



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: 13 July 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: 13 July 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S ONE HUNDREDTH 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 “100th Motion for Finding of Disclosure Violation and for Evidentiary Hearing”, filed publicly on 17 June 2015 (“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 Rules 66(A)(ii) and 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by failing to disclose a 1995 statement of witness Herbert Okun (“Statement”) before 16 June 2015.¹ He submits that the Prosecution missed the 7 May 2009 deadline for the disclosure of Rule 66(A)(ii) material and that the Statement was only disclosed following a request by his legal adviser that the Prosecution review and compare its disclosure logs in the *Mladić* case with what had been disclosed to him.²

2. The Accused requests an evidentiary hearing where employees of the Prosecution would be required to testify about why the Statement had not been disclosed and to ensure compliance with their disclosure obligations before the judgement in this case is issued.³ The Accused submits that he could not wait until the 30 September 2015 deadline set by the Chamber for the filing of the next disclosure violation motion because the evidentiary hearing needed to be organised at the earliest possible time to ensure full disclosure.⁴ The Accused proposes that after the evidentiary hearing he would suggest remedial measures and/or sanctions depending on the underlying causes of the disclosure violation.⁵

3. The Statement is a report of an interview with Okun and Cyrus Vance conducted by employees of the Prosecution in 1995, in which they sought information about the degree of control exercised by the Accused and Ratko Mladić before and during the conflict in Bosnia and Herzegovina.⁶ Okun said in the Statement that the most difficult period in which to establish the Accused’s command and control was from February to May 1992.⁷ Okun also pointed to an incident where an airforce commander in Banja Luka refused to obey an order from the

¹ Motion, para. 1. The Statement is attached in Annex A to the Motion.

² Motion, paras. 11–13.

³ Motion, paras. 2, 26.

⁴ Motion, fn. 1. This deadline was set in the Decision on Accused’s Ninety-Eighth and Ninety-Ninth Disclosure Violation Motions, 8 June 2015, para. 18.

⁵ Motion, para. 3.

⁶ Motion, para. 4.

⁷ Motion, para. 6, referring to Statement, p. 2.

Accused.⁸ When questioned about whether they knew of any examples where the Accused asserted control and action was taken, neither Vance nor Owen could think of any example and said that “it was hard to say”.⁹ In the Accused’s submission, this contradicts the evidence which Okun gave in this case which suggested that the Accused was in control of Bosnian Serb forces.¹⁰

4. The Accused thus seeks a finding that the Prosecution violated both Rule 66(A)(ii) and 68 of the Rules with respect to the late disclosure of the Statement.¹¹ The Accused argues that he was prejudiced by the late disclosure of the Statement as he was prevented from confronting Okun with his earlier statements in which he expressed doubts about the Accused’s control in early 1992.¹²

5. The Accused also refers to the history of disclosure violations in this case, and argues that the Chamber’s approach of trying to cajole the Prosecution to meet its disclosure obligations has failed as shown by the repeated violations.¹³ The Accused suggests that this latest violation was not the product of “human error” or “administrative oversight” but was the product of a deliberate decision not to disclose the Statement and that an evidentiary hearing is necessary to determine why it was not disclosed and to identify how many other statements and exculpatory material have yet to be disclosed.¹⁴ He argues that an assessment of prejudice is not relevant to his request for an evidentiary hearing to identify who was responsible for the disclosure violation.¹⁵

6. On 1 July 2015, the Prosecution filed publicly the “Prosecution Response to One Hundredth Motion for Finding of Disclosure Violation and for Evidentiary Hearing” (“Response”), in which it opposes the Motion.¹⁶

7. The Prosecution acknowledges that the Statement should have been disclosed earlier, appologises for this error, but submits that the Accused has failed to demonstrate that an evidentiary hearing is warranted.¹⁷ It argues that the Accused’s allegations of bad faith are unfounded given that the Prosecution disclosed the Statement as soon as the human error which

⁸ Motion, para. 7, referring to Statement, p. 4.

⁹ Motion, para. 8, referring to Statement p. 4.

