



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: 29 September 2010
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: 29 September 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S SEVENTEENTH MOTION FOR FINDING OF
DISCLOSURE VIOLATION AND FOR REMEDIAL MEASURES**

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 “Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential Annexes on 10 September 2010 (“Seventeenth Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Seventeenth Motion, the Accused argues that there has been a violation of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by the Office of the Prosecutor (“Prosecution”) in relation to the late disclosure of material to him. Specifically, the Accused alleges violations of Rule 68 of the Rules in connection with the late disclosure of a large batch of documents by the Prosecution on 31 August 2010, even though the documents in question had been provided to the Prosecution in January 2010.¹ The Accused notes that this batch comprises a total of 1,072 items amounting to approximately 5,740 pages, which were disclosed by the Prosecution as material which “may fall within the ambit of Rule 68”.²

2. The Accused submits that this late disclosure of material violated the Prosecution’s obligation under Rule 68 to ensure that such material be disclosed as soon as practicable.³ He submits that the volume of the material and any practical difficulties faced by the Prosecution in relation to it does not excuse the Prosecution from its obligation to disclose it as soon as it “saw that exculpatory material was contained in the seized items”.⁴

3. Having conducted a limited examination of some of the documents disclosed, the Accused points to 13 examples which he submits “reveal vital exculpatory information” as they demonstrate that a number of locations in Sarajevo were legitimate military targets at the time relevant to the Indictment, given the presence and operations of the Army of Bosnian and Herzegovina at those locations.⁵

4. The Accused requests that the Trial Chamber make a finding that the Prosecution has violated Rule 68 by failing to disclose this material as soon as practicable, and requests that the

¹ Seventeenth Motion, para. 2.

² Seventeenth Motion, paras. 3-4.

³ Seventeenth Motion, para. 14.

⁴ Seventeenth Motion, paras. 14-15. The Accused cites *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179 (“*Kordić and Čerkez Appeals Judgement*”) and *Prosecutor v. Karemera et. al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 19.

⁵ Seventeenth Motion, paras. 4-11.

proceedings be immediately suspended to allow him and his Defence team to review these documents “prior to calling further prosecution witnesses”.⁶ The Accused submits that his team would require a period of 12 working days to review this material.⁷

5. On 13 September 2010, the Trial Chamber heard the oral response of the Prosecution to the Seventeenth Motion (“Prosecution’s Oral Response”), as well as an oral reply on behalf of the Accused from his legal adviser (“Accused’s Oral Reply”).⁸ The Prosecution’s Oral Response suggests that the delay in the disclosure of this material, from when it was seized and provided to the Prosecution to when it was provided to the Accused, was due to the highly fragmented way in which the documents were split on seized hard drives, rendering the process of their review cumbersome and time-consuming, as well as the possibility that the material contained “confidential and potentially privileged information, so that the review of this material had to be kept out of the normal process to ensure the trial teams were not tainted in any way should the material turn out to be privileged in that manner”.⁹

6. In the Accused’s Oral Reply, the Accused stresses the significance of the material in question and argues that the Prosecution did not comply with its obligations under Rule 68 given its failure to at least alert the Defence of the exculpatory nature of the material.¹⁰ The Accused seeks a finding that the Prosecution violated Rule 68 in failing to disclose the material “as soon as practicable” and submits that “the only remedy that we can think of that would really help us at this stage is to give us time to review the material so that we would be in a position to use it with the upcoming witnesses”.¹¹

7. Having heard these oral submissions, the Chamber determined that it was in the interests of justice to suspend the hearing of evidence following the testimony of Francis Thomas, for a period of one week, so that the Accused and his team could review this recently disclosed Rule 68 material.¹² The Chamber did not rule, at that time, on the issue of whether the provision of the material in August 2010 amounted to a violation of the Prosecution’s Rule 68 obligations, which would be dealt with in due course.

⁶ Seventeenth Motion, paras. 16-17.

