



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: 6 November 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: 6 November 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S SEVENTY-FOURTH 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 “74th Motion for Finding of Disclosure Violation: Demurenko Material”, filed by the Accused on 22 October 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 66(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) in relation to its failure to timely disclose two documents (“Documents”) signed by the first defence witness, Andrey Demurenko (“Witness”).¹ In the Accused’s submission, the Documents were disclosed to him on 19 October 2012, which was two days after the Witness had completed his testimony.² The Accused requests an express finding by the Chamber that the Prosecution has violated its disclosure obligations pursuant to Rule 66(B).³

2. The Accused notes that on 8 February 2012, the Chamber ordered the Prosecution to make available for inspection, by 9 May 2012, all documents authored by certain identified persons relating to the events in Bosnia and Herzegovina between 1992 and 1995 and that the Witness was one of those identified persons.⁴ On 14 September 2012, the Prosecution informed the Accused that due to a clerical error, it had failed to disclose 63 documents authored by the Witness.⁵ The Accused submits that he did not file a disclosure violation motion for the 63 documents which were disclosed to him prior to the Witness’s testimony.⁶ However, on 19 October 2012, the Prosecution disclosed the Documents and informed the Accused that it did not apply to the Rule 70 provider for permission to disclose this material until 5 October 2012.⁷ The Accused argues that the Prosecution’s delay in making this request violated Rule 66(B) of the Rules and the deadline set by the Chamber, and prevented the Documents from being available during the Witness’s testimony.⁸

3. The Accused contends that he was prejudiced by this disclosure violation given that he could have tendered the Documents into evidence as associated exhibits had they been disclosed

¹ Motion, para. 1.

² Motion, para. 2.

³ Motion, para. 8.

⁴ Motion, para. 3, citing Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012 (“Sarajevo Decision”).

⁵ Motion, para. 5, Annex C.

⁶ Motion, para. 5, Annex C.

⁷ Motion, para. 7, Annex A.

prior to the Witness's testimony.⁹ In the Accused's submission, the Documents are relevant, probative, and consistent with his "case that the Bosnian Muslims were responsible for many of the sniping and shelling incidents in Sarajevo" and that the "Bosnian government was looking for a response to the Markale II shelling from the international community and UN".¹⁰

4. As a remedy for this alleged disclosure violation, the Accused requests that the Chamber admit the Documents as defence exhibits and that the Chamber issue a warning to the Prosecution pursuant to Rule 46(A) of the Rules "in light of the egregious nature of the violation".¹¹

5. On 29 October 2012, the Prosecution filed the "Prosecution's Response to 74th Motion for Finding of Disclosure Violation: Demurenko Material" ("Response"). It submits that the Motion should be dismissed on the basis that it is based on a misapprehension that the Documents were identified on 14 September 2012 and that the Prosecution failed to request Rule 70 clearance at that time.¹² In the Prosecution's submission, the Documents were in fact not identified "until immediately before clearance was requested" and that therefore there was no violation of Rule 66(B) as clearance was requested as soon as the Documents were identified.¹³

6. The Prosecution contends that the Documents were only found when preparing for the cross-examination of the Witness and were not identified during their electronic searches given that its optical character recognition technology did not recognise the Witness's name or signature.¹⁴ Once the Documents were identified, the Prosecution requested urgent clearance for their disclosure but only received that clearance on 17 October 2012.¹⁵ The Prosecution submits that it made "all reasonable efforts to obtain Rule 70 clearance as expeditiously as possible" and that it "endeavoured in good faith to comply with the Accused's Rule 66(B) request".¹⁶

7. The Prosecution further argues that the Accused was not prejudiced by the disclosure as the "information contained in the Documents was already in his possession" and that therefore the remedies requested by him should be dismissed.¹⁷ In that regard, the Prosecution observes

⁸ Motion, para. 7.

⁹ Motion, para. 9.

¹⁰ Motion, para. 10.

¹¹ Motion, paras. 11, 12.

¹² Response, para. 1.

¹³ Response, para. 1.

¹⁴ Response, paras. 3, 4.

¹⁵ Response, para. 4.

¹⁶ Response, para. 5.

