



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: 14 August 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: 14 August 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S SECOND MOTION FOR NEW TRIAL FOR 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 Accused’s “Second Motion for New Trial for Disclosure Violations”, filed on 30 July 2014 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. The Accused seeks an order granting a new trial on the basis of the numerous violations by the Office of the Prosecutor (“Prosecution”) of its disclosure obligations under the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ In the Accused’s submission the cumulative prejudice he has suffered from the disclosure violations, has resulted in an unfair trial such that starting a new trial is the only remedy.²

2. On 13 August 2012, the Accused filed the “Motion for New Trial for Disclosure Violations” (“First Motion”), which was denied by the Chamber, on 3 September 2012, in the “Decision on Accused’s Motion for a New Trial For Disclosure Violations” (“First Decision”). The Accused submits that the Prosecution has continued to violate its disclosure obligations during and after his defence case which opened on 16 October 2012, despite the frequent warnings from the Chamber to the Prosecution to fully comply with its disclosure obligations.³ The Accused asserts that in this period, the Prosecution has failed to disclose an additional 18 statements pursuant to Rule 66(A)(ii) and an additional 211 documents pursuant to Rule 68.⁴ The Accused further notes that following the rendering of the First Decision, the total number of occasions on which the Chamber found that the Prosecution has violated its disclosure obligations has increased from 58 to 73.⁵

3. The Accused contends, moreover, that a new trial should be ordered as a sanction for the Prosecution’s cumulative disclosure violations.⁶ In this regard, the Accused repeats the submissions he made in the First Motion, citing the Appeals Chamber jurisprudence which has

¹ Motion, para. 1.

² Motion, para. 1.

³ Motion, paras. 5, 8.

⁴ Motion, para. 5.

⁵ Motion, para. 5.

⁶ Motion, paras. 6, 9.

held that the obligation to disclose is as important as the obligation to prosecute and that compliance with these obligations is essential to a fair trial.⁷

4. The Accused further submits that even if the Chamber declines to order a new trial as a sanction against the Prosecution, it should do so in order to remedy the prejudice he has suffered.⁸ While acknowledging that in each of its decisions, the Chamber has found that he was not prejudiced by the individual disclosure violations, the Accused asks the Chamber to consider the cumulative effect of these violations in ordering a new trial.⁹ The Accused repeats the submissions he made in the First Motion about the cumulative impact of the Prosecution's disclosure violations on his ability to plan and conduct a coherent defence.¹⁰ The Accused acknowledges that the Chamber has already ruled that he has suffered no cumulative prejudice with respect to the disclosure violations found by the end of the Prosecution's case.¹¹ However, he requests that the Chamber consider the issue of cumulative prejudice again, having regard to the continuation of the violations during the defence case.¹²

5. On 7 August 2014, the Prosecution filed the "Prosecution Response to 'Second Motion for New Trial for Disclosure Violations'" ("Response"). In the Response, the Prosecution submits that the Motion should be dismissed because the Accused has failed to show that a new trial is warranted either "as a remedy or as a sanction".¹³ More specifically, the Prosecution contends that the Accused repeats the same arguments which he made in his First Motion and that these arguments were subsequently dismissed by the Chamber in the First Decision.¹⁴ The Prosecution further submits that the Chamber has already considered the cumulative effect of the disclosure violations when assessing the question of prejudice and ruled that the Accused has not suffered prejudice as a result of those violations in this case.¹⁵ It argues that the Accused

⁷ Motion, para 7 citing *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Judgement, 16 January 2007, para. 72; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("Kordić and Čerkez Appeal Judgement"), paras. 183, 242; *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, p. 3; *Prosecutor v. Karemera et. al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 9. *See also*: First Motion, para. 8.

⁸ Motion, paras. 10, 19.

⁹ Motion, paras. 11–12.

¹⁰ Motion, paras. 13–17. *See also*: First Motion, paras. 5–6, 16–17, 19.

¹¹ Motion, para. 18.

¹² Motion, paras. 18–19.

¹³ Response, paras. 1, 7.

¹⁴ Response, paras. 1–2.

