



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: 9 July 2013

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: 9 July 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S EIGHTIETH AND EIGHTY-FIRST 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 “80th Motion for Finding of Disclosure Violation”, filed on 10 June 2013 (“Eightieth Motion”), and the Accused’s “81st Motion for Finding of Disclosure Violation”, filed on 12 June 2013 (“Eighty-First Motion”), and hereby issues its decision thereon.

I. Submissions

A. Eightieth Motion

1. In the Eightieth 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 untimely disclosure of notes of an interview with a crime technician from the Banja Luka police (“Interview”).¹ The Interview was in the possession of the Prosecution since July 2003 but was only disclosed to the Accused on 5 June 2013.² The Accused contends that the Interview is exculpatory as it contains a reference to the Korićanske Stijene incident³ and to an order by the Accused that (1) the incident be investigated; (2) the survivors not be harmed; and (3) the bodies be collected.⁴

2. The Accused contends that he was prejudiced by the late disclosure of the Interview after the close of the Prosecution case as he could have used it to cross-examine witnesses who testified about the Korićanske Stijene incident.⁵ The Accused seeks an express finding that the Prosecution violated Rule 68 of the Rules and requests that the Chamber order that his defence team be given “open-file disclosure” in light of the continuing disclosure violations.⁶

3. On 24 June 2013, the Prosecution filed the “Prosecution Response to Karadžić’s 80th Motion for Finding of Disclosure Violation” with confidential appendix (“First Response”). It submits that the Eightieth Motion should be dismissed on the basis that the Accused has failed to demonstrate that he has been prejudiced by the late disclosure of the Interview and that in the absence of prejudice he is not entitled to any remedy.⁷ The Prosecution acknowledges that the

¹ Eightieth Motion, paras. 1–2, 5.

² Eightieth Motion, para. 1, confidential annex A.

³ Third Amended Indictment, Scheduled Incident B15.6.

⁴ Eightieth Motion, paras. 2–3.

⁵ Eightieth Motion, para. 4.

⁶ Eightieth Motion, paras. 5–6.

⁷ First Response, paras. 1, 3, 8.

Interview should have been disclosed earlier and expresses its regret for the late disclosure which was due to “human error”.⁸

4. With respect to the Accused’s request for access to the Prosecution’s evidence collection, the Prosecution observes that this request remains impracticable and inappropriate and the Accused fails to “point to any basis” for the Chamber to reconsider its previous decisions on this request.⁹ The Prosecution also observes that it is open to the Accused if he can show good cause to seek to recall relevant Prosecution witnesses or seek to amend his Rule 65 *ter* list to add the person who was the subject of the Interview as a Defence witness.¹⁰

5. The Prosecution also submits that the Accused possessed material similar to the information contained in the Interview and he already conducted cross-examination of Prosecution witnesses and sought to elicit evidence in his defence case about the investigation which he purportedly ordered with respect to the Korićanske Stijene incident.¹¹ The Prosecution also points to witnesses on the Accused’s 65 *ter* witness list who are anticipated to testify about the Accused’s disapproval of and order to investigate the Korićanske Stijene incident.¹²

B. Eighty-First Motion

6. In the Eighty-First Motion, the Accused argues that the Prosecution violated Rule 68 of the Rules by the untimely disclosure of exculpatory documents it obtained from the Government of the Republic of Serbia (“Serbia”) in January and March 2010.¹³ Amongst these documents the Prosecution isolated material which was potentially subject to lawyer-client privilege (“Material”) and suspended its review pending determination of its privileged status.¹⁴ The Prosecution filed a motion with the Appeals Chamber seeking appointment of independent counsel to review the Material.¹⁵ The President of the Tribunal appointed a Judge to review the Material.¹⁶

⁸ First Response, para. 2.

⁹ First Response, paras. 1, 6.

¹⁰ First Response, para. 7.

¹¹ First Response, paras. 4–5, referring to P3768, para. 5; P3760, T. 14048–14049; cross-examination of Nenad Krejić, T. 20861 (3 November 2011); Milan Komljenović, T. 20938 (8 November 2011); D3695, para. 242; Bogdan Subotić, T. 40104–40105 (20 June 2013), T. 40173–40175 (21 June 2013).

¹² First Response, confidential appendix.

¹³ Eighty-First Motion, paras. 1–2.

