



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: 22 July 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: 22 July 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S FIFTY-THIRD AND FIFTY-FOURTH 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 “Fifty-Third Motion for Finding of Disclosure Violation and for Sanctions (June 2011)”, filed on 1 July 2011 (“Fifty-Third Motion”) and the Accused’s “Fifty-Fourth Motion for Finding of Disclosure Violation and for Sanctions (KDZ240)” filed publicly with confidential annexes on 4 July 2011 (“Fifty-Fourth Motion”), and hereby issues its decision thereon.

I. Submissions

A. Fifty-Third Motion

1. In the Fifty-Third Motion, the Accused argues that the Office of the Prosecutor (“Prosecution”) has violated Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) in relation to the disclosure in June 2011 of a transcript of an interview with General Svetozar Guzina, who was a battalion commander in the Ilidža Brigade (“Guzina Interview”), which had been in the Prosecution’s possession for seven and a half years.¹ He observes that the Guzina Interview is just one of the 99 documents disclosed pursuant to Rule 68 in June 2011 and that he has been unable to review all this material while the trial has been ongoing.²

2. The Accused submits that General Guzina indicated that the School of Theology “served only as a viewing point and weapons were used there only when [the Bosnian Serbs] were under attack by Muslim forces” and that “no one ever issued an order to shoot at civilians”.³ The Accused suggests that the exculpatory nature of the Guzina Interview is likely to be uncontested, given the Prosecution allegations that SRK snipers were positioned in places including the School of Theology and the School of the Blind which were both under General Guzina’s area of responsibility.⁴

3. The Accused submits that he was prejudiced by the late disclosure as Richard Phillips, who testified in these proceedings, was present during the interview, and could have been cross-examined on the Guzina Interview so as to elicit the exculpatory information.⁵ He also suggests that the Guzina Interview could have been used during his cross-examination of General Adrianus van Baal who in his consolidated statement referred to an UNMO daily situation report which mentioned that the Commander of the 1st Battalion of the Ilidža Brigade had admitted

¹ Fifty-Third Motion, paras. 1-2.

² Fifty-Third Motion, para. 3.

³ Fifty-Third Motion, paras. 7.

⁴ Fifty-Third Motion, paras. 7-8.

that the VRS was responsible for sniping from the House of the Blind while, according to the Accused, General Guzina denied making such an admission.⁶

4. The Accused seeks an express finding from the Chamber that the Prosecution violated Rule 68 by failing to disclose the Guzina Interview as soon as practicable and that a sanction be imposed on the Prosecution for its continuing violation of the Chamber's orders.⁷ He reiterates that given the recent and repeated violations of Rule 68 by the Prosecution, the Chamber should consider holding a hearing on the issue as to why the Prosecution has been unable to comply with its obligation to ensure that all Rule 68 material has been disclosed.⁸ He also repeats that the Chamber should consider "whether the cumulative effect of these disclosure violations has demonstrated that the prosecution is unable to manage a case of this scope and that the appropriate remedy is to reduce the scope of the case".⁹

5. In addition, the Accused submits that the failure to disclose the Guzina Interview earlier also amounts to a violation of Rule 66(B) given the request he made on 9 May 2011 for all information including recordings, statements, memoranda or reports of interview obtained from any member of the SRK.¹⁰ He observes that the Guzina Interview was not disclosed with the other material provided in response to this Rule 66(B) request, even though General Guzina was a battalion commander of the SRK.¹¹

6. On 12 July 2011, the Prosecution filed the "Prosecution Response to Fifty-Third Motion for Finding of Disclosure Violation and for Sanctions (June 2011)" ("Response to Fifty-Third Motion"). It acknowledges that the Guzina Interview contains potentially exculpatory material and should have been disclosed to the Accused earlier but submits that the requested remedies should not be granted due to the Accused's failure to demonstrate any prejudice.¹² The Prosecution claims that the Guzina Interview was not identified in its searches of "suspect and indictee-related material" given that it was not entered into its evidence collection as a "suspect interview".¹³ It observes that on 8 June 2011 it had indicated that a "small number of interviews containing potentially exculpatory material" may not have been identified during its Rule 68 searches and that this prompted a systematic review of its audio and video-recorded interviews

⁵ Fifty-Third Motion, para. 9.

⁶ Fifty-Third Motion, para. 10.

