



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: 7 May 2014
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: 7 May 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S NINETY-FIRST DISCLOSURE VIOLATION MOTION

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the Accused’s “91st Motion for Finding of Disclosure Violation and for Remedial Measures (April 2014)”, filed on 8 April 2014 with confidential annexes (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused argues that the Office of the Prosecutor (“Prosecution”) has violated Rules 66(A)(ii) and 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) in relation to its untimely disclosure on 28 February and 7 March 2014 of information provided by seven of its witnesses whose evidence was admitted pursuant to Rule 92 *bis* (“Statements”).¹ The Accused submits that the Prosecution violated Rule 66(A)(ii) of the Rules by failing to disclose the Statements in line with the 7 May 2009 deadline or as soon as practicable after coming into the Prosecution’s possession.²

2. The Accused contends that the failure to disclose a transcript of interview with KDZ107 (“Interview”) not only violated Rule 66(A)(ii), but also violated Rule 68 of the Rules as it suggests that persons who were shot at the Vuk Karadžić School on 13 July 1995 had tried to escape which in his submission is potentially exculpatory.³ The Accused argues that he was prejudiced by this violation as he was unable to (i) cite this new information as a reason to refuse the admission of KDZ107’s prior testimony pursuant to Rule 92 *bis*; (ii) request that KDZ107 be called for cross-examination; or (iii) request that the Interview be admitted as a supplemental Rule 92 *bis* statement.⁴

3. Accordingly, the Accused seeks an express finding that the Prosecution violated its disclosure obligations pursuant to Rule 66(A)(ii) with respect to its untimely disclosure of the Statements.⁵ He also seeks a finding of violation of Rule 68 with respect to the Interview.⁶ The Accused refers to the Chamber’s exclusion of proposed Defence witnesses for failing to meet the deadline for the designation of Rule 92 *bis* witnesses and similarly requests that the Chamber exclude the testimony of the seven witnesses as a sanction for the Prosecution’s disclosure

¹ Motion, para. 2.

² Motion, paras. 2–3.

³ Motion, para. 8.

⁴ Motion, para. 9.

⁵ Motion, para. 10.

⁶ Motion, para. 1.

violation.⁷ The Accused renews his request that the Prosecution be ordered to provide “open-file disclosure” given the ongoing disclosure violations.⁸

4. On 17 April 2014, the Prosecution filed the “Prosecution Response to Karadžić’s 91st Motion for Finding of Disclosure Violation and for Remedial Measures (April 2014)” with a confidential appendix (“Response”), arguing that the Motion should be dismissed.⁹

5. The Prosecution notes that one of the Statements was inadvertently disclosed pursuant to Rule 66(A)(ii) but relates to a different person with the same name as a witness in this case and thus cannot constitute a disclosure violation.¹⁰ The Prosecution acknowledges that the other six statements (“Remaining Statements”) should have been disclosed earlier pursuant to Rule 66(A)(ii) and expresses its regret for this delay.¹¹ However, the Prosecution argues that the Accused has failed to demonstrate that he was prejudiced by the late disclosure of the Remaining Statements and in the absence of prejudice, he is not entitled to any remedy and that in any event the remedies sought in the Motion are unwarranted, impracticable, and disproportionate.¹²

6. The Prosecution contends that with respect to five of the Remaining Statements (“Five Statements”), the Accused fails to argue that the late disclosure caused him prejudice.¹³ It argues that the Motion should be summarily dismissed with respect to the Five Statements, as the Accused ignored the Chamber’s repeated instruction that he must establish prejudice when alleging a disclosure violation.¹⁴ In any event, the Prosecution argues that the Accused was not prejudiced by the late disclosure of the Five Statements.¹⁵ The Prosecution observes that the information contained in the Five Statements bolsters or at the very least does not undermine or significantly alter the evidence already admitted pursuant to Rule 92 *bis* with respect to these witnesses.¹⁶

7. In relation to the Interview, the Prosecution argues that its late disclosure did not cause any prejudice to the Accused given that similar information about the circumstances in which

⁷ Motion, para. 11.

⁸ Motion, para. 13.

