



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: 20 April 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: 20 April 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S FORTY-SIXTH 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 “Forty-Sixth Motion for Finding of Disclosure Violation and for Sanctions: March 2011 – Rule 66(A)(ii)”, filed publicly with confidential annexes on 5 April 2011 (“Forty-Sixth Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Forty-Sixth Motion, the Accused argues that there have been violations of Rule 66(A)(ii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by the Office of the Prosecutor (“Prosecution”) in relation to the disclosure of three statements to him in March 2011.¹ He submits that the statements of witnesses KDZ080 (“KDZ080 Statement”), Milan Tupajić (“Tupajić Statement”), and Rule 92 *quater* witness KDZ044 (“KDZ044 Statement”), have been in the Prosecution’s possession for several years but were only disclosed to him on 3 March, 8 March and 25 March 2011 respectively.² The Accused asserts that this delay “violated not only the original 7 May 2009 disclosure deadline, but the 1 October 2010 deadline for disclosure of all remaining Rule 66(A)(ii) material”.³ He requests an express finding by the Chamber that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of these three statements.⁴

2. As a sanction for these violations and for the repeated failure by the Prosecution to adhere to the two deadlines imposed by the Chamber for the disclosure of Rule 66(A)(ii) material, the Accused requests that the witnesses’ testimonies be excluded.⁵ In support of this submission, he argues that the repeated suspensions of the trial have “not served to stop the flow of disclosure violations”.⁶

3. On 15 April 2011, the Prosecution filed the “Prosecution’s Response to Karadžić’s Forty-Sixth Motion for Finding of Disclosure Violation and for Sanctions” (“Response to Forty-Sixth Motion”). It submits that the Forty-Sixth Motion should be dismissed on the basis that the Accused has failed to demonstrate any prejudice and that the remedy of exclusion of evidence is unwarranted.⁷ The Prosecution claims that two of the statements were not identified in Rule

¹ Forty-Sixth Motion, para. 1.

² Forty-Sixth Motion, para. 1.

³ Forty-Sixth Motion, para. 3.

⁴ Forty-Sixth Motion, paras. 3, 8.

⁵ Forty-Sixth Motion, paras. 5, 7, 15.

⁶ Forty-Sixth Motion, para. 7.

⁷ Response to Forty-Sixth Motion, para. 1.

66(A)(ii) searches due to “formatting anomalies” and the third was not disclosed due to “Prosecution oversight”.⁸

4. The Prosecution emphasises that the Chamber has held that in the absence of demonstrated prejudice, there is no justification for excluding relevant evidence and, given that the Accused makes no claim of prejudice, “he appears to concede that he has not been prejudiced” with respect to the statements referred to in the Forty-Sixth Motion.⁹ The Prosecution argues that, in any event, the Accused has not been prejudiced by the late disclosure of the three statements.¹⁰ In support of this submission it observes that the Accused will have ample time to consider the disclosed material and incorporate it if necessary into his preparations given that two of the witnesses are not scheduled to testify until after the 2011 summer recess and the third is a Rule 92 *quater* witness.¹¹ In addition, it argues that there was no inconsistency between the KDZ080 Statement and other prior statements of this witness and that the Prosecution does not intend to elicit from KDZ080 the “limited amount of new information” contained in the statement.¹² With respect to the Tupajić Statement, the Prosecution claims that most matters of any relevance “are already contained in one of the witness’s prior statements” and testimony in the *Krajišnik* case.¹³ Similarly, it argues that the information in the KDZ044 Statement is covered in the witness’s previously disclosed statements and that there are no inconsistencies between these statements and the KDZ044 Statement.¹⁴

5. The Prosecution also argues that the Accused has failed to demonstrate a proper basis on which the Chamber should grant declaratory relief in the absence of prejudice and that he inaccurately suggests that the Prosecution has acted in bad faith with respect to its disclosure obligations.¹⁵

II. Applicable Law

6. 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 of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all

⁸ Response to Forty-Sixth Motion, paras. 3, 5, 9, 12.

⁹ Response to Forty-Sixth Motion, para. 2.

¹⁰ Response to Forty-Sixth Motion, para. 2.

¹¹ Response to Forty-Sixth Motion, paras. 4, 8, 11.

¹² Response to Forty-Sixth Motion, para. 4.

¹³ Response to Forty-Sixth Motion, para. 7.

¹⁴ Response to Forty-Sixth Motion, para. 10.

¹⁵ Response to Forty-Sixth Motion, paras. 12-18.

transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*". The applicable deadline in this case was 7 May 2009.¹⁶

7. 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.¹⁷

III. Discussion

8. Given that none of the three statements were recently created, they should have been disclosed in accordance with the 7 May 2009 deadline set by the pre-trial Judge. Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of the three statements referred to in the Forty-Sixth Motion. While some mistakes by the Prosecution in ensuring full compliance with its disclosure obligations may be inevitable, particularly in a case of this size, the Chamber is not convinced that the reasons offered by the Prosecution justify the failure to identify these statements earlier and stresses that, with the exception of newly created material, or material which has recently come into the Prosecution's possession, there should be no further disclosure of Rule 66(A)(ii) material. This latest example demonstrates yet again the failure by the Prosecution to maintain an efficient system for the disclosure of documents in this case.

9. However, given that one of the affected witnesses is a Rule 92 *quater* witness and the other two will not be called to testify before the summer recess, the Chamber finds that the Accused and his team will have sufficient time to review the disclosed material, and incorporate it, if necessary, into his ongoing preparations. Furthermore, having considered the length of the statements, the absence of any arguments by the Accused as to how this late disclosure has caused him prejudice, and the Prosecution's submissions that the information contained therein is covered by and consistent with the witnesses' previously disclosed statements, the Chamber is not satisfied that the Accused has been prejudiced by their late disclosure. The Chamber repeats its observation that it would consider imposing penalties on the Prosecution, including the exclusion of testimony, if its failure to meet the deadlines for disclosure became a "material

¹⁶ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

¹⁷ *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, Appeals Judgement, 29 July 2004, para. 268.

issue”¹⁸ and if there was “demonstrable prejudice to the Accused”.¹⁹ Given the absence of prejudice to the Accused, there is no basis to order the exclusion of these witnesses’ evidence.

IV. Disposition

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

- a) **GRANTS**, by majority, Judge Kwon dissenting²⁰, the Forty-Sixth Motion in part, and finds that the Prosecution has violated Rule 66(A)(ii) of the Rules with respect to this motion; and
- b) **DENIES** the Forty-Sixth Motion in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this twentieth day of April 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁸ Decision on Accused’s Twenty-Ninth Disclosure Violation Motion, 11 January 2011 (“Decision on Twenty-Ninth Motion”), para. 14.

¹⁹ Decision on Twenty-Ninth Motion, para. 14; Decision on Accused’s Eleventh to Fifteenth Motions for Finding of Disclosure Violation and for Remedial Measures, 24 September 2010, para. 45

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.