



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: 11 March 2013

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: 11 March 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S SEVENTY-SEVENTH AND SEVENTY-EIGHTH
DISCLOSURE VIOLATION MOTIONS**

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 “77th Motion for Finding of Disclosure Violation (January 2013)”, filed on 11 February 2013 (“Seventy-Seventh Motion”)¹, and the Accused’s “78th Motion for Finding of Disclosure Violation and for Suspension of the Trial”, filed on 20 February 2013 (“Seventy-Eighth Motion”), and hereby issues its decision thereon.

I. Submissions

A. Seventy-Seventh Motion

1. In the Seventy-Seventh 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 its failure to disclose one statement of Armin Baždar (“Baždar Statement”) and two statements of KDZ607 (“KDZ607 Statements”) (together “Statements”) before the 7 May 2009 deadline for the disclosure of such material.² The Statements were made in 1996 but were not disclosed to the Accused until 22 January 2013.³ The Accused seeks an express finding that the Prosecution violated its disclosure obligations and argues that he was prejudiced by these violations as he could have used the Statements in his cross-examination of Baždar and KDZ607 (“Witnesses”) if they had been disclosed by the 7 May 2009 deadline.⁴

2. As a sanction for the repeated violations by the Prosecution of its disclosure obligations the Accused requests the exclusion of the Witnesses’ testimony.⁵ The Accused asserts that when a party other than the Prosecution violates a rule of the Tribunal it is sanctioned regardless of whether anyone has been prejudiced and cites a number of contempt judgements to support this assertion.⁶ The Accused further contends that the failure to sanction the Prosecution unless a “showing of prejudice is made” involves the application of an “inexplicable double standard”.⁷

3. On 26 February 2013, the Prosecution filed the “Prosecution Response to 77th Motion for Finding of Disclosure Violation (January 2013)” with confidential annex (“First Response”). It submits that the Seventy-Seventh Motion should be dismissed on the basis that the Accused has

¹ The Chamber notes that the Seventy-Seventh Motion was reclassified as a confidential filing on 12 February 2013 and that a public version of the Seventy-Seventh Motion was filed on 12 February 2013.

² Seventy-Seventh Motion, paras. 1–3; confidential annex B.

³ Seventy-Seventh Motion, para. 2.

⁴ Seventy-Seventh Motion, paras. 1, 3–4.

⁵ Seventy-Seventh Motion, para. 6.

⁶ Seventy-Seventh Motion, para. 7.

failed to demonstrate that he has been prejudiced by the late disclosure of the Statements, and that even if there was some prejudice, the exclusion of the evidence of the Witnesses would not be warranted given the possibility of recalling them for cross-examination.⁸ The Prosecution acknowledges that the Statements should have been disclosed in accordance with the 7 May 2009 deadline and claims that the failure to do so was the result of a technical error given that its optical character recognition technology did not recognise the names of the Witnesses.⁹

4. The Prosecution further submits that the information contained in the Baždar Statement “is already contained in prior statements of the witness” that were already in the Accused’s possession when he cross-examined the witness.¹⁰ With respect to KDZ607, the Prosecution also asserts that the “vast majority of the information” found in the KDZ607 Statements were also contained in other statements of KDZ607 that were already in the Accused’s possession when he cross-examined the witness.¹¹ The Prosecution recognises that two minor matters in the KDZ607 Statements are not discussed in previously disclosed statements but argues that the Accused “failed to show how the lack of these specific pieces of new information caused him any prejudice”.¹²

B. Seventy-Eighth Motion

5. In the Seventy-Eighth Motion, the Accused argues that the Prosecution violated Rule 66(A)(ii) and Rule 68 of the Rules by only disclosing a statement of Aleksandar Vasiljević (“Vasiljević Statement”) on 18 February 2013.¹³ The Accused seeks an express finding that the Prosecution violated Rule 66(A)(ii) for its failure to disclose the Vasiljević Statement by the 7 May 2009 deadline given that he was a Prosecution witness at the time.¹⁴ The Accused also contends that the Vasiljević Statement contains exculpatory material and seeks an express finding that the Prosecution has also violated Rule 68 of the Rules by failing to disclose the statement earlier.¹⁵

6. The Accused argues that this violation is “particularly egregious” given that (1) Vasiljević had been specifically interviewed for this case; (2) he told the Prosecution that his information was more favourable to the Accused; (3) the interview was taken only one month

⁷ Seventy-Seventh Motion, para. 7.