¹⁴ Eighty-First Motion, para. 3.

¹⁵ Eighty-First Motion, para. 3.

¹⁶ Eighty-First Motion, para. 3.

7. On 30 July 2012, the Accused in his “73rd Motion for Finding of Disclosure Violation (July 2012)”¹⁷ contended that the Prosecution had violated Rule 68 of the Rules by delaying seeking an independent party to review the privileged status of the Material for more than 18 months.¹⁸ The Chamber denied the motion as speculative and premature.¹⁹

8. On 6 June 2013, the Prosecution disclosed the Material consisting of 179 documents after receiving clearance from the Appeals Chamber.²⁰ The Accused contends that the Material contains exculpatory material including statements of individuals (“Statements”) which rebut the allegation that Ljubiša Beara had genocidal intent with respect to the killing of prisoners from Srebrenica.²¹ He argues that he was prejudiced by this late disclosure as he could have used the Statements during his cross-examination of Prosecution witnesses who were members of the VRS Main Staff acquainted with Beara.²² The Accused also claims that he was prejudiced as he was not able to use the Statements “by calling some of these individuals as witnesses in his defence case”.²³ The Accused requests that the Chamber make a finding that the Prosecution violated its disclosure obligations by delaying submission of the Statements to the Appeals Chamber for more than 18 months.²⁴

9. On 26 June 2013, the Prosecution filed the “Prosecution Response to Karadžić’s 81st Motion for Finding of Disclosure Violation” with confidential appendices (“Second Response”). The Prosecution argues that the Eighty-First Motion should be dismissed as the Accused was not prejudiced by the disclosure of the Statements which relate to Beara’s alleged good character and that in the absence of prejudice he is not entitled to a remedy.²⁵ In support of this argument the Prosecution notes that “[i]nformation similar to that in the Unsigned Statements” had been available to the Accused and yet he did not use this material during his cross-examination of Prosecution witnesses.²⁶ The Prosecution further observes that this evidence can be elicited from Beara himself and that the Accused also retains the ability to seek to amend his witness list or move to recall witnesses.²⁷ It also contends that general evidence which does not address

¹⁷ The Chamber ordered that the Registry re-classify the motion as confidential. Decision on Accused’s Seventy-Third Disclosure Violation Motion, 21 August 2012 (“Seventy-Third Decision”), para. 12(b),

¹⁸ Eighty-First Motion, para. 4.

¹⁹ Eighty-First Motion, para. 5 referring to Seventy-Third Decision, para. 10.

²⁰ Eighty-First Motion, para. 6.

²¹ Eighty-First Motion, paras. 7–8.

²² Eighty-First Motion, para. 10.

²³ Eighty-First Motion, para. 10.

²⁴ Eighty-First Motion, para. 11.

²⁵ Second Response, para. 1.

²⁶ Second Response, paras. 1, 7–11, 15.

²⁷ Second Response, paras. 1, 13–14.

Beara's "role and actions at Srebrenica, and which instead relates to his character" will be of minimal weight at best.²⁸

10. The Prosecution expresses its regret for the delay and acknowledges that the Statements may fall within Rule 68 of the Rules and should have been disclosed to the Accused earlier.²⁹ The Prosecution asserts that it acted in good faith in seeking to make the Material available to the Accused.³⁰ The Prosecution further acknowledges that there was a significant delay between its receipt of the Material in January and March 2010 and its request in November 2011 for the Appeals Chamber to appoint independent counsel to review the Material for privileged documents.³¹ Following receipt of the order on 29 May 2013 that the Material did not contain privileged information, the Prosecution disclosed the Material to the Accused on 6 June 2013.³²

11. The Prosecution further submits that two-thirds of the Material disclosed in June 2013 was already in the Accused's possession, was available to him, or was "manifestly irrelevant".³³

II. Applicable Law

12. 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". 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.³⁴

13. 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.³⁵

²⁸ Second Response, para. 12.

²⁹ Second Response, para. 2.

³⁰ Second Response, para. 2.

³¹ Second Response, para. 5.

³² Second Response, para. 5.

³³ Second Response, para. 6.

³⁴ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), para. 179.

III. Discussion

A. Eightieth Motion

14. The Chamber finds that the Prosecution violated Rule 68 of the Rules by its failure to disclose the Interview as soon as practicable. The Interview was in the possession of the Prosecution since July 2003 but was only disclosed to the Accused on 5 June 2013.