¹⁵ Response, paras. 1–2.

ignores the Chamber's approach of assessing the potential prejudice for specific disclosure violations and the cumulative effect of those violations on the Accused's fair trial rights.¹⁶

6. The Prosecution also submits that the Accused has exaggerated the extent of the Prosecution's disclosure violations and requests that the Chamber reject the Accused's "baseless request for a new trial as a sanction".¹⁷ The Prosecution emphasises that the Chamber has previously rejected such a sanction when the Accused has not been prejudiced by the disclosure violations and should do the same with respect to the Motion.¹⁸

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 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".¹⁹

9. 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.²⁰

10. Articles 20(1) and 21(4)(c) of the Statute of the Tribunal ("Statute") protect the rights of an accused person to be tried expeditiously, with full respect for his rights, and without undue delay. In addition, Article 21(4)(b) of the Statute provides that an accused person should have "adequate time and facilities for the preparation of his defence".

¹⁶ Response, para. 3.

¹⁷ Response, paras. 5–6.

¹⁸ Response, para. 6.

¹⁹ Decision on the Accused's Motion to Set Deadlines for Disclosure, 1 October 2009, paras. 8, 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 267.

²⁰ *Kordić and Čerkez* Appeal Judgement, para. 179; *Blaškić* Appeal Judgement, para. 268.

III. Discussion

11. In the Motion, the Accused simply repeats the arguments which he raised in the First Motion and which were subsequently dismissed by the Chamber in the First Decision. He requests the Chamber to consider the issue of cumulative prejudice, having regard to the additional violations that have occurred during the defence case.²¹

12. In assessing the potential prejudice to the Accused, the Chamber has had regard to individual disclosure violations as well as their cumulative effect on the Accused's fair trial rights.²² The Chamber has adopted the same approach during the defence case, by taking into consideration not only each disclosure violation but also the cumulative effect of these violations in determining whether or not the Accused has suffered prejudice.

13. The Chamber has issued 16 disclosure violation decisions after the First Decision.²³ As with the disclosure violation motions filed prior to the defence case, while the Chamber ruled that the Prosecution breached its disclosure obligations, it never found that the Accused had been prejudiced as a result of those violations. In concluding that there was no prejudice to the Accused with respect to the disclosure violations, the Chamber found that (i) the subject matter of the disclosed material was of limited length, marginal relevance or not of such significance;²⁴ (ii) the Accused already possessed similar if not identical material or similar material had already been admitted into evidence;²⁵ (iii) the Accused had already cross-examined or elicited

²¹ Motion, para. 18.

²² First Decision, para. 16 and decisions cited therein.

²³ Decision on Accused's Seventy-Fourth Disclosure Violation Motion, 6 November 2012 ("Seventy-Fourth Decision"); Hearing, T. 32151–32152 (17 January 2013) ("Seventy-Fifth Decision"); Hearing, T. 32881–32883 (29 January 2013) ("Seventy-Sixth Decision"); Decision on Accused's Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions, 11 March 2013 ("Seventy-Seventh and Seventy-Eighth Decision"); Hearing, T. 38096–38098 (9 May 2013) ("Seventy-Ninth Decision"); Decision on Accused's Eightieth and Eighty-First Disclosure Violation Motions, 9 July 2013 ("Eightieth and Eighty-First Decision"); Decision on Accused's Eighty-Second Disclosure Violation Motion, 7 November 2013 ("Eighty-Second Decision"); Decision on Accused's Eighty-Third Motion for Finding of Disclosure Violation, 21 November 2013 (*confidential*) ("Eighty-Third Decision"); Decision on Accused's Eighty-Fourth Disclosure Violation Motion, 16 January 2014 ("Eighty-Fourth Decision"); Decision on Accused's Eighty-Fifth Disclosure Violation Motion, 21 January 2014 ("Eighty-Fifth Decision"); Hearing, T. 47545–47546 (3 March 2014) ("Eighty-Sixth Decision"); Decision on Accused's Eighty-Seventh Disclosure Violation Motion, 10 March 2014 ("Eighty-Seventh Decision"); Decision on Accused's Eighty-Eighth Disclosure Violation Motion, 18 March 2014 ("Eighty-Eighth Decision"); Decision on Accused's Eighty-Ninth and Ninetieth Disclosure Violation Motions, 16 April 2014 ("Eighty-Ninth and Ninetieth Decision"); Decision on Accused's Ninety-First Disclosure Violation Motion, 7 May 2014 ("Ninety-First Decision"); Decision on Accused's Ninety-Second Disclosure Violation Motion, 10 June 2014 ("Ninety-Second Decision").

²⁴ Seventy-Fifth Decision, T. 32151–32152; Seventy-Seventh and Seventy-Eighth Decision, paras. 19, 21; Eightieth and Eighty-First Decision, paras. 16, 19; Eighty-Second Decision, paras. 19–20; Eighty-Third Decision, para. 11; Eighty-Fifth Decision, para. 22; Eighty-Seventh Decision, para. 14; Eighty-Eighth Decision, para. 10; Eighty-Ninth and Ninetieth Decision, para. 20; Ninety-First Decision, paras. 17–18.