¹⁷ Response, paras. 1, 6.

that although it does not object to the admission of the Documents from the bar table, other documents which “contain virtually identical information” were in the Accused’s possession by the time the Witness testified and were either tendered through the Witness or not used at all.¹⁸ More specifically, with respect to the Accused’s request for a warning pursuant to Rule 46(A) of the Rules, the Prosecution observes that this request is unsubstantiated and that the Accused has “made no attempt to show that the conditions set forth in Rule 46(A)” which apply to the conduct of individual counsel were met in this case.¹⁹

II. Applicable Law

8. Rule 66(B) of the Rules requires that “the Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs and tangible objects in the Prosecutor’s custody or control” which (i) are material to the preparation of the defence, or (ii) are intended for use by the Prosecutor as evidence at trial, or (iii) were obtained from or belonged to the accused. In accordance with the language of the Rule, the Accused should first direct any request for inspection to the Prosecution and only refer the matter to the Chamber when such request has failed.²⁰

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.²¹

III. Discussion

10. In the Sarajevo Decision, the Chamber ordered the Prosecution to allow the Accused, and/or members of his defence team, no later than 8 March 2012, to inspect a range of material in its custody relating to certain prospective defence witnesses listed in a confidential annex thereto.²² On 29 February 2012, the Chamber orally granted the Prosecution’s request for an extension of time in which to comply with the Sarajevo Decision until 9 May 2012.²³ The Witness was one of those prospective witnesses and the Documents therefore fall within the

¹⁸ Response, para. 7.

¹⁹ Response, paras. 8, 9.

²⁰ Sarajevo Decision, para. 7 citing Decision on Accused Motion for Inspection and Disclosure, 9 October 2008, para. 4.

²¹ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

²² Sarajevo Decision, para. 20.

²³ T. 25473–25474 (29 February 2012).

categories of material which the Accused requested pursuant to Rule 66(B).²⁴ The Prosecution should therefore have disclosed the Documents to the Accused by 9 May 2012. The Chamber therefore finds that the Prosecution did not fulfil the deadline imposed by the Chamber in the Sarajevo Decision to allow inspection of the Documents pursuant to Rule 66(B). However, the Chamber also finds that the Accused was not prejudiced by this failure given that material very similar to the Documents was admitted into evidence through the Witness and the Accused will also have ample opportunity to present the Documents during the remainder of his defence case, should he choose to do so.

11. In the absence of prejudice to the Accused there is no basis to grant the remedies sought by him. As noted above, there is no reason to admit the Documents at this stage as a remedy of the Prosecution's failure to comply with the Sarajevo Decision. While the Accused requests an express finding that the Prosecution violated its disclosure obligations under Rule 66(B) of the Rules, the Chamber finds that there was no such violation. The Chamber considers that given the language of Rule 66(B), there can only be a violation of the Rule if the Prosecution refused to permit the Accused to inspect the material identified therein. In this case while the Prosecution failed to adhere to the deadline which was set by the Chamber in the Sarajevo Decision, it cannot be said to have violated the terms of Rule 66(B) given that the Accused was given access to the material he requested, albeit belatedly.

12. With respect to the Accused's request that a warning be issued to the Prosecution pursuant to Rule 46(A) of the Rules, the Chamber notes that the Accused has failed to establish that such a warning is warranted. In that regard the Chamber is satisfied that the Prosecution acted in good faith and the failure to identify the Documents earlier was due to technological limitations which prevented its computer-based searches from recognising the Witness's name or signature on the Documents.²⁵ The Chamber is also satisfied that the Prosecution sought Rule 70 clearance and disclosed the Documents as soon as they were identified and that there was no unreasonable delay in that regard.

²⁴ Sarajevo Decision, confidential Annex A, p. 3.

²⁵ See Decision on Accused's Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon, 29 March 2011, para. 37 where the Chamber found that in the absence of a strict deadline for compliance with Rule 66(B) requests there was no disclosure violation.

IV. Disposition

13. For the foregoing reasons, the Trial Chamber, pursuant to Rules 54, 66(B), and 68 *bis* of the Rules, hereby **DENIES** the Motion

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



Judge O-Gon Kwon
Presiding

Dated this sixth day of November 2012
At The Hague
The Netherlands

[Seal of the Tribunal]