⁷ Seventeenth Motion, para. 18.

⁸ Prosecution’s Oral Response, T. 6588-T. 6589, 13 September 2010. Accused’s Oral Reply, T. 6589.25-T. 6591.7 and T. 6591.14-T. 6592.2, 13 September 2010.

⁹ Prosecution’s Oral Response, T. 6588, 13 September 2010.

¹⁰ Accused’s Oral Reply, T. 6590, 13 September 2010.

¹¹ Accused’s Oral Reply, T. 6591, 13 September 2010.

¹² T. 6593-T. 6594, 13 September 2010. The Chamber originally ordered a suspension of proceedings following the testimony of witness Mulaosmanović-Cehajić, but following submissions made by the parties decided to also hear the testimony of witness Thomas before suspending proceedings until 27 September 2010 (T. 6625-T. 6627, 13 September 2010, T. 6930, 16 September 2010).

8. On 20 September 2010, the Prosecution filed the “Prosecution Response to Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures” (“Response to the Seventeenth Motion”). It submits that it has complied fully with its Rule 68 disclosure obligations and that the Motion should be dismissed.¹³

9. The Prosecution notes that the material provided to the Accused is divided into two categories, although all of that material was seized by the Serbian Ministry of Interior (“MUP”) from the premises of Dragomir Pećanac and Milorad Pelemiš on 2 December 2009. The first category is comprised of material on 11 DVDs (“DVD Material”), whereas the second category is material found on a computer hard drive (“Hard Drive Material”).¹⁴ According to the Prosecution, the DVD Material was provided to the ICTY Field Office in Belgrade, by the Serbian MUP, on 21 January 2010, and was subsequently transferred to the Prosecution’s Evidence Unit for processing on 28 January 2010.¹⁵ The Hard Drive Material was only provided to the ICTY Field Office in Belgrade, by the Serbian MUP, on 9 March 2010, and arrived in The Hague on 23 March 2010.¹⁶

10. The Prosecution submits that, unlike Prosecution trial teams in other cases before the Tribunal, which chose to disclose the DVD material in bulk to the accused in those cases, in February 2010, “without reference to a specific Rule...due to the particular circumstances in these cases”, the *Karadžić* Prosecution team carried out a detailed review and assessment prior to disclosure.¹⁷ Following that review, the first batch of 21 Sarajevo-related documents was disclosed under Rule 68 on 16 June 2010, with the remainder disclosed on 31 August 2010.¹⁸ The Prosecution notes that it “would consider disclosing material without detailed prior review and assessment should the Accused indicate this to be his preference”.¹⁹

11. In confidential Appendix A to the Prosecution’s Response to the Seventeenth Motion, it outlines the circumstances which delayed the review and subsequent disclosure of both the DVD Material and the Hard Drive Material.²⁰

12. On 23 September 2010, the Accused filed a “Request for Leave to Reply: Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures” (“Request for Leave to

¹³ Response to the Seventeenth Motion, para. 1.

¹⁴ Response to the Seventeenth Motion, paras. 1-2.

¹⁵ Response to the Seventeenth Motion, para. 3.

¹⁶ Response to the Seventeenth Motion, para. 5.

¹⁷ Response to the Seventeenth Motion, paras. 3-4.

¹⁸ Response to the Seventeenth Motion, para. 4 and Confidential Appendix B.

¹⁹ Response to the Seventeenth Motion, footnote 3.

²⁰ Response to the Seventeenth Motion, paras. 3-5, and Confidential Appendix A.

