant to Rule 92 *ter* within two weeks of that witness's testimony, unless good cause is shown, the Chamber will deduct any lost court time from the time allocated to the Accused to present his case; and
- d) **DENIES** the Prosecution request for a deadline for the provision of a 65 *ter* summary for the Accused's own testimony by 31 March 2013.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-sixth day of March 2013
At The Hague
The Netherlands

[Seal of the Tribunal]