²⁵ Seventy-Fourth Decision, para. 10; Seventy-Sixth Decision, T. 32881–32882; Seventy-Seventh and Seventy-Eighth Decision, paras. 18–21; Eightieth and Eighty-First Decision, paras. 16–19; Eighty-Third Decision, para.

evidence from witnesses on the subject matter of the disclosed material;²⁶ (iv) the Accused would have the opportunity to tender the material through another witness or a properly-worded bar table motion;²⁷ or (v) the material pertained to Rule 92 *bis*, Rule 92 *quater* witnesses or witnesses who ultimately did not testify.²⁸

14. In asking for a new trial, the Accused is effectively asking for every witness to be recalled.²⁹ However, while the Accused has filed several motions to recall multiple witnesses on the basis of disclosure violations by the Prosecution, in no instance has he been able to show that the disclosed material was of such significance that it warranted the recall of a witness.³⁰

15. The disclosure violations both before and during the defence case reflect badly on the Prosecution's disclosure practices. However, the Accused has also failed to pay regard to the Chamber's repeated instruction that he should not consider the filing of disclosure violation motions as a purely numerical exercise and that he should instead focus on disclosure violations where there is demonstrable prejudice.³¹ By ignoring this instruction, the Accused has once again failed to exhibit how any of the newly disclosed material could have been used by him to advance his case, in light of the other material in his possession. Consequently, he has not demonstrated that the disclosure violations which have been documented thus far have caused prejudice to him, either on an individual or a cumulative basis.

16. The Chamber has taken a number of measures to ensure that the Accused's preparations for trial were not prejudiced and that the cumulative effect of the disclosure violations did not compromise his right to a fair trial.³² These measures included (i) the suspension of the proceedings on multiple occasions; (ii) the postponement of witness testimonies to ensure that the Accused had sufficient time to review the disclosed material; (iii) the imposition of additional deadlines for the Prosecution to review and disclose material; and (iv) requiring the

11; Eighty-Fourth Decision, para. 14; Eighty-Fifth Decision, para. 22; Eighty-Sixth Decision, T. 47546; Eighty-Seventh Decision, para. 14; Eighty-Eighth Decision, para. 10; Eighty-Ninth and Ninetieth Decision, para. 20; Ninety-First Decision, para. 17.

²⁶ Seventy-Sixth Decision, T. 32881–32882; Eightieth and Eighty-First Decision, para. 16; Eighty-Second Decision, para. 20; Eighty-Fourth Decision, paras. 14; Eighty-Fifth Decision, para. 22.

²⁷ Seventy-Fourth Decision, para. 10; Eightieth and Eighty-First Decision, para. 17; Eighty-Fifth Decision, para. 23.

²⁸ Seventy-Ninth Decision, T. 38097; Eighty-Third Decision, para. 12; Ninety-First Decision, para. 16.

²⁹ First Decision, para. 18.

³⁰ See Decision on Accused's Motion to Recall Eleven Sarajevo Witnesses, 5 October 2011, para. 22; Decision on Accused's Motion to Recall Twelve Municipalities Witnesses, 20 January 2012, para. 24.

³¹ Seventy-Seventh and Seventy-Eighth Decision, para. 24; Seventy-Ninth Decision, T. 38097–38098; Eighty-Seventh Decision, para. 14; Eighty-Ninth and Ninetieth Decision, para. 15; Ninety-First Decision, para. 19; Ninety-Second Decision, para. 8.

³² See First Decision, paras. 14–16.

Prosecution to provide detailed reports, answer questions relating to their disclosure practices and to implement additional measures to rectify identified problems.³³

17. These measures were taken to ensure that the Accused would not be prejudiced by the Prosecution's disclosure violations, even in a cumulative sense. In light of these measures and the Chamber's finding that the Accused has suffered no prejudice as the result of the disclosure violations in this case, there is no basis to order the exceptional measure of a new trial, either as a remedy or as a sanction.

IV. Disposition

18. For the foregoing reasons, and pursuant to Articles 20(1) and 21(4)(c) of the Statute and Rule 54 and 68 *bis* of the Rules, the Trial Chamber hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this fourteenth day of August 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

³³ First Decision, paras. 14–16. *See also*: Seventy-Seventh and Seventy-Eighth Decision, para. 23; Eighty-Fifth Decision, para. 21.