UNITED NATIONS

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: 7 November 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: **7 November 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S EIGHTY-SECOND 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 "82nd Motion for Finding of Disclosure Violation and for Remedial Measures (September 2013)", filed on 11 October 2013 ("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 untimely disclosure of four documents ("Documents") which, in his submission, contain information of an exculpatory nature.[1] The Documents were disclosed by the Prosecution earlier in 2013 as part of the "Rules of the Road" collection of documents.[2]

2. The Accused contends that the first document is a work plan ("First Document") which "shows that Bosnian Muslims were still living peacefully in Ključ municipality in December 1992, had not been ethnically cleansed," and that the Bosnian Serb authorities sought to collaborate with local Bosnian Muslims to combat those engaged in terrorist activities.[3]

3. In the Accused's submission, the second document is a report ("Second Document") which shows that the conduct of the authorities in Ključ was neither directed towards destroying nor persecuting Bosnian Muslims as a group but only targeted Bosnian Muslims who were engaged in crimes or sabotage.[4] The Accused submits that he was prejudiced by the late disclosure of the First Document and Second Document as he could not use them during his cross-examination of witnesses who testified about events in Ključ.[5]

4. The Accused submits that the third document is a report of an interview ("Third Document") with a detainee at Manjača camp which suggests that (1) the living conditions were far better there than at Kotor Varoš; (2) the guards did not beat or mistreat detainees as long as they followed the rules of the camp; (3) the head of the camp did not allow any person to enter the camp to mistreat the detainees; and (4) the detainees received food twice a day and were visited by the International Committee of the Red Cross ("ICRC") which gave them food, medicine, and clothing.[6] The Accused argues that he was prejudiced by the late disclosure of

[1] Motion, paras. 1–2.
[2] Motion, para. 1.
[3] Motion, paras. 3–4.
[4] Motions, paras. 6–7.
[5] Motions, paras. 5, 8.
[6] Motion, para. 9.

the Third Document as he could not use the exculpatory material contained therein during his cross-examination of witnesses who testified about conditions at the Manjača camp.[7]

5. The fourth document is a report of an interview with a Bosnian Muslim from Ilidža ("Fourth Document") who stated that Arkan's men arrived in the municipality, carried out a coup and that the "only local" kept by the paramilitaries was Nedeljko Prstojević, and that Arkan's men "ran the show".[8] In the Accused's submission, this document is exculpatory as it shows that crimes in Ilidža were committed by paramilitary groups outside the control of the authorities and he was prejudiced as he could not use this document during his cross-examination of witnesses who testified about events in Ilidža.[9]

6. The Accused requests the Chamber to make a finding that the Prosecution violated Rule 68 of the Rules by the late disclosure of the Documents and seeks the admission of each of the Documents as a remedy for the violations.[10] The Accused further asks that he be granted an additional four hours for his defence case and renews his request that he be given "open-file disclosure" with respect to the Prosecution's evidence collection.[11]

7. On 22 October 2013, the Prosecution filed the "Prosecution Response to Karadžić's 82nd Motion for Finding of Disclosure Violation" ("Response"). It submits that the Motion should be dismissed on the basis that three of the Documents are not exculpatory and do not fall within Rule 68 of the Rules.[12] With respect to the Fourth Document, the Prosecution acknowledges that it may fall within Rule 68 but contends that the Accused has failed to demonstrate that he has been prejudiced by its late disclosure and in the absence of prejudice he is not entitled to any remedy.[13]

8. The Prosecution submits that the First Document and Second Document are not exculpatory as they do not contradict the Prosecution case that ethnic cleansing occurred, nor that the authorities in Ključ engaged in persecutory conduct.[14] The Prosecution refers to duplicative evidence on the record which, in its submission, is consistent with the First Document that some Bosnian Muslims remained in Ključ in December 1992.[15] It further submits that evidence which shows that a "very small number of Muslims remained living in the

[7] Motion, paras. 10–11.
[8] Motion, para. 12.
[9] Motion, paras. 13–14.
[10] Motion, paras. 15, 18.
[11] Motion, paras. 19–20.
[12] Response, paras. 1–2, 19.
[13] Response, paras. 1, 19.
[14] Response, para. 3.

municipality in December 1992 is not inconsistent with the ethnic cleansing of that municipality".[16] The Prosecution also argues that the First Document and Second Document do not support his contention that the authorities "sought to collaborate and cooperate with Muslims in the local area" and that in addition, the events described in these documents took place months after the alleged crimes in the municipality and are at best of peripheral relevance.[17]

9. With respect to the Third Document, the Prosecution contends that it is not exculpatory, but is actually consistent with its case and other evidence that by mid-November 1992, the ICRC was regularly visiting the Manjača camp which resulted in better conditions than those in other camps.[18]