Reply”). The Accused sought leave to reply to the Response to the Seventeenth motion so that he could “set forth the scope of the violation” and comment on the Prosecution’s explanation for the delay in disclosure.²¹ On 27 September 2010, the Trial Chamber denied this request on the basis that it was satisfied that had sufficient information to make an informed decision on the Seventeenth Motion but allowed the Accused to file a table listing the documents disclosed which he claimed amounted to violations of Rule 68.²²

13. On 27 September 2010, the Accused filed the “Table of Violations: Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures” (“Disclosure Violation Table”), identifying 96 documents which he submits are “of an exculpatory nature and which represent violations of the prosecution’s obligation under Rule 68”.²³

II. Applicable Law

14. Rule 68 imposes a continuing obligation on the Prosecution (as soon as practicable) 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”.²⁴ Material has been considered to affect the credibility of that evidence if “it undermines the case presented by the Prosecution at trial”.²⁵ In order to establish a violation of this obligation by the Prosecution, the Defence must “present a *prima facie* case making out the probable exculpatory or mitigating nature” of the materials in question.²⁶

15. The Appeals Chamber has stressed the importance of the Prosecution’s obligation to disclose exculpatory material under Rule 68.²⁷ Determining what material should be disclosed under Rule 68 is a facts-based judgement which falls within the discretion and responsibility of the Prosecution.²⁸ While the general practice of the Tribunal has been to “respect the Prosecution’s function in the administration of justice, and the Prosecution’s execution of that

²¹ Request for Leave to Reply, para. 3.

²² T. 6932 and T. 6935, 27 September 2010.

²³ Disclosure Violation Table, para. 3 and Annex A.

²⁴ Decision on the Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009 (“Decision on Deadlines for Disclosure”), para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 267 (“*Blaškić Appeals Judgement*”).

²⁵ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Judgement, 19 April 2004, para. 178 (“*Krstić Appeals Judgement*”).

²⁶ *Kordić and Čerkez Appeals Judgement*, para. 179.

²⁷ *Kordić and Čerkez Appeals Judgement*, paras. 183 and 242; *Krstić Appeals Judgement*, para. 180; and *Blaškić Appeals Judgement*, para. 264.

²⁸ *Kordić and Čerkez Appeals Judgement*, para. 183; *Blaškić Appeals Judgement*, para. 264.

function in good faith”,²⁹ that does not excuse a failure to disclose exculpatory material “as soon as practicable” in accordance with Rule 68.

16. An assessment of whether material has been disclosed “as soon as practicable” will depend on whether the Prosecution “has sufficiently accounted for its own conduct”,³⁰ or whether there was an “inordinate amount of time before disclosing material in this case, and [whether the Prosecution] has failed to provide a satisfactory explanation for the delay”.³¹ While the Appeals Chamber has recognised the practical difficulties for the Prosecution in discharging its Rule 68 obligations when dealing with large volumes of evidence, it has concluded that “notwithstanding the practical difficulties encountered by the Prosecution, [...] evidence of an exculpatory nature must also be disclosed to the defence forthwith”.³²

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 a breach of Rule 68.³³

III. Discussion

18. Having considered the 13 examples identified in the Seventeenth Motion and the 83 additional examples identified in the Disclosure Violation Table, the Trial Chamber finds that some of the material disclosed in the batch of documents is potentially exculpatory.³⁴ It follows that these documents should have been disclosed to the Accused “as soon as practicable” pursuant to Rule 68. Indeed, in disclosing all this material pursuant to Rule 68, the Prosecution appears to acknowledge its potentially exculpatory nature. While the Chamber recognises that Rule 68 necessarily imposes a continuing obligation on the Prosecution, it will assess whether the material that is the subject of the Motion was disclosed “as soon as practicable”, taking into consideration the date when it came into the Prosecution’s possession and the date of its provision to the Accused, in addition to any other relevant circumstances.

²⁹ *Kordić and Čerkez Appeals Judgement*, para. 183.

³⁰ *Kordić and Čerkez Appeals Judgement*, paras. 209 and 243.

³¹ *Krstić Appeals Judgement*, para. 197.

³² *Kordić and Čerkez Appeals Judgement*, para. 243; *see also* *Krstić Appeals Judgement*, para. 180 and *Blaškić Appeals Judgement*, para. 265 which acknowledge the additional burden that a broad interpretation of Rule 68 imposes on the Prosecution “in terms of the volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory”.

