



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: 8 June 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: 8 June 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S NINETY-EIGHTH AND NINETY-NINTH DISCLOSURE
VIOLATION MOTIONS**

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 “98th Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly on 30 April 2015 with confidential annexes (“Ninety-Eighth Motion”) and the “99th Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly on 4 May 2015 with confidential annexes (“Ninety-Ninth Motion”) (together “Motions”), and hereby issues its decision thereon.

I. Submissions

1. In the Motions, the Accused argues that the Office of the Prosecutor (“Prosecution”) has violated Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by failing to disclose documents of an exculpatory nature (“Documents”) as soon as practicable.¹ The Documents were disclosed by the Prosecution in February, March, and April 2015 even though they had been in its possession for a considerable period of time.²

2. The Accused submits that the Documents are relevant and exculpatory with respect to a number of issues including (i) the Accused’s lack of effective control over Mladić;³ (ii) the absence of genocidal intent or intent to kill Bosnian Muslims in Srebrenica;⁴ (iii) the absence of a joint criminal enterprise to forcibly transfer the civilian population of Srebrenica;⁵ (iv) the credibility of Momir Nikolić with respect to the plan to execute prisoners in Srebrenica;⁶ (v) the absence of “a joint criminal enterprise in which murder, infliction of serious bodily harm, rape, and other crimes against Bosnian Muslims and Croats held in prison camps was intended or foreseeable”;⁷ and (vi) events in Bijeljina in March and April 1992.⁸

3. The Accused further explains the exculpatory nature of four of the Documents which were subject to Rule 70 conditions in confidential annex F to the Ninety-Eighth Motion.⁹ In the Ninety-Ninth Motion the Accused also submits that the Prosecution violated an order of the

¹ Ninety-Eighth Motion, para. 1; Ninety-Ninth Motion, para. 1.

² Ninety-Eighth Motion, paras. 2–4; Ninety-Ninth Motion, para. 4.

³ Ninety-Eighth Motion, paras. 6–7.

⁴ Ninety-Eighth Motion, paras. 10–14.

⁵ Ninety-Eighth Motion, paras. 16–17, 20–22.

⁶ Ninety-Eighth Motion, paras. 25, 29–30. The Accused notes that this document was the subject of the Seventh Motion to Re-open Defence Case, 30 March 2015 (“Seventh Re-Opening Motion”).

⁷ Ninety-Eighth Motion, paras. 31–32.

⁸ Ninety-Ninth Motion, para. 3. Given the protective measures applicable to the relevant witness, the Accused explains the detail of this evidence in Confidential Annex A to the Ninety-Ninth Motion.

⁹ Ninety-Eighth Motion, para. 33.

Trial Chamber in the *Stanišić and Simatović* case, which granted him access to confidential material from that case.¹⁰

4. The Accused seeks a finding that the Prosecution violated Rule 68 of the Rules by failing to disclose each of the Documents as soon as practicable.¹¹

5. The Accused argues that he was prejudiced by the late disclosure of the Documents because he was prevented from interviewing and/ or calling witnesses who could testify about the issues contained therein.¹² As a remedy, he requests that he be allowed to re-open his defence case to admit the Documents as defence exhibits.¹³ In the alternative, the Accused asks that the Chamber draw an inference against the Prosecution with respect to the factual issues to which the Documents relate.¹⁴ The Accused also requests the Chamber to convene an oral hearing where the Prosecution is required to explain its continued failure to disclose exculpatory material and where he can suggest further steps to ensure all exculpatory material is disclosed to him prior to the delivery of the judgement in this case.¹⁵

6. On 14 May 2015, the Prosecution filed publicly the “Prosecution Response to 98th Motion for Finding of Disclosure Violation and for Remedial Measures” with confidential appendices (“Ninety-Eighth Response”), arguing that the Ninety-Eighth Motion should be dismissed.¹⁶ On 18 May 2015, the Prosecution confidentially filed the “Prosecution Response to Ninety-Ninth Motion for Finding of Disclosure Violation and for Remedial Measures” (“Ninety-Ninth Response”), arguing that the Ninety-Ninth Motion should also be denied.¹⁷

7. The Prosecution acknowledges that some of the Documents were not disclosed earlier due to human or clerical error and expresses its regret for the late disclosure.¹⁸ However, it submits that the Accused was not prejudiced because the information contained in the Documents is (i) duplicative of other materials available to the Accused or tendered into evidence; (ii) not exculpatory; or (iii) of negligible probative value.¹⁹ It submits that in the

¹⁰ Ninety-Ninth Motion, para. 5 referring to Case No. IT-03-69-T, *Prosecutor v. Stanišić and Simatović*, Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the *Stanišić & Simatović* Case, 16 July 2009 (“Access Decision”).

