



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 March 2016

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 March 2016

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S 107TH DISCLOSURE VIOLATION MOTION

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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 “107th Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly on 8 March 2016 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused argues that the Office of the Prosecutor (“Prosecution”) violated Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by failing to disclose exculpatory material.¹ The Accused refers to three documents which, in his submission, are exculpatory but were only disclosed by the Prosecution on 15 February and 1 March 2016 (“Documents”).²
2. The first document is a report of statements made by the Accused to international representatives in which he claimed that Bosnian Serbs were willing to have Bosnian Muslims and Bosnian Croats living with them and that he would allow for the unimpeded passage of humanitarian convoys to Srebrenica. (“First Document”).³
3. The second document is an interview given by Mladić in July 1995, in which he claimed that (i) the VRS was interrogating Bosnian Muslim troops and policemen in Potočari and that those who had not committed war crimes would be released; and (ii) civilians who wanted to remain in Srebrenica could stay (“Second Document”).⁴
4. The third document is an order signed by Biljana Plavšić which indicated that the Presidency of Republika Srpska had ordered the free and unobstructed movement of humanitarian aid convoys (“Third Document”).⁵
5. The Accused requests that the Chamber make a finding that the Prosecution violated its disclosure obligations pursuant to Rule 68 with respect to the Documents.⁶ In relation to the First Document he further requests that he be allowed to re-open his case in order to admit it

¹ Motion, para. 1.

² Motion, paras. 4, 10, 15.

³ Motion, paras. 5–6.

⁴ Motion, paras. 11–12.

⁵ Motion, para. 15.

⁶ Motion, paras. 9, 14, 18.

from the bar table or to call one of the participants in the meeting to testify.⁷ With respect to the Second Document, the Accused requests that the Chamber allow him to re-open his case in order to recall Krajišnik to testify about the content of the document.⁸ For the Third Document, the Accused requests that he be allowed to re-open his case to admit the document from the bar table.⁹ He also asks that the Chamber draw an adverse inference with respect to each of the issues affected by the disclosure violations.¹⁰

6. The Accused repeats his request for an evidentiary hearing to determine why the Prosecution has failed to comply on multiple occasions with its disclosure obligations pursuant to Rule 68 and to allow the Chamber to assure itself that all Rule 68 material has been disclosed before issuing its judgement.¹¹

7. On 10 March 2016, the Chamber instructed the Prosecution by e-mail that pursuant to Rule 126 *bis* of the Rules, it should file an expedited response to the Motion no later than 15 March 2016. On 11 March 2016, the Prosecution publicly filed the “Prosecution Response to 107th Motion for Finding of Disclosure Violation and for Remedial Measures” (“Response”).

8. The Prosecution submits that the Motion should be denied and notes that two of the three documents referred to in the Motion had already been disclosed to the Accused.¹² The Prosecution argues that the Accused in repeatedly ignoring duplicative or identical material demonstrates that his claims of prejudice are spurious and that these motions were “purely a litigation tactic”.¹³

9. The Prosecution acknowledges that the Third Document contains “facially exculpatory material” and should have been disclosed earlier and expresses its regret for this late disclosure.¹⁴ However, the Prosecution submits that it has negligible probative value, as it relates to an issue which is “generally not in dispute” and in any event is duplicative of a wide range of material already tendered into evidence by the Accused.¹⁵

⁷ Motion, para. 9.

⁸ Motion, para. 14.

⁹ Motion, para. 18.

¹⁰ Motion, paras. 9, 14, 18.

¹¹ Motion, para. 20.

¹² Response, paras. 1, 2, 4, 10.

¹³ Response, paras. 3, 5.

¹⁴ Response, para. 1.

¹⁵ Response, paras. 1, 6–8.

10. The Prosecution submits that given the Accused's failure to show prejudice his requested remedial measures should be denied.¹⁶

11. The Prosecution also notes that the Accused failed to offer a reason why an evidentiary hearing was required when written motion practice has been sufficient to dispose of previous motions.¹⁷ It also notes that the Chamber has repeatedly found that with respect to disclosure violation motions, the Accused has engaged in a purely numerical and wasted valuable judicial resources.¹⁸

II. Applicable Law

12. 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.¹⁹

13. 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

III. Discussion

14. At the outset the Chamber recalls that on 18 February 2016, the Accused was instructed by the Chamber that "should he choose to file a further disclosure violation motion, a consolidated motion should be filed by 26 February 2016".²¹ In setting this deadline, the Chamber was mindful of the scheduled date for the pronouncement of the Judgement on 24 March 2016 and ensuring that there was adequate time for a response to, and consideration of, any issues raised. It also considered the long sequence of motions filed by the Accused

¹⁶ Response, para. 1.

¹⁷ Response, para. 9.

¹⁸ Response, para. 9.

¹⁹ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), para. 179.

²⁰ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

where he disregarded the Chamber's repeated instruction that the filing of disclosure violation motions should not be a purely numerical exercise and that he should instead focus on disclosure violations where there was demonstrable prejudice.²²

15. The Motion was thus filed outside the deadline set for the filing of any further disclosure violation motions, but in the interests of justice, the Chamber will address the merits of the Motion. It is clear however, that the Accused is pursuing this issue as a litigation tactic through frivolous motions, and is not genuinely interested in furthering his case. Having regard to these factors and given the very advanced stage of the case, the Chamber instructs the Accused, that it will not entertain any further disclosure violation motions. This includes the "108th Motion for Finding of Disclosure Violation and for Remedial Measures" filed publicly with confidential annexes on 14 March 2016 ("108th Motion").

16. The Chamber notes that the First Document and Second Document had already been disclosed to the Accused, albeit in different form. The Chamber therefore finds that there is no disclosure violation in this regard. This supports the Chamber's conclusion that these frivolous motions are now being used as a pure litigation tactic.

17. Having reviewed the Third Document, the Chamber finds that it contains potentially exculpatory material and should thus have been disclosed by the Prosecution pursuant to Rule 68 of the Rules as soon as practicable. The failure to do so amounted to a disclosure violation. However, the Chamber finds that the Accused was not prejudiced by this violation given that the material contained in this document was of such negligible probative value and duplicative of material already admitted into evidence. It added nothing new or of significance to the material already before the Chamber. In the absence of prejudice to the Accused, the requested remedies are denied.

²¹ Decision on Accused's 104th and 105th Disclosure Violation Motions, 18 February 2016, para. 35 ("104th and 105th Decision").

²² 104th and 105th Decision, para. 35.

IV. Disposition

18. For the foregoing reasons, the Chamber, pursuant to Rules 54, 68, 68 *bis* and 89 of the Rules, hereby:

- (a) **GRANTS** by majority, Judge Kwon dissenting,²³ the Motion in part and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the Third Document;
- (b) **DENIES** the remainder of the Motion; and
- (c) **DECIDES** that the Chamber will not entertain any further disclosure violation motions, including the 108th Motion.

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



Judge O-Gon Kwon
Presiding

Dated this fourteenth day of March 2016
At The Hague
The Netherlands

[Seal of the Tribunal]

²³ 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.