



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: 21 August 2012

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: 21 August 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S SEVENTY-THIRD 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 seized of the “73rd Motion for Finding of Disclosure Violation (July 2012)”, filed by the Accused on 30 July 2012 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the 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 its failure to disclose voluminous material which in the Accused’s submission contains “items of an exculpatory nature” (“Documents”).¹ The Documents were found in a batch of material seized by Serbian authorities and handed over to the Prosecution in January and March 2010 (“Seized Material”).² The Accused notes that the Chamber has previously held that the Prosecution violated its disclosure obligations with respect to the late disclosure of the Seized Material which included some items found to be potentially exculpatory in nature.³

2. The Prosecution identified that the Documents were potentially subject to lawyer-client privilege and isolated them from the Seized Material pending determination of their privileged status.⁴ On 18 November 2011, the Prosecution filed a motion with the Appeals Chamber seeking the appointment of independent counsel to review the Documents to determine their privileged status, but the Appeals Chamber on 16 July 2012 instead decided to request the President of the Tribunal to appoint a Judge for this purpose.⁵ The Documents are currently being reviewed for lawyer-client privilege by the Judge appointed by the President.⁶

3. The Accused contends that the Prosecution violated Rule 68 of the Rules by failing to seek an independent review of the privileged status of the Documents as soon as practicable, given that it waited for more than 18 months before doing so.⁷ In the Accused’s submission since the Seized Material was “replete with exculpatory material”, the Prosecution “should have been more diligent in obtaining a determination of the privileged status” of the Documents

¹ Motion, para. 2.

² Motion, para. 2.

³ Motion, para. 2, and the two decisions cited therein.

⁴ Motion, para. 3.

⁵ Motion, para. 3 citing *Prosecutor v. Popović et al*, Case No. IT-05-88-A, Decision on Prosecution Motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client Privilege, 16 July 2012 (public redacted version) (“*Popović Decision*”), paras. 1–3, 8.

⁶ Motion, para. 3. See *Prosecutor v. Popović et al*, Case No. IT-05-88-A, Order Assigning a Judge to Review Material Potentially Subject to Lawyer-Client Privilege, 26 June 2012 (confidential).

⁷ Motion, para. 4.

which were also handed over as part of the Seized Material.⁸ The Accused argues that he was prejudiced by this delay given that he was required to conduct all his cross-examination and will be required to proceed with his defence case without the Documents having been disclosed.⁹

4. As a remedy the Accused requests a specific finding that the Prosecution violated Rule 68 of the Rules by failing to seek review of the privileged status of the Documents as soon as practicable.¹⁰ He also requests the Chamber to delay the commencement of the Srebrenica component of the defence case until the Documents have been reviewed and disclosed.¹¹

5. On 3 August 2012, the Prosecution filed the confidential “Prosecution’s Response to Karadžić’s 73rd Motion for Finding of Disclosure Violation (July 2012) and Request to Reclassify the Motion as Confidential” (“Response”). It submits that the Motion should be dismissed on the basis that neither the Prosecution nor the Accused has seen the Documents and that therefore it cannot be determined whether they should be subject to disclosure.¹² In the Prosecution’s submission, the Chamber would be unable to determine whether the Documents are potentially exculpatory until the reviewing Judge has determined whether or not they are subject to lawyer-client privilege.¹³

6. The Prosecution further argues that if the Documents are found by the reviewing Judge to be subject to lawyer-client privilege, they would not be subject to disclosure and the Motion would be moot.¹⁴ The Prosecution also contends that the remedy sought by the Accused is inappropriate and based on speculation given that he “cannot show he has been prejudiced by the non-disclosure of material that he has no basis to assert is exculpatory”.¹⁵

7. The Prosecution also seeks reclassification of the Motion as confidential, given that it discloses the name of the person who was in possession of the Documents which could be subject to lawyer-client privilege and where they were found.¹⁶ The Prosecution observes that this information was redacted by the Appeals Chamber when it issued the *Popović* Decision and

⁸ Motion, para. 5.

⁹ Motion, para. 5.

¹⁰ Motion, paras. 7, 11.

¹¹ Motion, paras. 8, 11.

¹² Response, paras. 1–2.

¹³ Response, para. 3.

¹⁴ Response, para. 4.

¹⁵ Response, para. 5.

¹⁶ Response, paras. 6–9.

that the Motion could frustrate efforts to keep this information confidential if it remained public.¹⁷

II. Applicable Law

8. 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”.¹⁸ 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

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.²⁰

III. Discussion

10. Given that the Documents have not yet been seen by either of the parties let alone reviewed to determine whether or not they are subject to lawyer-client privilege, the Chamber is unable to assess whether they are potentially exculpatory and thus subject to disclosure under Rule 68 of the Rules. The Motion calls for speculation as to the potentially exculpatory nature of the Documents and a finding of violation under Rule 68 solely based on the Prosecution’s delay in seeking an independent review of their privileged status. Such a determination is premature, particularly given the possibility that the Documents may not be disclosed to the Accused at all if deemed to be subject to lawyer-client privilege. Accordingly, there is no basis on which to make a finding that the Prosecution violated its disclosure obligations under Rule 68 of the Rules or to delay the Srebrenica component of the defence case.²¹

11. The Chamber notes that the Motion identified by name the person who was in possession of the Documents which may be subject to lawyer-client privilege, which is specifically the

¹⁷ Response, para. 8.

¹⁸ Decision on the Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009, paras. 8, 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić* Appeal Judgement”), para. 267.

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

²⁰ *Kordić and Čerkez* Appeal Judgement, para. 179; *Blaškić* Appeal Judgement, para. 268.

²¹ Despite this conclusion, the Chamber notes its concern as to how long it took for the Prosecution to seek an independent review of the privileged status of the Documents following their receipt in 2010. The reason for this delay has not been addressed by the Prosecution.

information the Appeals Chamber redacted from the *Popović* Decision. In the interests of conforming with the position of the Appeals Chamber as to the necessary confidentiality of this information the Chamber will reclassify the Motion as a confidential filing.

IV. Disposition

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

- a) **DENIES** the Motion; and
- b) **ORDERS** the Registry to reclassify the Motion as a confidential filing.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-first day of August 2012
At The Hague
The Netherlands

[Seal of the Tribunal]