



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: 19 August 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: 19 August 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S FIFTY-FIFTH 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 Accused’s “Fifty-Fifth Motion for Finding of Disclosure Violation and for Sanctions (July 2011)”, filed publicly with confidential annexes on 28 July 2011 (“Fifty-Fifth Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Fifty-Fifth 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 July 2011 of an interview with the former head of UN Civil Affairs in Bosnia and Herzegovina, Sergio Viera de Mello (“de Mello Interview”) and an interview with a former Police Station Commander in Vogošća, Vlado Kelović (“Kelović Interview”) (collectively, “Interviews”).¹

2. The Accused submits that the de Mello Interview is exculpatory as it indicates that he “did not have control over the attack on Goražde, and that the shell which landed on Markale market came from no more than 2000 metres away”.² He contends that he was prejudiced by the late disclosure of the de Mello Interview as he was unable to confront UN personnel who testified about these events with it and could not use it in developing his pre-trial defence strategy.³

3. With respect to the Kelović Interview, the Accused suggests that it contains exculpatory information which indicates that Muslims from Vogošća were neither expelled nor mistreated.⁴ He contends that he was prejudiced by the late disclosure of the Kelović Interview as he was unable to confront witnesses who testified about events in Vogošća with it and could not use it in developing his pre-trial defence strategy.⁵ The Accused seeks an express finding that the Prosecution has violated Rule 68 by failing to disclose the Interviews earlier and requests that the Chamber appoint a special master to oversee disclosure and consider reducing the scope of the case.⁶

¹ Fifty-Fifth Motion, paras. 1, 3, 5.

² Fifty-Fifth Motion, paras. 2-3.

³ Fifty-Fifth Motion, para. 4.

⁴ Fifty-Fifth Motion, para. 5.

⁵ Fifty-Fifth Motion, paras. 6-7.

⁶ Fifty-Fifth Motion, para. 9.

4. On 9 August 2011, the Prosecution filed the “Prosecution Response to Fifty-Fifth Motion for Finding of Disclosure Violation and for Sanctions (July 2011)” (“Response to Fifty-Fifth Motion”). It acknowledges that the Interviews contain potentially exculpatory material and should have been disclosed to the Accused earlier but submits that the Fifty-Fifth Motion should be dismissed and the requested remedies should not be granted due to the Accused’s failure to demonstrate any prejudice.⁷

5. More specifically, the Prosecution disputes the basis on which the Accused claims that the de Mello Interview is exculpatory with respect to the shelling of Markale but concedes that it does contain de Mello’s personal views about the Accused’s command and control over Bosnian Serb armed forces in the Goražde offensive in 1994 which are potentially exculpatory.⁸ The Prosecution stresses that the Accused has failed to demonstrate how his defence or cross-examination of witnesses who have already testified would have differed if he had possessed the de Mello Interview earlier. It notes that the Accused had personal knowledge of the issue of command and control over the Goražde offensive in 1994 and yet failed to challenge the Prosecution’s military expert, Reynaud Theunens, on this issue.⁹ It also contends that the failure to use the de Mello Interview during his cross-examination of Theunens demonstrates that it was “of no actual significance and that its late disclosure could not have had a detrimental impact on the Accused’s overall preparation for trial or his approach to cross-examination of witnesses”.¹⁰

6. With respect to the Kelović Interview, the Prosecution argues that the Accused has not demonstrated any prejudice and that he “had access to similar information regarding denials of crimes in Vogošća from other sources” and had “conducted his cross-examination of witnesses in a manner consistent with the alleged exculpatory information”.¹¹ It also observes that the Accused could not in any event have tendered the Kelović Interview by using it during his cross-examination of another witness and that he retains the ability to tender it during the presentation of his defence case.¹²

II. Applicable Law

7. 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

⁷ Response to Fifty-Fifth Motion, paras. 1, 7.

⁸ Response to Fifty-Fifth Motion, para. 4.

⁹ Response to Fifty-Fifth Motion, para. 5.

¹⁰ Response to Fifty-Fifth Motion, para. 5.

¹¹ Response to Fifty-Fifth Motion, para. 6.

evidence”.¹³ 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.¹⁴

8. 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”.¹⁵

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.¹⁶

III. Discussion

10. The Prosecution acknowledges that the Interviews contain 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 Interviews, the Chamber concludes that they do contain potentially exculpatory material. The de Mello Interview contains information which draws into question the Accused’s control over Ratko Mladić and as such is potentially exculpatory. In addition, while the Prosecution challenges the accuracy of de Mello’s observation regarding the distance of the origin of fire on the Markale Market, this does not change the potentially exculpatory nature of his conclusion that he was unable to say whether the shell came from Bosnian Serb or ABiH positions. The Kelović Interview contains denials of crimes alleged to have occurred in Vogošća.¹⁷

11. The Chamber notes that the Interviews were only disclosed to the Accused in July 2011 and there is no suggestion that they were recently received by the Prosecution. The Chamber

¹² Response to Fifty-Fifth Motion, para. 6.

¹³ 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.

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

¹⁵ Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010, para. 11.

¹⁶ *Kordić and Čerkez Appeals Judgement*, para. 179; *Blaškić Appeals Judgement*, para. 268.

¹⁷ Fifty-Fifth Motion, confidential Annex A, p. 5; confidential Annex B, starting at 172, 180, and 228 minutes.

therefore finds that the Prosecution has violated its obligation under Rule 68 of the Rules by failing to disclose these documents as soon as practicable.

12. While the Prosecution violated its disclosure obligations under Rule 68 of the Rules by the late disclosure of the Interviews, the Chamber finds that the Accused has suffered no prejudice as a result of these violations. In reaching this conclusion, the Chamber reviewed the Interviews 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. The Chamber was also mindful that the Accused retains the ability to tender the Interviews during the presentation of his defence case and that the Accused, in the Prosecution's submission, "had access to similar information regarding general denials of crimes in Vogošća from other sources".¹⁸

13. Given the absence of demonstrated prejudice to the Accused and mindful of the Prosecution's Disclosure Report filed on 27 July 2011 and the improvements made to its internal oversight measures and disclosure practices detailed therein, the Chamber finds that the requested remedies of appointing a special disclosure master and ordering a reduction in the scope of the case are unwarranted.

¹⁸ Response to Fifty-Fifth Motion, para. 6, reference to testimony of Branko Vlačo and interview of Borislav Maksimović which had been previously disclosed to the Accused.

IV. Disposition

14. 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 dissenting¹⁹, the Fifty-Fifth Motion in part, and finds that the Prosecution has violated Rule 68 of the Rules with respect to the late disclosure of the Interviews; and
 - b) **DENIES** the Fifty-Fifth Motion in all other respects.
- Done in English and French, the English text being authoritative.



Judge O-Gon Kwon
Presiding

Dated this nineteenth day of August 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁹ 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 motion should be dismissed in its entirety.