10. The Prosecution acknowledges that the Fourth Document may fall within Rule 68, expresses its regret for its late disclosure, but contends that the Accused has suffered no prejudice from the late disclosure of the document.[19] The Prosecution argues that the Fourth Document falls under Rule 68 but only to a limited extent as it contradicts the testimony of Nedeljko Prstojević that he never worked with the paramilitaries that came to Ilidža.[20] The Prosecution argues however that, contrary to the Accused's submission, the Fourth Document does not show that the authorities lacked control over the paramilitaries in Ilidža.[21]

11. The Prosecution submits that the remedies sought by the Accused are "disproportionate, impracticable and inappropriate" and that in the absence of prejudice no remedy is warranted.[22] Specifically, the Prosecution argues that given that three of the Documents are not exculpatory, no remedy is warranted and with respect to the Fourth Document it submits that the violation was of a "technical nature" and that in the absence of prejudice to the Accused the remedies sought are inappropriate.[23]

12. The Prosecution further argues that there are no grounds to grant additional time for the defence case with respect to the Fourth Document given that the Accused had already cross-examined the relevant witness with respect to the issue raised in the document.[24] The

[15] Response, para. 4.
[16] Response, para. 5.
[17] Response, paras. 6–7.
[18] Response, paras. 8–10.
[19] Response, paras. 11–12.
[20] Response, para. 12.
[21] Response, para. 13.
[22] Response, para. 14.
[23] Response, paras. 15–16.
[24] Response, para. 17.

Prosecution finally observes that the Accused's request for "open-file disclosure" has already been rejected by the Chamber on three occasions, and that the Accused is thus requesting reconsideration without asserting a clear error of reasoning or pointing to "any particular circumstance justifying reconsideration in order to prevent an injustice".[25]

II. Applicable Law

13. 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.[26]

14. 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.[27]

III. Discussion

15. Having reviewed the First Document and the Second Document, the Chamber is not satisfied that they are potentially exculpatory. Contrary to the Accused's assertion, the First Document does not show that Bosnian Muslims were still living peacefully in Ključ municipality in December 1992. It also does not support the Accused's case that the municipality had not been ethnically cleansed. It simply suggests that local Bosnian Muslims who remained in the municipality were sought by the Bosnian Serb authorities to collaborate with them.

16. With respect to the Second Document, while it does show that measures were being taken against Bosnian Muslim "outlaws", it does not support the Accused's assertion that the conduct of the authorities in Ključ was neither directed towards destroying nor persecuting Bosnian Muslims as a group but was only targeting Bosnian Muslims who were engaged in crimes or sabotage. The Second Document in fact makes reference to the only Muslim

[25] Response, para. 18.

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

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

settlement which had not been vacated in the municipality and that only 45 households with about 200 people remained.[28]

17. The Chamber therefore finds that there was no violation of Rule 68 of the Rules with respect to the late disclosure of the First Document and the Second Document and there is no basis to grant the remedies sought in relation thereto.

18. The Chamber agrees that the Third Document is consistent with the Prosecution case that by mid-November 1992, the ICRC was regularly visiting Manjača which resulted in better conditions than those found in other camps. However, the Third Amended Indictment charges the Accused with responsibility for crimes alleged to have been committed at Manjača between 21 April and 18 December 1992.[29] The Chamber therefore finds that information which suggests that there was no mistreatment of detainees and that the conditions of detention at Manjača from November to December 1992 was better than at other facilities is potentially exculpatory and should have been disclosed pursuant to Rule 68 of the Rules.

19. The Chamber therefore finds that the Prosecution violated Rule 68 of the Rules by its failure to disclose the Third Document as soon as practicable. The Third Document was only disclosed to the Accused in March or April 2013 but dates back to March 1993. However, the Chamber finds that the exculpatory value of the Third Document is limited and the Accused was not prejudiced by this late disclosure given that the Third Document is consistent with other evidence presented in this case that the conditions of detention at the Manjača camp improved following regular visits from the ICRC starting at the end of August 1992.[30]

20. The Chamber finds that the Fourth Document falls within the purview of Rule 68 of the Rules as it may affect the credibility of a Prosecution witness because it contains limited information which contradicts the evidence of Nedeljko Prstojević that he never worked with the paramilitaries that came to Ilidža. Considering that the Accused already cross-examined Prstojević on the issue of control over the paramilitaries in Ilidža,[31] the Chamber finds that the Fourth Document is not of such significance that he was prejudiced by its late disclosure.

21. In the absence of prejudice to the Accused there is no basis to grant the remedies sought with respect to the Third Document and Fourth Document.

[28] Second Document, para. 2, Motion, Annex B.
[29] Third Amended Indictment, Scheduled Detention Facility C1.2.
[30] *See* Response, para. 9 and witness testimony cited therein.
[31] Hearing, T. 13823–13826 (21 March 2011).

IV. Disposition

22. 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,[32] the Motion in part, and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the Third Document and Fourth Document; and

b) **DENIES** the Motion in all other respects.

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

Judge O-Gon Kwon
Presiding

Dated this seventh day of November 2013
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 Motion should be dismissed in its entirety.