



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: 5 December 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: 5 December 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S NINETY-FIFTH DISCLOSURE VIOLATION MOTION

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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 “95th Motion for Finding of Disclosure Violation and for exclusion of testimony of Fadil Banjanović”, filed publicly on 19 November 2014 with confidential annexes (“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 17 November 2014 of a document (“Document”).¹ In his submission, the Document affects the credibility of Fadil Banjanović, whose prior testimony in the *Slobodan Milošević* case was admitted pursuant to Rule 92 *bis* in this case.² The Accused outlines the portions of the Document which in his submission undermine the credibility of Banjanović.³ The Document is subject to Rule 70 conditions.⁴

2. The Accused requests a finding that the Prosecution violated its disclosure obligation under Rule 68 of the Rules by the late disclosure of the Document.⁵ The Accused also requests exclusion of Banjanović’s testimony as a remedy and sanction for this specific violation and also as a sanction for the extensive disclosure violations by the Prosecution in this case.⁶ He submits that he was prejudiced by the failure to disclose the Document as soon as practicable because (i) he could have used the Document to argue that Banjanović should have been called for cross-examination; (ii) he could have called Banjanović as a witness in his own case; (iii) it prevented him from investigating matters described in the Document which could have further undermined the credibility of Banjanović.⁷ Banjanović died in December 2011 and so cannot be called for cross-examination at this stage.⁸

3. Banjanović was the former mayor of Kozluk, Zvornik municipality; he gave evidence that Bosnian Muslims were forcibly moved to Serbia and that Bosnian Serb leaders in the

¹ Motion, confidential annex B.

² Motion, paras. 1, 5.

³ Motion, para. 5, confidential annex A.

⁴ Motion, para. 5.

⁵ Motion, paras. 7–8.

⁶ Motion, paras. 9, 16–17.

⁷ Motion, paras. 10–11.

⁸ Motion, para. 15.

municipality participated in this movement.⁹ The Accused argues that the Document demonstrates that Banjanović's evidence was unsuitable for admission pursuant to Rule 92 *bis* particularly given that he was the only witness to testify about the alleged deportation from Kozluk and two defence witnesses contradicted his testimony.¹⁰ The Accused further submits that the incident in Kozluk is one of only two identified instances of deportation as charged under Count 7 of the Third Amended Indictment.¹¹

4. On 3 December 2014, the Prosecution filed the "Prosecution Response to 95th Motion for Finding of Disclosure Violation and for exclusion of testimony of Fadil Banjanović" ("Response"), arguing that the Motion should be dismissed.¹² The Prosecution acknowledges that the Document was not disclosed earlier as a result of human error.¹³ In confidential appendix A, the Prosecution explains the occurrence of an error in its Rule 70 clearance and disclosure process which resulted in this failure and expresses regret for this late disclosure.¹⁴ However, in its submission, the Accused was not prejudiced by the late disclosure of the Document given that it was duplicative of other material available to the Accused or of marginal probative value.¹⁵

5. The Prosecution also notes that reconsideration of the decision to admit Banjanović's evidence pursuant to Rule 92 *bis* is unwarranted because no injustice has occurred.¹⁶ The Prosecution notes that Banjanović's evidence was "thoroughly cross-examined" and thus continues to meet the standards of reliability for admission pursuant to Rule 92 *bis*.¹⁷ It also refers to multiple pieces of evidence which, in its submission, corroborates Banjanović's testimony and is contrary to the Accused's assertion that his evidence was the only evidence on the involuntary circumstances of the deportation from Kozluk.¹⁸

6. The Prosecution contends that in the absence of prejudice, exclusion of Banjanović's testimony is unwarranted as either a remedy or sanction.¹⁹ It further outlines the measures taken

⁹ Motion, para. 2.

¹⁰ Motion, paras. 3–4, 12–13.

¹¹ Motion, para. 13.

¹² Response, para. 1.

¹³ Response, para. 1.

¹⁴ Response, confidential appendix A, paras. 1–2.