⁸ First Response, paras. 1, 6.

⁹ First Response, para. 2.

¹⁰ First Response, paras. 3–4.

¹¹ First Response, paras. 3–4.

¹² First Response, para. 5; confidential annex A.

¹³ Seventy-Eighth Motion, paras. 1–2.

¹⁴ Seventy-Eighth Motion, para. 3.

before the deadline for disclosure of such statements; and (4) the Senior Trial Attorney responsible for this case was present during the interview of Vasiljević.¹⁶

7. The Accused emphasises that despite the repeated warnings of the Chamber, the Prosecution has continued to violate its disclosure obligations in the absence of a meaningful remedy.¹⁷ The Accused submits that the only solution at this stage of the proceedings would be to order the Prosecution to make its full database available to the Defence to allow his team to locate exculpatory and undisclosed prior statements.¹⁸ For this purpose the Accused requests a one month suspension of trial to allow four members of his team to search the Prosecution's database, under the Prosecution's supervision, to ensure "once and for all" that the Prosecution was not hiding or negligently failing to disclose material.¹⁹

8. The Accused suggests that if material is found in these searches which the Prosecution claims is privileged, it could be sealed and presented to the Chamber for determination as to its disclosure.²⁰ He also submits that once he has full access to the Prosecution databases, the disclosure violation motions would stop and he would seek leave to add any witnesses discovered through the process.²¹ The Accused concludes that this would be a "modest remedy" for the serial disclosure violations in this case.²²

9. On 4 March 2013, the Prosecution filed the "Prosecution Response to Karadžić's 78th Motion for Finding of Disclosure Violation and for Suspension of Trial" with public annex A ("Second Response"). The Prosecution acknowledges that the Vasiljević Statement should have been disclosed pursuant to Rule 66(A)(ii) and Rule 68 of the Rules but was not, due to an "administrative error".²³ The Vasiljević Statement was inadvertently not entered into the Prosecution's evidence collection and therefore could not be found through electronic searches.²⁴ Despite this acknowledgement, the Prosecution argues that the Seventy-Eighth Motion should be dismissed given the Accused's failure to demonstrate prejudice and that, in the absence of prejudice, no remedy is warranted.²⁵

¹⁵ Seventy-Eighth Motion, paras. 4–6

¹⁶ Seventy-Eighth Motion, para. 7.

¹⁷ Seventy-Eighth Motion, paras. 8–11.

¹⁸ Seventy-Eighth Motion, para. 12.

¹⁹ Seventy-Eighth Motion, para. 13.

²⁰ Seventy-Eighth Motion, para. 14.

²¹ Seventy-Eighth Motion, para. 15.

²² Seventy-Eighth Motion, para. 16.

²³ Second Response, para. 1.

²⁴ Second Response, para. 2.

²⁵ Second Response, para. 1.

