



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: 1 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: 1 June 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S SEVENTY-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 “71st Motion for Finding of Disclosure Violation (April 2012)”, filed by the Accused on 1 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) and Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) in relation to the disclosure on 10 April 2012 of a statement given by Aleksander Vasiljević to the Prosecution in 2005 (“Statement”).¹

2. He observes that Vasiljević was listed as a Prosecution witness in this case which required the Prosecution to disclose the Statement pursuant to Rule 66(A)(ii) by 7 May 2009.² In the Accused’s submission, in any event the Statement should have been disclosed pursuant to Rule 68 since it is also “clearly exculpatory” as it includes an observation by Vasiljević that he was told by Tomislav Kovač that the Accused had no knowledge about the killing of prisoners in Srebrenica.³ The Accused’s contends that he was prejudiced by this late disclosure as he could have cited the Statement in his opening statement and used it with witnesses who testified about his relationship with Ratko Mladić at the time of the events in Srebrenica.⁴ The Accused therefore requests a specific finding that the Prosecution has violated its disclosure obligations with respect to this late disclosure.⁵ As a sanction and remedial measure, he requests that the Chamber order the Prosecution to call Kovač as a witness in its case-in-chief to allow the exculpatory information in the Statement to be elicited prior to the close of the Prosecution case to allow the Chamber to consider it with respect to the Accused’s Motion for Judgement of Acquittal pursuant to Rule 98 *bis*.⁶

3. On 15 May 2012, the Prosecution filed the “Prosecution Response to Karadžić’s Seventy-First Motion for Disclosure Violation (April 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.⁷ It contends that the Chamber should not find

¹ Motion, paras. 1–2.

² Motion, para. 3.

³ Motion, paras. 2, 4.

⁴ Motion, para. 5.

⁵ Motion, paras. 1, 3–4.

⁶ Motion, para. 7.

⁷ Response, paras. 1, 13.

that there was a violation of Rule 66(a)(ii) given that Vasiljević was removed from the Prosecution's Rule 65 *ter* witness list on 22 March 2012.⁸

4. The Prosecution acknowledges that the late disclosure of the Statement was an oversight and should have been disclosed earlier pursuant to Rule 68. However, the Prosecution argues that the Statement has “virtually no *actual* exculpatory value” and would have very little probative value unless Kovač testified.⁹ In that regard, the Prosecution observes that the Accused is free to call Kovač during his defence case to testify about the Accused's knowledge of the events described in the Statement.¹⁰ It also notes that a “large amount of material reflecting what Kovač has said about the Srebrenica events” had already been disclosed to the Accused and that his defence team has already had direct access to Kovač as a potential witness.¹¹

5. The Prosecution further contends that the Accused was not prejudiced by not being able to refer to the Statement in his opening statement, given that the opening statement has no evidentiary value.¹² In addition, the Prosecution observes that it would have been unlikely that the Accused would have been able to tender this Statement into evidence as none of the witnesses called by the Prosecution would have been able to verify its contents.¹³ It also observes that the Accused has failed to demonstrate that the Statement is of such significance that its late disclosure has caused him prejudice.¹⁴ In support of this submission, the Prosecution contends that the Accused has already explored his relationship with Mladić at the time of the alleged crimes in Srebrenica with witnesses who have testified in this case and that the Statement would have added nothing to this line of questioning.¹⁵

6. Finally the Prosecution argues that even if the Chamber finds that the Accused was prejudiced by the late disclosure of the Statement, the sanction and remedy sought by the Accused is inappropriate.¹⁶ In that regard the Prosecution recognises that the late disclosure of the Statement was an error which was “immediately rectified as soon as that error came to light”.¹⁷ The Prosecution contends that even if Kovač was called by the Prosecution and the Accused was able to elicit favourable information it would have no effect on the Chamber's

⁸ Response, para. 2.

⁹ Response, para. 5.

¹⁰ Response, para. 5.

¹¹ Response, para. 5.

¹² Response, para. 7.

¹³ Response, para. 7.

¹⁴ Response, para. 8.

¹⁵ Response, para. 9, referring to the Accused's cross-examination of Manojlo Milovanović and Petar Škrbić.