¹¹ Ninety-Eighth Motion, paras. 8, 14, 18, 23, 28, 34; Ninety-Ninth Motion, para. 7.

¹² Ninety-Eighth Motion, paras. 9, 15, 19, 24, 29.

¹³ Ninety-Eighth Motion, para. 35; Ninety-Ninth Motion, para. 8.

¹⁴ Ninety-Eighth Motion, para. 36; Ninety-Ninth Motion, para. 9.

¹⁵ Ninety-Eighth Motion, para. 37; Ninety-Ninth Motion, para. 10.

¹⁶ Ninety-Eighth Response, para. 1.

¹⁷ Ninety-Ninth Response, paras. 1, 12.

¹⁸ Ninety-Eighth Response, para. 1, Confidential Appendix A, para. 1. *See also* Ninety-Ninth Response, paras. 1–2.

¹⁹ Ninety-Eighth Response, para. 1; Ninety-Ninth Response, paras. 1, 3–6.

absence of prejudice, the Accused's requested remedies should be denied.²⁰ The Prosecution also notes that it did not violate the Access Decision in the *Stanišić and Simatović* case because the obligation to identify the relevant evidence was on the *Stanišić* Defence which tendered the said material in that case.²¹

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.²²

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.²³

III. Discussion

10. The Chamber has reviewed the portions of the Documents referred to by the Accused. The Chamber turns to the first document referred to in the Ninety-Eighth Motion ("Document One"). Document One includes a passing reference to an argument between the Accused and Mladić and suggests that Mladić refused to follow some orders from the government of Republika Srpska.²⁴ Given the absence of any date, context, or background to this reference, the Chamber does not consider that the information contained in Document One is potentially exculpatory.

11. With respect to the second document ("Document Two"), it suggests that some buses carrying women and children were stopped once or twice at Sandići to allow captured boys to be put onboard and that the Bosnian Muslims who were being held at Sandići meadow were given

²⁰ Ninety-Eighth Response, para. 1; Ninety-Ninth Response, para. 10.

²¹ Ninety-Ninth Response, para. 11.

²² *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), para. 179.

²³ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

²⁴ Ninety-Eighth Motion, Annex A, p. 7.

water to drink.²⁵ The Chamber considers these references are potentially exculpatory and should have been disclosed to the Accused earlier.

12. The third document (“Document Three”) includes information about an order given to Serb Forces conducting searches in a village near Potočari not to mistreat any civilians and to reassure them that they could stay in their houses.²⁶ The Chamber considers that the information about the order being given was potentially exculpatory and should have been disclosed to the Accused earlier. The fourth document (“Document Four”) includes information from a witness that he provided civilians who passed by Potočari with food and water, that he did not see anyone mistreating them and that he was told, that they should not allow any violence against civilians or prisoners.²⁷ The Chamber finds that Document Four is potentially exculpatory with respect to the instruction that the witness should not allow violence against civilians or prisoners and should have been disclosed to the Accused earlier.

13. However, the Chamber finds that the potentially exculpatory material is so marginal and the probative value of Document Two, Document Three and Document Four is so low that the Accused was not prejudiced by this late disclosure. For example with respect to Document Three, when the Serb Forces conducted a search they found no civilians remaining in their homes. In addition with respect to Document Four, the information is very limited given that the witness in question did not see what happened in Potočari and could only really speak about his own actions. Contrary to the Accused’s assertion, the Chamber does not consider that the information in Document Three or Document Four contradicts the Prosecution’s case with respect to the forcible transfer of the civilian population from Srebrenica or has any significant probative value in that regard.

14. With respect to the fifth document (“Document Five”), the Chamber has already analysed it when it ruled on the Accused’s Seventh Re-Opening Motion.²⁸ The Chamber recalls that it found that Document Five, contrary to the Accused’s submissions did not contradict or even relate to the specific evidence of Momir Nikolić and would have no probative value in this regard.²⁹ The Chamber concludes that Document Five, contrary to the Accused’s assertion, does not contain any information which bears on the credibility of Momir Nikolić and there was no disclosure violation with respect to its disclosure.