¹⁵ Response, paras. 1, 2.

¹⁶ Response, para. 3.

¹⁷ Response, para. 3, referring to Decision on Prosecution's First Motion for Admission of Statements and Transcripts in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 10 November 2009, para. 32.

¹⁸ Response, paras. 4–5; confidential appendix A, paras. 4, 9.

¹⁹ Response, para. 1.

by the Chamber to ensure the Accused was not prejudiced and to protect the administration of justice and the Accused's right to a fair trial.²⁰

7. The Prosecution contends that no information in the Document "contradicts, or even relates to" Banjanović's evidence regarding the expulsion of Bosnian Muslims from Kozluk in 1992 and, on the contrary, relates to the conduct of the witness after the end of the conflict.²¹ The Prosecution argues that four of the six extracts from the Document cited by the Accused relating to Banjanović's credibility are "vague, unsourced or unsupported insinuations about possible inaccuracies" in statements given by the witness.²² The Prosecution contends that these references carry very little weight as indicators of the veracity of his testimony before the Tribunal and in any event would not have formed the basis for effective impeachment of his testimony had he been called to testify.²³ With respect to the two remaining extracts, the Prosecution notes that the information contained therein is also of marginal probative value. In any event this information was available to the Accused when the motion to admit Banjanović's testimony pursuant to Rule 92 *bis* was filed and he was not deprived of an opportunity of requesting the witness be called for cross-examination.²⁴

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.²⁵

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.²⁶

²⁰ Response, paras. 6–7.

²¹ Response, confidential appendix A, para. 3.

²² Response, confidential appendix A, para. 5.

²³ Response, confidential appendix A, para. 5.

²⁴ Response, confidential appendix A, paras. 6–8.

²⁵ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("Kordić and Čerkez Appeal Judgement"), para. 179.

²⁶ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

III. Discussion

10. Having reviewed the Document in its entirety, the Chamber finds that there are certain portions which could affect the credibility of Banjanović and thus should have been disclosed to the Accused pursuant to Rule 68 as soon as practicable. While the Prosecution has been in possession of the Document since October 2004, it only sought the Rule 70 provider's consent in February 2014 and disclosed it to the Accused in November 2014. The Chamber therefore finds that the Prosecution violated its disclosure obligations by failing to disclose the Document as soon as practicable.

11. However, the Chamber does not consider that the information contained in the Document is of any important significance to the assessment of Banjanović's credibility and thus finds that the Accused was not prejudiced by this disclosure violation. In reaching that conclusion the Chamber noted that the references in the Document, which could cast some doubt on the credibility of the Banjanović, relate largely to his involvement in political discussions pertaining to the post-conflict re-settlement of Bosnian Muslims which post-date and are unconnected with the core content of his evidence in this case. In addition some of the information contained in the Document and referred to by the Accused had already been disclosed or was available to him.²⁷

12. The Chamber further notes that Banjanović's testimony in the *Slobodan Milošević* case was admitted in full, including extensive cross-examination about the alleged deportation of the population from Kozluk.²⁸ The Chamber will have regard to the totality of his evidence and the line of cross-examination in the *Slobodan Milošević* case and other evidence received in this case in assessing the weight to attribute to his testimony. Having regard to these factors, the Chamber does not find that the circumstances are such that the late disclosure of the Document would warrant reconsideration of its decision to admit Banjanović's evidence pursuant to Rule 92 *bis* in order to prevent an injustice.

²⁷ See Response, confidential appendix A, paras. 6–7.

²⁸ See Fadil Banjanović, P57 (Transcript from *Prosecutor v. S. Milošević*).

IV. Disposition

13. For the foregoing reasons, the Chamber, pursuant to Rules 54, 68, 68 *bis* and 89 of the Rules, hereby:

- (a) **GRANTS** by majority, Judge Kwon dissenting,²⁹ the Motion in part and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the Document;
- (b) **DENIES** the remainder of the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this fifth day of December 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁹ 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.