10. The Prosecution submits that the Accused has long possessed numerous prior statements of Vasiljević which duplicate all the information contained in the Vasiljević Statement.²⁶ In the Second Response, the Prosecution observes that hundreds of pages of Rule 66(A)(ii) material for Vasiljević has already been in the Accused's possession for several years including documents pertaining to (1) Bosnian paramilitary groups, the arming of Bosnian Muslims and crimes committed against the JNA; (2) Vasiljević's discussions with Alija Izetbegović about paramilitary activities and crimes against the JNA; and (3) Vasiljević's view that Bosnian Serbs were not involved in the crimes committed in Bijeljina in early March 1992.²⁷

11. The Prosecution further observes that on the date of disclosure, Vasiljević had yet to testify as a Defence witness and the Accused therefore "had adequate time to adapt" even if the Vasiljević Statement did contain new material.²⁸

12. The Prosecution further submits that the remedy proposed by the Accused is not feasible and "unlikely to provide the Accused with better access to relevant information than he already has".²⁹ In support of this submission, the Prosecution observes that the Accused already has access to non-sensitive, non-witness related material through the Electronic Disclosure Suite ("EDS") which gives the Accused access to approximately 60 per cent of the Prosecution's holdings.³⁰ In addition the Prosecution submits that even if access to sensitive material is granted, in the one month suggested, the Accused's team could "do no more than review a sample of the same material that the Prosecution has already reviewed" which would be "enormously duplicative" and would also have to be conducted without the expertise of the Prosecution unit.³¹ In the Prosecution's submission, the Accused's duplication of the searches already conducted by the Prosecution would not rectify these problems.³²

13. The Prosecution also highlights the practical difficulties in granting the Accused access to the non-EDS portion of its evidence collection, which in its submission would require a review of approximately 3.6 million pages of material to determine which material has been provided by sensitive witnesses, and to identify material subject to protective measures and confidential third-party material provided pursuant to Rule 70(B).³³

²⁶ Second Response, paras. 1, 3.

²⁷ Second Response, para. 3; public annex A.

²⁸ Second Response, para. 4.

²⁹ Second Response, para. 8.

³⁰ Second Response, para. 9.

³¹ Second Response, paras. 9–10.

³² Second Response, para. 11.

³³ Second Response, paras. 12–15.

14. With respect to the requested suspension, the Prosecution asserts that the Accused has failed to show good cause for such an exceptional measure and if he is not granted access to the Prosecution evidence collection his “request for suspension falls away”.³⁴

II. Applicable Law

15. 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*”.

16. 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.³⁵

17. 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.³⁶

III. Discussion

A. Seventy-Seventh Motion

18. The Chamber finds that the Prosecution violated Rule 66(A)(ii) of the Rules by its failure to disclose the Baždar Statement and KDZ607 Statements before the 7 May 2009 deadline for the disclosure of such material. While the repeated disclosure violations reflect poorly on the Prosecution’s disclosure practices, the Chamber must assess whether the specific violations have caused any prejudice to the Accused. Having reviewed the Baždar Statement, the Chamber finds that its content mirrors the material which had already been disclosed to the Accused with respect to this witness.³⁷ The Chamber therefore finds that the Accused was not prejudiced by

³⁴ Second Response, para. 17.

³⁵ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”), para. 179.

³⁶ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

³⁷ See P3286 and 65 *ter* 24674.

this late disclosure. In the absence of prejudice there is no basis to exclude Baždar's evidence as a sanction for this violation.

19. With respect to the KDZ607 Statements, the Prosecution itself acknowledges that there are "two minor matters" which had not been discussed in previously disclosed statements.³⁸ Having reviewed the KDZ607 Statements, the Chamber notes that their content adds very little of significance to the material already disclosed to the Accused pertaining to this witness and that the Accused has failed to show how any new material could have been used to further his case during his cross-examination of KDZ607.³⁹ The Chamber therefore finds that the Accused has failed to demonstrate that he has been prejudiced by this disclosure violation. In the absence of prejudice there is no basis to exclude KDZ607's evidence as a sanction for this violation.

B. Seventy-Eighth Motion

20. The Chamber finds that the Prosecution violated Rule 66(A)(ii) and Rule 68 of the Rules by its late disclosure of the Vasiljević Statement. Vasiljević was not dropped as a Prosecution witness until 20 March 2012, well after the 7 May 2009 deadline for the disclosure of Rule 66(A)(ii) material.⁴⁰ The Chamber also finds that the Vasiljević Statement contains potentially exculpatory material which should have been disclosed as soon as practicable pursuant to Rule 68 of the Rules.