¹⁶ Response, paras. 10, 13.

determination under Rule 98 *bis*.¹⁸ In support of this submission, the Prosecution contends that at the Rule 98 *bis* stage of the case, the Chamber is required to “take the Prosecution’s evidence at its highest” and that any inconsistencies in that evidence as well as evidence favourable to the Accused would only be assessed at the conclusion of the proceedings.¹⁹

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”.²⁰ 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.²¹

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.²²

III. Discussion

10. In this case the Prosecution was required to disclose all Rule 66(A)(ii) material to the Accused no later than 7 May 2009.²³ While Vasiljević is no longer on the Prosecution’s Rule 65 *ter* witness list, he was still on this list at the time of the 7 May 2009 deadline and was only removed in March 2012.²⁴ It follows that the Prosecution violated its disclosure obligations by

¹⁷ Response, para. 11.

¹⁸ Response, para. 12.

¹⁹ Response, para. 12, citing, Case No. IT-96-21-A, *Prosecutor v. Zejnil Delalić et al.*, Judgement, 20 February 2001, para. 434 (emphasis in original omitted). Case No. IT-95-10-A, *Prosecutor v. Goran Jelisić*, Judgement, 5 July 2001, para. 37.

²⁰ Decision on the Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009, para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 267.

²¹ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179.

²² *Kordić and Čerkez* Appeal Judgement, para. 179; *Blaškić* Appeal Judgement, para. 268.

²³ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

²⁴ See Prosecution Motion to Amend its Rule 65 *ter* Witness List, 20 March 2012; Hearing, T. 26674 (22 March 2012); Prosecution Submission of Revised Rule 65 *ter* Witness List, 26 March 2012.

failing to disclose the Statement pursuant to Rule 66(A)(ii) by 7 May 2009. In deciding whether the Accused has been prejudiced by a Rule 66(A)(ii) violation, the Chamber considers *inter alia* whether the Accused will have sufficient time to review the disclosed material and incorporate it into his preparations before a witness testifies for the purposes of cross-examination.²⁵ However, given that Vasiljević was ultimately not called as a witness, the Accused did not need the Statement to prepare for his cross-examination of the witness. The Chamber therefore finds that the Accused was not prejudiced with respect to the Rule 66(A)(ii) violation.

11. The Chamber also finds that the content of the Statement is potentially exculpatory and should have been disclosed to the Accused pursuant to Rule 68 of the Rules. Given that the Statement dates back to 2005 and was only disclosed in April 2012, the Chamber finds that the Prosecution has violated its disclosure obligations under Rule 68 of the Rules by failing to disclose the Statement as soon as practicable.

12. While the Prosecution violated its disclosure obligations under Rule 68 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 of little probative value. The Chamber was also mindful that it is still open to the Accused to call Kovač during his defence case as a witness to comment on the Statement if he is of the view that its content is of significance to his case. The Chamber also noted the Prosecution's submission that a "large amount of material reflecting what Kovač had said about the Srebrenica events" had already been disclosed to the Accused.²⁶ In addition the Chamber noted that the Accused has cross-examined witnesses who have testified in this case regarding his relationship with Mladić at the time of the alleged crimes in Srebrenica²⁷ and that witnesses already called in this case would have been unable to comment to any significant extent on the content of the Statement.

13. In the absence of prejudice to the Accused there is no basis to grant the Accused's requested sanction or remedy that the Prosecution be ordered to call Kovač during their case-in-chief. The Chamber sees no merit in the Accused's submission that the exculpatory information contained in the Statement should be elicited prior to the close of the Prosecution case to allow the Chamber to consider it for the purposes of the Rule 98 *bis* proceedings. For the purposes of determining "if there is no evidence capable of supporting a conviction" on any count under the

²⁵ Decision on Accused's Twenty-Ninth Disclosure Violation Motion, 11 January 2011, paras. 13, 17; Decision on Accused's Forty-Sixth Disclosure Violation Motion, 20 April 2011, para. 9; Decision on Accused's Forty-Eighth Disclosure Violation Motion, 30 May 2011, para. 12.

²⁶ Response, para. 5.

terms of Rule 98 *bis*, the Chamber would not be assisted by the evidence contained in the Statement.

IV. Disposition

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

- a) **GRANTS**, by majority, Judge Kwon dissenting²⁸, the Motion in part, and finds that the Prosecution has violated Rule 66(A)(ii) and Rule 68 of the Rules with respect to the late disclosure of the Statement; 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 first day of June 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁷ Hearing, T. 25638, 25656–25657, 25670–25672 (1 March 2012) (cross-examination of Milovanović) and Hearing, T. 26027–26028 (8 March 2012) (cross-examination of Škrbić).

²⁸ 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 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 also considers that since Vasiljević is no longer on the Prosecution's Rule 65 *ter* witness list, the Accused's motion with respect to the alleged Rule 66(A)(ii) violation is moot.