⁷ Fifty-Third Motion, paras. 12-13.

⁸ Fifty-Third Motion, para. 13.

⁹ Fifty-Third Motion, para. 13.

¹⁰ Fifty-Third Motion, para. 4.

¹¹ Fifty-Third Motion, paras. 5-6. The Chamber observes that the Accused does not request any remedy for the alleged violation of Rule 66(B).

¹² Response to Fifty-Third Motion, paras. 1-2, 5.

¹³ Response to Fifty-Third Motion, para. 2.

which resulted in the identification and disclosure of the Guzina Interview.¹⁴ The Prosecution also undertakes to “provide further details in the forthcoming Disclosure Report about the measures it has taken to ensure compliance with its disclosure obligations”.¹⁵

7. The Prosecution submits that the Accused has failed to explain how his defence or approach to cross-examination would have differed if he had possessed the Guzina Interview earlier.¹⁶ Responding to the Accused’s claim that he could have elicited the exculpatory information during his cross-examination of Phillips, the Prosecution submits that the appropriate way to “elicit an out-of-court statement is via Rules *92bis* or *92quater* or by calling the witness *viva voce* in his defence case” and that these options remain available to the Accused.¹⁷ In addition it observes that the potentially exculpatory aspects of the Guzina Interview fall outside the scope of Phillips’ testimony which was limited to the structure of the SRK.¹⁸ It also contests the Accused’s claim that the Guzina Interview contradicts information contained in General van Baal’s statement on the basis that Guzina had merely stated that he could not remember certain events but that he “did not deny admitting in July 1994 that the VRS had conducted sniping from the House of the Blind or that he promised there would be no more sniping from that location”.¹⁹

B. Fifty-Fourth Motion

8. The Accused requests a finding that the Prosecution violated Rule 68 of the Rules by failing to disclose three exculpatory documents which relate to the testimony of KDZ240 (“KDZ240 Material”).²⁰ He observes that these documents were disclosed only three days before KDZ240 was scheduled to testify and that the Prosecution had been in possession of the KDZ240 Material for a “considerable time”.²¹ On 4 July 2011, the Accused’s legal adviser requested that the Chamber require the Prosecution to explain how the KDZ240 Material was missed in its Rule 68 searches and to postpone the cross-examination of KDZ240 until after the summer recess to allow him and his team to review the newly disclosed material.²² The Chamber was also requested to “take more robust steps to protect his right to a fair trial, such as

¹⁴ Response to Fifty-Third Motion, para. 3, reference to “Prosecution’s Response to Karadžić’s Forty-Ninth Motion for Finding of Disclosure Violation and for Sanctions (May 2011) and Fiftieth Motion for Finding of Disclosure Violations and Motion for Seventh Suspension of Proceedings with Appendices A to E, 8 June 2011, paras. 34-36.

¹⁵ Response to Fifty-Third Motion, para. 4.

¹⁶ Response to Fifty-Third Motion, para. 6.

¹⁷ Response to Fifty-Third Motion, para. 6.

¹⁸ Response to Fifty-Third Motion, para. 6.

¹⁹ Response to Fifty-Third Motion, para. 7.

²⁰ Fifty-Fourth Motion, paras. 1, 4.

²¹ Fifty-Fourth Motion, para. 2.

the appointment of a Special Master for disclosure, and a reduction in the scope of this obviously unmanageable case”.²³

9. On 4 July 2011 in closed session, having heard the oral submissions of the parties, the Chamber denied the request in the Fifty-Fourth Motion for the postponement of KDZ240’s cross-examination.²⁴ The Chamber was of the view that having considered the length and subject matter of the KDZ240 Material, a postponement of the cross-examination was not necessary given that the Accused would have had sufficient time to consider the newly disclosed material.²⁵ The Prosecution was also asked to address in its report, which is to be filed by 1 August 2011, why the KDZ240 Material was not identified and disclosed earlier.²⁶ This decision will therefore only examine the outstanding requests in the Fifty-Fourth Motion.