³³ *Kordić and Čerkez Appeals Judgement*, para. 179; *Blaškić Appeals Judgement*, para. 268.

³⁴ While the Chamber has not engaged in a document by document analysis of the 96 examples identified in Annex A of the Disclosure Violation Table to determine whether each document is indeed exculpatory, the Chamber is satisfied based on the descriptions provided by the Accused that at least some of the material disclosed in the batch of documents fall within the scope of Rule 68 and should have been disclosed “as soon as practicable”.

19. Having considered the information provided in Confidential Appendix A to the Response to the Seventeenth Motion, the Trial Chamber recognises that there were legitimate reasons for the initial delay in review by the Prosecution of the DVD Material and the Hard Drive Material. With respect to the DVD Material, these issues were resolved by 28 January 2010, when the Prosecution's Evidence Unit commenced processing this material.³⁵ While the Prosecution "cannot be expected to disclose material which – despite its best efforts – it has not been able to review and assess",³⁶ in assessing the best efforts of the Prosecution the Chamber will consider whether it took "an inordinate amount of time before disclosing material in this case, and [whether the Prosecution] has failed to provide a satisfactory explanation for the delay".³⁷

20. The Trial Chamber is not satisfied that the DVD Material was disclosed "as soon as practicable" given the delay from the time the review process commenced on 28 January 2010, until the partial disclosure of Sarajevo-related documents on 16 June 2010, and of the remaining documents on 31 August 2010. The Prosecution has failed to provide a satisfactory explanation for this delay. Therefore, the Chamber finds that there was a violation of Rule 68 with respect to the disclosure of the DVD Material.

21. With respect to the Hard Drive Material, given the nature of the materials and the issues raised in Confidential Appendix A to the Response to the Seventeenth Motion, the Trial Chamber is satisfied that the Prosecution had continuing technical and practical difficulties in reviewing the material since it was received in The Hague on 23 March 2010.³⁸ Those difficulties can be attributed to the nature of the Hard Drive Material and do not reflect a deficiency in the Prosecution's review process. In this case, the Chamber is satisfied that the Prosecution has acted in good faith and took all reasonable steps to ensure that the Hard Drive Material was disclosed to the Accused as soon practicable. Therefore, the Chamber finds that despite the delay between receipt of the material and its disclosure to the Accused, the Prosecution did not breach Rule 68 by disclosing the Hard Drive Material on 31 August 2010.

22. As noted above, the Chamber already granted the relief requested by the Accused in the Motion, namely a temporary suspension of the hearing of evidence, irrespective of whether the Prosecution had breached its Rule 68 obligations in relation to the disclosure of the DVD Material and the Hard Drive Material. Having now concluded that the Prosecution did breach its Rule 68 obligations with regard to the former, the relief requested for that breach has become

³⁵ Response to the Seventeenth Motion, Confidential Appendix A, para. 3.

³⁶ *Krstić Appeals Judgement*, para. 197; *Blaškić Appeals Judgement*, paras. 274-275.

³⁷ *Krstić Appeals Judgement*, para. 197; *Kordić and Čerkez Appeals Judgement*, para. 209.

moot. The Chamber notes, nonetheless, its concern about the Prosecution's efforts to ensure timely disclosure of Rule 68 material to the Accused. This is particularly troubling in light of the fact that the Prosecution has already been found in violation of its Rule 66(A)(ii) disclosure obligations in relation to a number of documents.

IV. Disposition

23. For the foregoing reasons, the Trial Chamber notes the disclosure violations identified above, but given that the requested remedy has already been granted, pursuant to Rules 54, 68, and 68 *bis* of the Rules, the Trial Chamber hereby **DISMISSES** the Motion as moot.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-ninth day of September 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁸ Response to the Seventeenth Motion, Confidential Appendix A, para. 4.