



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: 16 January 2014

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: 16 January 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S EIGHTY-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 Accused’s “84th Motion for Finding of Disclosure Violation and for Remedial Measures (November 2013)”, filed on 4 December 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 Three of the Documents were disclosed by the Prosecution in early 2013 as part of the “Rules of the Road” collection of documents and the fourth document was disclosed in November 2013 following a specific request by the Accused.²

2. The Accused contends that the Documents are exculpatory with respect to allegations and events in Grbavica (“First Document”), Hadžići (“Second Document”), Bijeljina (“Third Document”) and Korićanske Stijene (“Fourth Document”).³ The Accused submits that the Documents contradict allegations “that there was a policy or joint criminal enterprise to expel non-Serbs and commit violent acts against them”.⁴ With respect to the Korićanske Stijene incident, the Accused alleges that the Fourth Document shows that the killings were not planned by the Bosnian Serb authorities and that they tried to prosecute the perpetrators.⁵

3. In the Accused’s submission, he was prejudiced by the late disclosure of the Documents as he could not use them during his cross-examination of Prosecution witnesses or during his direct examination of witnesses who had testified about the municipalities and incidents in question.⁶

4. 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.⁷ The Accused further asks that he be

¹ Motion, para. 1.

² Motion, para. 1.

³ Motion, paras. 2–4, 6–8, 9–10, 12–14.

⁴ Motion, paras. 4, 7, 10.

⁵ Motion, para. 14.

⁶ Motion, paras. 5, 8, 11, 15.

⁷ Motion, para. 16.

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.⁸

5. On 19 December 2013, the Prosecution filed the “Prosecution Response to Karadžić’s 84th Motion for Finding of Disclosure Violation and for Remedial Measures (November 2013)” (“Response”). It submits that the Motion should be dismissed given that the Accused has failed to show that he was prejudiced by the late disclosure of the Documents.⁹ The Prosecution does not accept that the Second Document or Third Document are exculpatory and were thus subject to disclosure under Rule 68.¹⁰

6. The Prosecution acknowledges that the First Document and Fourth Document should have been disclosed pursuant to Rule 68 and expresses its regret for this error.¹¹ However, with respect to the First Document the Prosecution contends that it does not fall within Rule 68 to the extent claimed by the Accused.¹² In any event, the Prosecution submits that the Accused suffered no prejudice as a result of the late disclosure of the Documents given that the newly disclosed material is duplicative or adds nothing significant to material already in the Accused’s possession.¹³ The Prosecution also cites examples of where the Accused has already elicited similar evidence from witnesses who have testified to date or has cross-examined witnesses on the issues raised in the Documents.¹⁴ In addition, it contends that any evidence contained in the Documents would be of “minimal weight” and further that the Accused failed to identify any witnesses who could have testified about the specific incidents referred to in the Documents.¹⁵

7. 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.¹⁶ The Prosecution further argues that there are no grounds to grant additional time for the defence case given that (i) the Accused had already cross-examined the relevant witnesses with respect to the issues raised in the Documents; (ii) the disclosed information is of such limited significance; and (iii) the Accused already possessed “substantially similar information”.¹⁷ The Prosecution finally observes that the Accused’s request for “open-file disclosure” has already been rejected by the Chamber on four occasions, and that the Accused is thus requesting

⁸ Motion, paras. 19–20.

⁹ Response, para. 1.

¹⁰ Response, paras. 4–6.

¹¹ Response, paras. 2, 13.

¹² Response, para. 3.

¹³ Response, paras. 7–9, 12–14.

¹⁴ Response, paras. 9, 12–14.

¹⁵ Response, paras. 10–11.

¹⁶ Response, para. 1.

reconsideration without asserting a clear error of reasoning or pointing to “any particular circumstance justifying reconsideration in order to prevent an injustice”.¹⁸

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”. 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. Having reviewed the First Document, the Chamber is not convinced that the humane conduct of one Bosnian Serb individual who was described as a “commissioner” for the entry hall to an apartment building in Grbavica is potentially exculpatory. In the absence of further information about the appointment, power, and mandate of this “commissioner”, the Chamber does not consider his individual actions in helping Bosnian Muslims to be potentially exculpatory. However, the Chamber finds that to the extent that the document suggests that many civilians were killed or wounded in Grbavica because of snipers shooting from the “free territory” is potentially exculpatory with respect to the allegations against the Accused. However, in this regard, the Chamber notes that the Chamber has already received evidence pertaining to sniper fire into Grbavica.²¹ The Chamber therefore finds that the First Document is not of such significance that the Accused was prejudiced by its late disclosure.

¹⁷ Response, para. 14.

¹⁸ Response, para. 15.

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

²⁰ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

²¹ Stanislav Galić, T. 37476 (22 April 2013); Vlade Lučić, T. 30823 (3 December 2012); Dragan Maletić, T. 30840 (3 December 2012); Edin Garaplija, T. 33399 (7 February 2013); D2516 (Witness statement of Vlade Lučić dated 5 November 2012), paras. 4, 14, 17, 25; David Harland, T. 2076–2077 (7 May 2010); Aernout Van Lynden, T. 3061–3062 (31 May 2010); Michael Rose, T. 7267–7268 (5 October 2010); Martin Bell, T. 9923 (15 December 2010).

11. With respect to the Second Document, the Chamber is not satisfied that there is a basis to conclude that the fact that Milan Kuzman intervened to ensure that a Bosnian Muslim would not be mistreated and detained is potentially exculpatory. The Accused has failed to show how the intervention of one individual who does not appear to have had an official function in the municipality is potentially exculpatory or would show that only Bosnian Muslims who “assisted the enemy” were detained by Bosnian Serb authorities in Hadžići.

12. The Chamber is also not satisfied that the Third Document is potentially exculpatory. The Third Document simply suggests that the President of the Municipality of Bijeljina assured a Bosnian Muslim that he would get involved if he found out anything about his son and would try to release him. There is no indication that any action was actually taken in this regard and it does not appear that the Bosnian Muslim’s son was ever found. Contrary to the Accused’s submission, the Third Document does not suggest that crimes in Bijeljina were committed by persons over which the authorities had no control.

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

14. The Chamber finds that to the extent that the Fourth Document suggests that the Korićanske Stijene incident was done “spontaneously on self-initiative” and that there was pressure from Banka Luka to arrest the perpetrators, it is potentially exculpatory. The Chamber therefore finds that the Prosecution violated Rule 68 of the Rules by failing to disclose the Fourth Document as soon as practicable. The Fourth Document was only disclosed to the Accused in November 2013 but dates back to October 2001. The Chamber finds, however, that the Fourth Document is consistent with other material already disclosed to the Accused. The Chamber also notes that the Accused has already conducted cross-examination of Prosecution witnesses and sought to elicit evidence about his disapproval of and order to investigate the Korićanske Stijene incident.²² The Chamber therefore finds that the Fourth Document is not of such significance that the Accused was prejudiced by its late disclosure.

15. In the absence of prejudice to the Accused, there is no basis to grant the remedies sought with respect to the Fourth Document.

IV. Disposition

16. 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,²³ the Motion in part, and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the First 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 sixteenth day of January 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

²² See Response, para. 13 and the documentary material and witness testimony cited therein.

²³ 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 has been a violation 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.