⁹ Response, para. 2.

¹⁰ Response, para. 2.

¹¹ Response, para. 3.

¹² Response, paras. 3, 13.

¹³ Response, para. 4.

¹⁴ Response, para. 4.

¹⁵ Response, para. 5.

¹⁶ Response, paras. 7– 10, confidential appendix.

prisoners were shot at the Vuk Karadžić school in July 1995 was already in his possession.¹⁷ In the Prosecution’s submission, the Interview adds nothing new or of significance to material already in the Accused’s possession and thus, the Accused suffered no prejudice.¹⁸

8. With respect to the Accused’s request to exclude the evidence of the witnesses referred to in the Motion, the Prosecution argues that the Accused failed to demonstrate that the Chamber should reconsider its prior 92 *bis* decisions with respect to these witnesses in order to prevent an injustice.¹⁹ The Prosecution observes that the Chamber’s decision to exclude proposed 92 *bis* witnesses for the Defence because of the Accused’s failure to show good cause for missing the deadline for filing 92 *bis* motions is an “entirely separate matter” from his request to exclude the evidence of the witnesses referred to in the Motion.²⁰

9. The Prosecution observes that the Accused’s request for “open-file disclosure” has already been rejected by the Chamber on a number of occasions, and that the Accused is therefore requesting reconsideration without asserting a clear error of reasoning or pointing to “any particular circumstance justifying reconsideration in order to prevent an injustice” and should thus be denied.²¹

10. On 1 May 2014, the Accused filed the “Supplemental Submission on 91st Motion for Finding of Disclosure Violation” (“Supplemental Submission”). The Accused refers to a decision of the Appeals Chamber of the Mechanism for International Criminal Tribunals (“MICT”) which granted a disclosure violation motion in part, made a finding of violation, and denied the remainder of the motion in the absence of prejudice to the appellant.²² The Accused submits that the Appeals Chamber of the MICT makes it clear that a finding of prejudice is not a pre-requisite to granting a disclosure violation motion in part, and suggests that Judge Kwon should now refrain from dissenting on this issue.²³

II. Applicable Law

11. Rule 66(A)(ii) of the Rules requires the Prosecution (within a time-limit prescribed by the Trial Chamber or pre-trial Judge) to make available to the Defence “copies of the statements

¹⁷ Response, para. 11.

¹⁸ Response, para. 12.

¹⁹ Response, para. 14.

²⁰ Response, para. 14.

²¹ Response, para. 15.

²² Supplemental Submission, paras. 1–2 referring to, *Prosecutor v. Ngirabatware*, Case No. MICT-12-29-A, Decision on Augustin Ngirabatware’s Motion for Sanctions for the Prosecution and for an order for Disclosure, 15 April 2014 (“MICT Decision”),

²³ Supplemental Submission, paras. 3–4.

of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*".

12. 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". 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.²⁴

13. 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.²⁵

III. Discussion

14. At the outset the Chamber notes that one of the Statements does not pertain to a witness in this case and therefore there was no Rule 66(A)(ii) violation with respect to the Prosecution's mistaken disclosure of this document.

15. In this case, the Prosecution was required to disclose all Rule 66(A)(ii) material to the Accused no later than 7 May 2009.²⁶ Turning to the Remaining Statements, which pertain to Rule 92 *bis* witnesses, the Chamber finds that the Prosecution violated its disclosure obligations pursuant to Rule 66(A)(ii) with respect to their late disclosure as they were only disclosed in February and March 2014.²⁷ The Remaining Statements, which were in the Prosecution's possession before the 7 May 2009 deadline, should have been disclosed by this date and subsequent statements should have been disclosed as soon as practicable. The fact that the Remaining Statements were in the Prosecution's possession for between nine months and nine years before their disclosure to the Accused is not a justifiable delay.

²⁴ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("Kordić and Čerkez Appeal Judgement"), para. 179.

²⁵ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

²⁶ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

²⁷ The Chamber has previously held that the disclosure obligations pursuant to Rule 66(A)(ii) extends to 92 *bis* witnesses: Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010, paras. 35, 38.

