



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: 10 June 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: 10 June 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S NINETY-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 “92nd Motion for Finding of Disclosure Violation and for Order to Prosecution”, filed on 21 May 2014 (“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 on 15 May 2014 of a statement given by Islam Selimović (“Statement”) which, in the Accused’s submission, contradicts the evidence of KDZ065 with respect to the details of the alleged execution at Jadar river on 13 July 1995.¹

2. The Accused contends that he was prejudiced by the late disclosure of the Statement because he was unable to locate and interview Selimović in time to present his evidence during his Defence case.² The Accused seeks a finding that the Prosecution violated Rule 68 of the Rules and requests that the Chamber order the Prosecution to review its evidence collection for any exculpatory evidence contained in undisclosed witness statements and to disclose that material.³ The Accused requests an order that these searches be completed and all exculpatory material be disclosed no later than 15 August 2014 and that the Prosecution certify that searches have been completed and all exculpatory material has been disclosed.⁴

3. On 4 June 2014, the Prosecution filed the “Prosecution Response to the Accused’s 92nd Disclosure Violation Motion” (“Response”), arguing that the Motion should be dismissed in its entirety because an identical copy of the Statement was disclosed to the Accused in September 2012, which was prior to the opening of the Defence case.⁵ The Prosecution apologises for the confusion caused by the re-disclosure of the Statement.⁶ While it acknowledges that the Statement does contain material which the Accused may consider to be potentially exculpatory

¹ Motion, paras. 1–4.

² Motion, para. 5.

³ Motion, paras. 1, 6, 14–16.

⁴ Motion, para. 17.

⁵ Response, paras. 1, 15. The Prosecution adds that the same copy of the Statement was disclosed again on 25 April 2013. Response, para. 2.

⁶ Response, paras. 2–3.

or of relevance to his case, the Prosecution argues that it does not contradict the evidence of KDZ065 as suggested by the Accused.⁷

4. The Prosecution contends that the Accused failed to demonstrate prejudice given that his sole argument was that the late disclosure of the Statement after the close of his case prevented him from locating and interviewing Selimović for the purpose of tendering his evidence and that the Statement had in fact been disclosed before the commencement of his Defence case.⁸ The Prosecution argues that the Accused is thus not entitled to any remedy, that in any event the requested relief is impracticable, and that the Motion contravenes the Chamber's instructions with respect to the filing of disclosure violation motions which focus on examples where there is demonstrable prejudice.⁹

II. Applicable Law

5. 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.¹⁰

6. 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.¹¹

III. Discussion

7. The Chamber notes that the Motion was filed on the basis of a mistaken understanding that the Statement was first disclosed to the Accused on 15 May 2014 and that he was prejudiced by being prevented from locating and interviewing Selimović for the purposes of his Defence case. However, the Statement was in fact first disclosed to the Accused in

⁷ Response, paras. 5–11.

⁸ Response, paras. 2, 4.

⁹ Response, paras. 12–13.

¹⁰ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”), para. 179.

¹¹ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

September 2012, before the start of the Defence case. In these circumstances the Chamber dismisses the Motion in its entirety.

8. The Chamber notes that while this reflects badly on the Prosecution's disclosure practices given that it incorrectly represented to the Accused that the Statement had not been previously disclosed, it also shows that contrary to the Chamber's repeated instructions, the Accused continues to file disclosure violation motions when there is no actual prejudice. The Accused is also reminded of the Chamber's instruction that unless an urgent remedy is required, any future alleged disclosure violations should be accumulated and filed in a consolidated motion one month before the final briefs are due to be filed.¹²

IV. Disposition

9. For the foregoing reasons, the Chamber, pursuant to Rules 54, 68, 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 tenth day of June 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

¹² Decision on Accused's Ninety-First Disclosure Violation Motion, 7 May 2014, para. 19.