²⁵ Ninety-Eighth Motion, Annex B, paras. 15, 17.

²⁶ Ninety-Eighth Motion, Annex C, para. 7.

²⁷ Ninety-Eighth Motion, Annex D, paras. 9–10.

²⁸ Decision on Accused’s Seventh Motion to Re-Open Defence Case, 20 April 2015 (“Decision on Seventh Re-Opening Motion”).

²⁹ Decision on Seventh Re-Opening Motion, paras. 14–15.

15. The sixth document (“Document Six”) is a letter from Mladić to UNPROFOR at the end of August 1992 offering in accordance with the London Conference to “exchange all war prisoners and all other persons who are kept in our prisons” and to disband those facilities on a reciprocal basis.³⁰ The Chamber finds that Document Six contains potentially exculpatory material which should have been disclosed as soon as practicable by the Prosecution. Its failure to do so constitutes a violation of its disclosure obligations pursuant to Rule 68 of the Rules. Document Six was only disclosed on 10 April 2015 even though it was in the Prosecution’s possession since the start of the case.³¹ However, the Chamber does not find that the Accused was prejudiced by this late disclosure. In reaching that conclusion, the Chamber found that Document Six is of limited probative value given that it simply reflected the agreement reached at the London Conference. In addition the Chamber notes that the information contained in Document Six is duplicative of other evidence which has been admitted pertaining to the agreement reached at the London Conference.³²

16. The Chamber has also reviewed the seventh (“Document Seven”), eighth (“Document Eight”), ninth (“Document Nine”) and tenth (“Document Ten”) documents discussed in confidential annex F to the Ninety-Eighth Motion. The Chamber has also reviewed portions of the statement (“Statement”) and testimony (“Testimony”) discussed in confidential annex A to the Ninety-Ninth Motion. Contrary to the Accused’s assertion, the Chamber does not find that Document Seven, Document Eight, or Document Ten are potentially exculpatory with respect to the issues he identifies. The Chamber therefore finds that there was no disclosure violation with respect to Document Seven, Document Eight, or Document Ten.

17. Having reviewed Document Nine, the Testimony,³³ and the Statement the Chamber finds that they contain potentially exculpatory information and the Prosecution violated its disclosure obligations pursuant to Rule 68 of the Rules by failing to disclose them as soon as practicable. However, the Chamber does not find that the Accused was prejudiced by this late disclosure. In reaching that conclusion, the Chamber found that the content of this material added nothing new or of significance to material already admitted in this case or available to the Accused on similar issues or was of very marginal probative value.³⁴

³⁰ Ninety-Eighth Motion, Annex E.

³¹ Ninety-Eighth Motion, paras. 4.

³² See Ninety-Eighth Response, fn. 33 and the exhibits cited therein. See also D1142 (Programme of Action of the London International Conference, 27 August 1992).

³³ The Chamber does not find the Testimony to be potentially exculpatory with respect to the first issue as submitted by the Accused: Ninety-Ninth Motion, Confidential Annex A, para. 12 (first dot point).

³⁴ See for example the citations in the Ninety-Eighth Response, Confidential Appendix A, para. 6 and Ninety-Ninth Response, paras. 3–4.

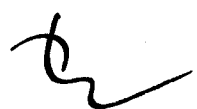
18. In the absence of prejudice to the Accused there is no basis to grant the remedies sought in the Motions. The Chamber recalls that the Accused has failed to pay regard to its repeated instruction that the filing of disclosure violation motions should not be a purely numerical exercise and that he should instead focus on disclosure violations where there is demonstrable prejudice.³⁵ To a large extent the Motions are a further reflection of this practice. 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 disclosure violation motion should not be filed before 30 September 2015.

IV. Disposition

19. 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,³⁶ the Motions in part and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of Document Two, Document Three, Document Four, Document Six, Document Nine, the Testimony, and the Statement; and
- (b) **DENIES** the remainder of the Motions.

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



Judge O-Gon Kwon
Presiding

Dated this eighth day of June 2015
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁵ Decision on Accused's Second Motion for New Trial for Disclosure Violations, 14 August 2014, para. 15.

³⁶ 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 Motions should be dismissed in their entirety.