



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: 27 June 2012

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: 27 June 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S SEVENTY-SECOND 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 “72nd Motion for Finding of Disclosure Violation (May 2012)”, filed by the Accused on 29 May 2012 (“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 Rule 66(A)(ii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) in relation to the disclosure on 14 May 2012 of a supplementary statement given by John Wilson to the Prosecution in 2008 (“Statement”).¹

2. He observes that since Wilson testified as a witness in this case in June 2010, the Prosecution was required to disclose the Statement pursuant to Rule 66(A)(ii) by 7 May 2009 in accordance with the deadline set by the Chamber in its “Order Following Status Conference and Appended Work Plan” on 6 April 2009.² The Statement includes Wilson’s opinion that General Mladić was taking orders from the JNA in May and June 1992, at a time when the Third Amended Indictment alleges that he was under the Accused’s command.³ The Accused requests an express finding that the Prosecution violated its disclosure obligations pursuant to Rule 66(A)(ii) by failing to disclose the Statement by this deadline⁴ and that the Chamber order Wilson to be recalled for cross-examination.⁵

3. On 31 May 2012, the Prosecution filed the “Prosecution Response to Karadžić’s Seventy-Second Motion for Disclosure Violation (May 2012)” (“Response”). It submits that the Motion should be dismissed on the basis that the Accused failed to establish that he was prejudiced by the late disclosure of the Statement.⁶ It expresses regret for the late disclosure which it acknowledges occurred due to an administrative error but emphasises that the Accused has not been prejudiced or shown good cause for the relief sought.⁷ In support of this contention, the Prosecution points to five other items which had been disclosed to the Accused

¹ Motion, paras. 1–2.

² Motion, para. 3. *See* Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

³ Motion, para. 2 and Annex B.

⁴ Motion, para. 3.

⁵ Motion, para. 6.

⁶ Response, paras. 1, 7.

⁷ Response, para. 1.

prior to Wilson's testimony which contain the "same evidence" as that contained in the Statement.⁸

4. The Prosecution also observes that the Accused has already cross-examined Wilson on "the very issue" contained in the Statement, namely Mladić's relationship with the JNA and specifically with General Panić.⁹ The Prosecution concludes by arguing that given the limited nature of the Statement, "the extensive prior similar disclosure, and the nature of his existing testimony, there is no good cause to recall General Wilson".¹⁰

5. On 11 June 2012, the Accused filed the "Notice of Appeals Chamber Jurisprudence Relative to 72nd Motion for Finding of Disclosure Violation (May 2012)" ("Notice") in which he refers to a decision of the Appeals Chamber which has recently been made public, where the Appeals Chamber made an explicit finding that the Prosecution violated its disclosure obligations even before proceeding to consider the issue of prejudice.¹¹ The Accused submits the Chamber should consider the *Lukić* Appeals Chamber Decision in ruling on the Motion given that this jurisprudence is of relevance to the remedy sought by the Accused and Judge Kwon's position with respect to this remedy.¹²

6. On 12 June 2012, the Prosecution filed the "Motion to Strike "Notice of Appeals Chamber Jurisprudence Relative to 72nd Motion for Finding of Disclosure Violation (May 2012)"" ("Prosecution Motion to Strike"). The Prosecution submits that the Notice should be struck from the record as it makes submissions in support of the Motion, without seeking leave to do so and was filed out of time.¹³ It observes that the Notice was filed 10 days after the Response, contrary to Rule 126 *bis* of the Rules.¹⁴ In any event the Prosecution observes that the Notice adds nothing to the merits of the Motion as the Chamber does not need to be notified of each decision rendered by other Chambers of the Tribunal and submits that the *Lukić* Appeals Chamber Decision "does not represent a departure from the governing law".¹⁵

⁸ Response, paras. 3–4 referring to (i) Wilson's statement dated 5 June 1995; (ii) an OTP information report dated 11 October 2008; (iii) Wilson's evidence in *Prosecutor v. Perišić*, Case No. IT-04-81-T, (T.854–857) (3 November 2008); (iv) an OTP information report dated 4 November 2008; and (v) Wilson's statement dated 26 March 2009.

⁹ Response, para. 5, referring to Hearing, T. 4063–4064 (22 June 2010).

¹⁰ Response, para. 6.

¹¹ Notice, para. 2 citing *Prosecutor v. Lukić and Lukić* (12 May 2011), Case No. IT-98-32/1-A, Decision on Milan Lukić's Motion for Remedies Arising Out of Disclosure Violations by the Prosecution, 12 May 2011 ("*Lukić* Appeals Chamber Decision"), para. 20.

¹² Notice, paras. 2, 5.

¹³ Prosecution Motion to Strike, para. 1.

II. Applicable Law

7. Rule 66(A)(ii) 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 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*”.

8. 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.¹⁶

III. Discussion

9. At the outset, the Chamber finds that the Notice filed by the Accused amounts to a reply to the Prosecution’s Response. The Notice was filed more than seven days after the Response and without seeking the Chamber’s leave to do so pursuant to Rule 126 *bis*. Accordingly the Chamber will not entertain the Notice in its determination of the Motion. Given this determination, the Chamber sees no need to order that the Notice be struck from the record. In any event the Chamber observes that the question of whether there can be an express finding of violation as a remedy in the absence of prejudice was not in issue before the Appeals Chamber in the *Lukić* case.

10. In this case the Prosecution was required to disclose all Rule 66(A)(ii) material to the Accused no later than 7 May 2009.¹⁷ It follows that the Prosecution violated its disclosure obligations by failing to disclose the Statement by 7 May 2009. While the Prosecution violated its disclosure obligations under Rule 66(A)(ii) of the Rules by the late disclosure of the Statement, the Chamber finds that the Accused has suffered no prejudice as a result of this violation. In reaching this conclusion, the Chamber reviewed the Statement and observed that its content is limited in length and that the information contained therein had already been disclosed to the Accused prior to Wilson’s testimony in other forms.¹⁸ The Accused has not substantiated his assertion that he was prejudiced by this late disclosure and has failed to demonstrate how the Statement adds anything to the material already disclosed to him. The

¹⁴ Prosecution Motion, para. 2.

¹⁵ Prosecution Motion, para. 3.

¹⁶ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

¹⁷ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

¹⁸ *See* Response, para. 4 and the five examples cited therein.

Chamber also considered that the Accused has already canvassed the issue of Mladić's relationship with, and subordination to, the JNA during his cross-examination of Wilson.¹⁹

11. In the absence of prejudice to the Accused, the Chamber finds that there is no basis to grant the Accused's request that Wilson be re-called for cross-examination.

IV. Disposition

12. For the foregoing reasons, the Trial Chamber, pursuant to Rules 54 and 66(A)(ii) of the Rules, hereby:

- a) **GRANTS**, by majority, Judge Kwon dissenting²⁰, the Motion in part, and finds that the Prosecution has violated Rule 66(A)(ii) of the Rules with respect to the late disclosure of the Statement;
- b) **DENIES** the Motion in all other respects;
- c) **DECIDES** that the Notice was filed in violation of Rule 126 *bis* of the Rules; and
- d) **DISMISSES** the Prosecution Motion to Strike.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-seventh day of June 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁹ Hearing, T. 4063–4064 (22 June 2010).

²⁰ 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) of the Rules, in the absence of prejudice to the Accused, he considers that the motion should be dismissed in its entirety.