II. Applicable Law

10. 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”.²⁷ 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.²⁸

11. The Chamber reiterates that regardless of the Prosecution’s internal practices, there is a clear obligation to disclose potentially exculpatory material “as soon as practicable” and that the “ongoing nature of the obligation relates only to the fact that as new material comes into the possession of the Prosecution it should be assessed as to its potentially exculpatory nature and disclosed accordingly”.²⁹

12. 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

²² Fifty-Fourth Motion, paras. 5-6; Hearing, T. 15943, 15955-15956 (Closed Session) (4 July 2010)

²³ Fifty-Fourth Motion, para. 7.

²⁴ Hearing, T. 15976, (Closed Session) (4 July 2010).

²⁵ Hearing, T. 15976, (Closed Session) (4 July 2010).

²⁶ Hearing, T. 15976, (Closed Session) (4 July 2010).

²⁷ 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, Appeals Judgement, 29 July 2004 (“*Blaškić* Appeals Judgement”), para. 267.

²⁸ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeals Judgement”), para. 179.

²⁹ Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010, para. 11.

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.³⁰

III. Discussion

13. The Prosecution acknowledges that the Guzina Interview referred to in the Fifty-Third Motion contains potentially exculpatory material and should have been disclosed to the Accused earlier. Considering this submission and having conducted its own review of the relevant portions of the Guzina Interview, the Chamber concludes that it does contain potentially exculpatory material and that the Prosecution has violated its obligation under Rule 68 of the Rules by failing to disclose this document as soon as practicable. It was only disclosed to the Accused on 15 June 2011 and there is no suggestion that it was recently received by the Prosecution. The Chamber observes that the Prosecution is scheduled to furnish a report to the Chamber on 1 August 2011 which specifically addresses the issue of why “interviews” as a category documents were not exhaustively searched, and also that the Prosecution has undertaken in its Response to the Fifty-Third Motion to report on measures taken to ensure compliance with its disclosure obligations.³¹

14. Having reviewed the KDZ240 Material, the Chamber finds it is potentially exculpatory as the documents it covers include references to assurances given by the Accused regarding facilitating the passage of humanitarian convoys to Srebrenica, Goražde, Sarajevo, and Tuzla and the evacuation of the wounded and sick from Srebrenica. The Prosecution has therefore violated its obligation to disclose the KDZ240 Material as soon as practicable given that the documents were only disclosed on 1 July 2011 and there is no suggestion that they were recently received by the Prosecution.

15. While the Prosecution violated its disclosure obligations under Rule 68 of the Rules by the late disclosure of the Guzina Interview and the KDZ240 Material, the Chamber finds that the Accused has suffered no prejudice as a result of these violations. In reaching this conclusion, the Chamber reviewed the Guzina Interview and KDZ240 Material and observed that their content is limited in length and not of such significance that their late disclosure has had a detrimental impact on the Accused’s overall preparation for trial or his approach to the cross-examination of witnesses. Having reviewed the relevant portions of the Guzina Interview, the Chamber does not accept the Accused’s contention that its content contradicts paragraph 51 of General van Baal’s consolidated statement and therefore concludes that his ability to cross-

³⁰ *Kordić and Čerkez Appeals Judgement*, para. 179; *Blaškić Appeals Judgement*, para. 268.

³¹ Decision on Accused’s Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011, para. 54(v); Response to Fifty-Third Motion, para. 4.

examine this witness was not prejudiced. In reaching that conclusion the Chamber observed that Guzina's statement that he could not remember certain events does not necessarily amount to a denial of events which were referred to in General van Baal's consolidated statement. The Chamber is also mindful that the Accused retains the ability to tender the Guzina Interview and its potentially exculpatory content during the presentation of his defence case.

16. Given the absence of demonstrated prejudice to the Accused and mindful of the fact that the Prosecution is scheduled to furnish a detailed report on its disclosure practices on 1 August 2011, the Chamber finds that the requested remedies of holding an oral hearing, appointing a special disclosure master and ordering a reduction in the scope of the case are unwarranted.

IV. Disposition

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

- a) **GRANTS**, by majority, Judge Kwon dissenting³², the Fifty-Third Motion and Fifty-Fourth Motion in part, and finds that the Prosecution has violated Rule 68 of the Rules with respect to the late disclosure of the Guzina Interview and the KDZ240 Material; and
- b) **DENIES**, the Fifty-Third Motion and Fifty-Fourth Motion in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-second day of July 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

³² 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 have been violations of Rule 68 of the Rules, in the absence of prejudice to the Accused, he considers that the motions should be dismissed in their entirety.