15. The Interview is from a crime technician from the Banja Luka police who was involved in the on-site investigation of the Korićanske Stijene incident and said: “we learned that Radovan Karadžić had issued an order that the crime should be investigated and that the survivors were not [to] be harmed and the bodies collected”.³⁶ The Chamber is aware that the Accused already possessed another statement from the same crime technician that he had heard rumours that the Accused had ordered that the bodies be recovered and that he viewed the Korićanske Stijene incident as “clearly a crime”.³⁷ In addition, there was other material available to the Accused which suggested that the Accused was enraged by the incident and demanded “answers about the massacre and who was responsible for it”³⁸ and that the Accused sent a dispatch which stated that the “leaderships of the two municipalities had to deal with that”.³⁹

16. The Chamber finds that while the material already available to the Accused is similar and relates to the Accused’s reaction to the Korićanske Stijene incident, it is not identical to the information contained in the Interview. The Interview is more explicit in its reference to the Accused’s order to investigate the incident and also includes a reference to the protection of survivors which is not found in the other material available to the Accused. However, the Chamber is not convinced that this new information adds much significance to what has already been disclosed to the Accused. The Chamber is also mindful that the Accused already conducted cross-examination of Prosecution witnesses and sought to elicit evidence in his defence case about his disapproval of and order to investigate the Korićanske Stijene incident.⁴⁰

³⁵ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

³⁶ Eightieth Motion, confidential annex B, p. 2.

³⁷ First Response, confidential appendix, para. 3.

³⁸ P3768 (Witness statement of Milan Komljenović dated 28 October 2011), para. 5.

³⁹ See Nenad Krejić, T. 20861 (3 November 2011); Nenad Krejić, P3760 (Transcript from *Prosecutor v. Stanišić & Župljanin*), T. 14049.

⁴⁰ Nenad Krejić, T. 20861 (3 November 2011); Milan Komljenović, T. 20938 (8 November 2011); D3695, para. 242; Bogdan Subotić, T. 40104–40105 (20 June 2013), 40173–40175 (21 June 2013).

17. The Chamber also notes that there is a witness on the Accused's witness list whose statement suggests the Accused "strongly disapproved of the [Korićanske Stijene] incident, requested that the exact situation with regard to the said incident and the identity of the perpetrators be established, and that urgent measures be taken to resolve the case and punish the perpetrators".⁴¹ This information is very similar to that contained in the Interview. The Accused will therefore have an opportunity to adduce any additional information contained in the Interview through this witness if he is of the view that it is of significance to his case. In addition it is also open to the Accused to seek to call the crime technician as a witness to testify about the Interview and its content. Having considered these factors, the Chamber finds that while the Interview may have contained some additional information, the Accused was not prejudiced by its late disclosure. In the absence of prejudice to the Accused, the Chamber sees no basis to grant the Accused access to the Prosecution's database, a request which it has previously denied.⁴²

B. Eighty-First Motion

18. The Chamber finds that the Prosecution violated Rule 68 of the Rules by its late disclosure of the Statements. While the Prosecution may have acted in good faith, this does not excuse the original delay between the receipt of the documents from the authorities of Serbia in January and March 2010 and the Prosecution's request on 17 November 2011 that the Material be reviewed for privileged information. This delay was unreasonable and the Chamber expresses its disappointment that the Prosecution made no attempt to even explain why there was such a delay.

19. However, having reviewed the Statements in light of other documents which had already been disclosed or available to the Accused,⁴³ the Chamber finds that the Accused was not prejudiced by the late disclosure. The Chamber is not satisfied that the Statements are of such significance or contain any new information that was not already contained in material which was available to the Accused.

⁴¹ First Response, confidential appendix, para. 1.

⁴² T. 38096–38098 (9 May 2013); Decision on Accused's Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions, 11 March 2013, para. 22.

⁴³ See Second Response, paras. 8–10 and the documents referred to therein.

IV. Disposition

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

- a) **GRANTS**, by majority, Judge Kwon dissenting,⁴⁴ the Eightieth Motion and Eighty-First Motion in part, and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the Interview and Statements; and
- b) **DENIES** the Eightieth Motion and Eighty-First Motion in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this ninth day of July 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴⁴ 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.