



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: 21 January 2015

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: 21 January 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S NINETY-SIXTH 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 “96th Motion for Finding of Disclosure Violation and for Exclusion of Evidence”, filed publicly on 11 December 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 10 December 2014 of a document (“Document”) which had been in its possession since 1999.¹ The Document is a United Nations report which documents efforts by the Accused to prevent crimes against non-Serbs in 1994.² In confidential annex A, the Accused outlines which portions of the Document are, in his submission, exculpatory.³

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.⁴ The Accused also requests exclusion of evidence of uncharged events in Bihać and Goražde in 1994 as a remedy and sanction for this specific violation and also as a sanction for the continuing disclosure violations by the Prosecution in this case.⁵ The Accused submits that the Prosecution convinced the Chamber to allow witnesses to testify about uncharged events in Bihać and Goražde on the basis that it was evidence relevant to “command and control, intent, and pattern”.⁶ He submits that he was prejudiced by the failure to disclose the Document as soon as possible as he could have elicited relevant information to refute this evidence from United Nations witnesses Rose and van Baal who were called by the Prosecution.⁷

3. On 24 December 2014, the Prosecution filed publicly the “Prosecution Response to 96th Motion for Finding of Disclosure Violation and for Exclusion of Evidence” with confidential appendix (“Response”), arguing that the Motion should be dismissed.⁸ The Prosecution acknowledges that the Document does contain some material of marginal exculpatory value

¹ Motion, paras. 1–3.

² Motion, paras. 1–2.

³ Motion, para. 2, confidential annex A.

⁴ Motion, paras. 4, 9.

⁵ Motion, paras. 1, 8–9.

⁶ Motion, para. 6.

⁷ Motion, para. 5.

⁸ Response, para. 1.

which was not disclosed earlier as a result of human error.⁹ However, in its submission, the Accused was not prejudiced by the late disclosure of the Document given that it was of marginal or extremely low probative value or duplicative of other material available to the Accused and tendered into evidence.¹⁰ In the confidential appendix to the Response, the Prosecution details evidence, which had been tendered in this case that is duplicative of the portions of the Document referred to by the Accused as exculpatory, and provides further explanation as to why this information is of extremely low probative value.¹¹

4. The Prosecution also contends that there is no connection between the exculpatory portions of the Document and witnesses Rose and van Baal and that the Accused's argument that he could have elicited information on the Document from these witnesses is speculative.¹² The Prosecution submits that in the absence of prejudice the Accused is not entitled to any remedy.¹³

5. The Prosecution further notes that the Chamber has consistently rejected previous requests by the Accused for sanctions against the Prosecution for disclosure violations and that the Accused has offered no reason why a sanction would be appropriate in this case.¹⁴ It also notes that the proposed exclusion of the evidence identified by the Accused would be arbitrary and disproportionate given the absence of prejudice and the lack of connection between that evidence and the Document.¹⁵

II. Applicable Law

6. 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.¹⁶

⁹ Response, para. 1. The Prosecution provides further detail about this error and the delay in requesting Rule 70 clearance: Response, confidential appendix, paras. 1–2.

¹⁰ Response, paras. 1–2, confidential appendix, para. 3.

¹¹ Response, confidential appendix, paras. 4–7.

¹² Response, para. 2.

¹³ Response, paras. 1–2.

¹⁴ Response, para. 4.

¹⁵ Response, para. 5.

¹⁶ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), para. 179.

7. 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.¹⁷

III. Discussion

8. Having reviewed the portions of the Document referred to by the Accused, the Chamber finds that it does contain some information which is potentially exculpatory and thus should have been disclosed to the Accused pursuant to Rule 68 as soon as practicable. However, the Chamber finds that this material adds nothing new or of significance to material already disclosed to the Accused. The Accused was thus not prejudiced by this disclosure violation. In the absence of prejudice to the Accused, there is no basis to grant the remedies sought by the Accused for this specific violation or as a sanction against the Prosecution.

9. The Chamber further notes the Prosecution's submission that the logical remedy, if the Accused had suffered prejudice, would have been to request that the case be re-opened so that the Document could be admitted.¹⁸ However, the Chamber is of the view that the potentially exculpatory portions are of such low probative value when read in the context of the full Document, that the interests of justice would not demand that the case be re-opened to allow for its admission.

10. The Chamber recalls its instruction during the trial phase of the case, that unless an urgent remedy was sought, the Accused should file a consolidated disclosure violation motion on a monthly basis.¹⁹ There was a similar instruction to file a consolidated disclosure violation motion prior to the filing of the closing briefs.²⁰ The Chamber further recalls its observation that the Accused failed to pay regard to its repeated instruction that the filing of disclosure violation motions should not be a purely numerical exercise and that he should instead focus on disclosure violations where there is demonstrable prejudice.²¹ Having considered these factors and given that the trial phase of the case has ended, the Chamber now instructs the Accused, that unless an urgent remedy is sought, a consolidated disclosure violation motion should be filed on 30 April 2015.

¹⁷ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

¹⁸ Response, para. 5, confidential appendix, para. 8.

¹⁹ Decision on Accused's Thirty-Second, Thirty-Third, Thirty-Fifth and Thirty-Sixth Disclosure Violation Motions, 24 February 2011, para. 23.

²⁰ Decision on Accused's Ninety-First Disclosure Violation Motion, 7 May 2014, para. 19.

²¹ Decision on Accused's Second Motion for New Trial for Disclosure Violations, 14 August 2014, para. 15.

IV. Disposition

11. 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,²² the Motion in part and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the Document; and
- (b) **DENIES** the remainder of the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-first day of January 2015
At The Hague
The Netherlands

[Seal of the Tribunal]

²² 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.