21. However, having reviewed the Vasiljević Statement in light of other documents which had already been disclosed to the Accused prior to his testimony,⁴¹ the Chamber finds that the Accused was not prejudiced by the late disclosure. The Chamber is not satisfied that the Vasiljević Statement contains any significant new information that was not already contained in material which was available to the Accused. The Chamber is also mindful that Vasiljević testified in this case on 4 and 5 March 2013, and the Accused had an opportunity to use the material contained in the Vasiljević Statement and disclosed on 18 February 2013 during his testimony but did not do so.

22. In the absence of prejudice to the Accused, the Chamber sees no basis to suspend the trial or to grant the Accused access to the Prosecution's database. Furthermore, the Chamber is of the view that granting the Accused access to the Prosecution's database is neither realistic nor practical, given the large volume of material involved, the necessary duplication of searches and

³⁸ First Response, para. 5; confidential annex A.

³⁹ See P3289, 65 *ter* numbers 07069, and 23239.

⁴⁰ Second Response, fn. 3.

⁴¹ Extracts from some of these documents were attached in the public annex A to the Second Response.

the practical problems associated with identifying and controlling access to material provided by sensitive witnesses, material subject to protective measures and confidential third-party material.

C. General Observations

23. The “technical” and “administrative” errors referred to by the Prosecution are not adequate excuses for their repeated disclosure violations. The Chamber reiterates that at this stage of the trial these errors should have already been identified and rectified. The Chamber instructs the Prosecution in its next monthly periodic disclosure report to explain what measures have been and will be taken to ensure that these technical and administrative errors are corrected and do not continue to occur. The Prosecution is instructed to detail the extent to which it has relied on optical character recognition to ensure that its disclosure obligations have been complied with and what other measures are taken to ensure that documents which could have been missed by these searches are disclosed to the Accused. The Prosecution is also instructed to make oral submissions explaining the disclosure violations found with respect to the Seventy-Seventh Motion and Seventy Eighth Motion and answer any questions from the Chamber with respect to the ongoing issue of disclosure violations on 19 March 2013 before the commencement of the witness testimony on that day.

24. The Chamber also takes this opportunity to recommend that the Accused should not consider the process of filing disclosure violation motions to be a numerical exercise of recording each and every violation. The Accused should instead focus on how a specific violation has caused him prejudice, and how any newly disclosed material could have been used by him to advance his case in light of the material already in his possession. It is one thing to argue that multiple documents have been disclosed in violation of the Rules, but such violations are unlikely to cause prejudice if the contents of the newly disclosed material adds nothing new or of significance to material already in the Accused’s possession.

IV. Disposition

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

- i) **GRANTS**, in part by majority, Judge Kwon dissenting⁴², the Seventy-Seventh Motion and Seventy-Eighth Motion, and finds that the Prosecution violated Rule

⁴² 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 Rule 68 of the Rules, in the absence of prejudice to the Accused, he considers that the motions should be dismissed in their entirety.

66(A)(ii) of the Rules with respect to its late disclosure of the Baždar Statement and KDZ607 Statements; and finds that the Prosecution violated Rule 66(A)(ii) and Rule 68 of the Rules by its late disclosure of the Vasiljević Statement;

- ii) **INSTRUCTS** the Prosecution in its next periodic disclosure report to address the Chamber's questions regarding its disclosure practices as outlined in paragraph 23 above; and
- iii) **INSTRUCTS** the Prosecution to make oral submissions on 19 March 2013 and answer any questions with respect to the ongoing issue of disclosure violations before the commencement of witness testimony on that day.

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



Judge O-Gon Kwon
Presiding

Dated this eleventh day of March 2013
At The Hague
The Netherlands

[Seal of the Tribunal]