16. While the Prosecution violated its disclosure obligations under Rule 66(A)(ii) of the Rules by the late disclosure of the Remaining Statements, the Chamber finds that the Accused has suffered no prejudice as a result of this violation. The Accused has failed to assert, let alone demonstrate how he was prejudiced by this late disclosure, which relates to 92 *bis* witnesses, who were not required for cross-examination. The Accused has failed to argue how the Remaining Statements add anything new or of significance to previously disclosed material or evidence already admitted in this case, which would cause him prejudice or warrant reconsideration of the decision to admit their evidence pursuant to Rule 92 *bis*. In the absence of prejudice to the Accused there is no basis to grant the requested remedies with respect to the Remaining Documents.

17. With respect to the Interview, the Chamber finds that information which suggests that detainees were killed while trying to escape from the Vuk Karadžić School is potentially exculpatory to the extent that it may suggest that detainees were not executed but were killed in the course of an attempted escape. The Chamber therefore finds that the Prosecution also violated its disclosure obligations pursuant to Rule 68 by failing to disclose the Interview as soon as practicable given that it dates back to November 2006. However, having reviewed the portion of the Interview referred to, the Chamber is not convinced that it is of such significance that the Accused was prejudiced by its late disclosure.²⁸ In reaching this conclusion, the Chamber took into account the equivocal nature of the witness's response in the Interview and the fact that the Accused already possessed similar information regarding the circumstances in which the detainees were allegedly killed at the Vuk Karadžić School.²⁹

18. The Chamber is also not convinced that the information contained in the Interview is of such significance that it would have assisted the Accused in seeking to challenge the admission of KDZ107's evidence pursuant to Rule 92 *bis* or request that he be called for cross-examination. In the absence of prejudice to the Accused there is no basis to grant the requested remedies with respect to the Interview.

19. The Chamber recalls that it previously instructed the Accused in February 2011 that "unless a disclosure violation motion seeks an urgent remedy" the resources of all parties would be best served by filing consolidated disclosure violation motions on a monthly basis.³⁰ The Chamber considers that a similar instruction is necessary given that the trial phase of the case has now ended, and considering that the Accused continues to file disclosure violation motions

²⁸ Motion, Confidential Annex I, p. 8.

²⁹ See D2262 (Supplemental statement of Mile Janjić dated 18 April 2012), para. 13.

which pay little or no attention to the Chamber's instruction to focus on disclosure violations which have caused him demonstrable prejudice. The Chamber therefore instructs the Accused, that unless an urgent remedy is required, any future disclosure violations should be accumulated and filed in a consolidated motion one month before the closing briefs are due to be filed. This will allow the parties to devote their valuable resources to the more pressing task at hand while maintaining the Accused's stated interest in documenting disclosure violations.

IV. Disposition

20. For the foregoing reasons, the Chamber, pursuant to Rules 54, 66(A)(ii), 68, and 68 *bis* of the Rules, hereby:

- a) **GRANTS**, by majority, Judge Kwon dissenting,³¹ the Motion in part, and finds that the Prosecution violated Rules 66(A)(ii) of the Rules with respect to its late disclosure of the Remaining Statements and also violated Rule 68 of the Rules with respect to its late disclosure of the Interview; and
- b) **DENIES** the Motion in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this seventh day of May 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁰ Decision on Accused's Thirty-Second, Thirty-Third, Thirty-Fifth and Thirty-Sixth Disclosure Violation Motions, 24 February 2011, para. 23.

³¹ Judge Kwon refers to his Partially Dissenting Opinion in the Decision on Accused's Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon, 29 March 2011. While Judge Kwon agrees with the majority that there has been a violation of Rule 66(A)(ii) and 68 of the Rules, in the absence of prejudice to the Accused, he considers that the Motion should be dismissed in its entirety. Judge Kwon maintains this position and notes that the Appeals Chamber of the MICT in the MICT Decision did not expressly address whether a finding of violation in the absence of prejudice is permissible and simply made such a finding. In the absence of an explicit consideration of this issue by the Appeals Chamber of the Tribunal or the MICT, Judge Kwon is of the view that his dissent on this issue can stand.