¹⁰ Motion, paras. 9–10.

¹¹ Motion, paras. 14–15, 26.

¹² Motion, para. 16.

¹³ Motion, paras. 17–23.

¹⁴ Motion, para. 24.

¹⁵ Motion, para. 25.

¹⁶ Response, paras. 1, 16.

¹⁷ Response, paras. 1, 3.

resulted in its non-disclosure was discovered.¹⁸ The Prosecution also submits that it has inquired into the origin of the error and that an evidentiary hearing would not produce additional information given that it has been unable to determine the source or reason for the error. This error occurred in 2009 when the Statement was erroneously flagged by a member of the Prosecution as not subject to disclosure.¹⁹ The Prosecution also notes that the Accused mischaracterises its disclosure practices and that contrary to the Accused's assertion, the comparison of disclosure logs was not conducted following a request from his legal adviser but was an ongoing process since the *Mladić* trial began in 2012 and was also part of a broader practice commenced in 2008 to review material with respect to related cases.²⁰

8. It also argues that the Accused exaggerates the alleged prejudice arising from the late disclosure of the Statement, and any such prejudice would be remedied through the admission of the Statement into evidence which the Accused failed to request.²¹ In this regard the Prosecution also notes that the comments made in the Statement are "vague, general remarks" which do not contradict or undermine Okun's evidence in this case.²² The Prosecution notes for example that in this case, Okun simply testified that the Accused himself had told him that he was in control of Bosnian Serb forces, which was also confirmed by contemporaneous notes of that meeting.²³ The Prosecution also points to other evidence which the Accused possessed which relates to the incident in Banja Luka and the failure of hardliners to implement his decision in this regard.²⁴

9. On 6 July 2015 the Accused filed publicly the "Request for Leave to Reply: 100th Motion for Finding of Disclosure Violation and for Evidentiary Hearing" ("Request"). The Accused submits that it has now obtained additional information which calls into question the Prosecution's explanation that it regularly reviews the disclosure logs from the *Mladić* case.²⁵ He submits that he believes that the Chamber would benefit from submissions on this new information before deciding whether to hold an evidentiary hearing.²⁶ On 7 July 2015 the Prosecution filed publicly the "Prosecution's Response to Accused's Request for Leave to Reply: 100th Motion for Finding of Disclosure Violation Motion (sic) and Evidentiary Hearing"

¹⁸ Response, paras. 1, 3, 5, 8.

¹⁹ Response, paras. 1, 4.

²⁰ Response, paras. 6–7.

²¹ Response, paras. 2, 9, 15.

²² Response, paras. 10, 12–13.

²³ Response, paras. 10–11.

²⁴ Response, paras. 13–14.

²⁵ Request, paras. 4–5.

²⁶ Request, para. 6.

(“Reply”). The Prosecution takes no position with respect to the Request but seeks leave to file a sur-reply if the Request were to be granted.²⁷

II. Applicable Law

10. Rule 66(A)(ii) of the Rules requires the Prosecution (within a time-limit prescribed by the Trial Chamber or pre-trial Judge) to make available to the Defence “copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*”.

11. 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.²⁸

12. 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.²⁹

III. Discussion

13. At the outset, having reviewed the nature of the information referred to in the Request, the Chamber does not consider that it would be assisted by further submissions in this regard before deciding on the Motion. The Request is therefore denied.

14. In this case, the Prosecution was required to disclose all Rule 66(A)(ii) material to the Accused no later than 7 May 2009.³⁰ The Statement which was in the Prosecution’s possession from 1995 should have been disclosed by this date. This was a clear error by the Prosecution and the Chamber finds that it violated its disclosure obligations in this regard.

²⁷ Reply, paras. 1–3.

²⁸ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”), para. 179.

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

³⁰ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

15. In addition the Chamber finds that the Statement is potentially exculpatory to the extent that it contradicts some of Okun's testimony and evidence in this case with respect to issues of the Accused's command and control and thus may have affected Okun's credibility in this regard. The Chamber therefore finds that the Prosecution also violated its disclosure obligations pursuant to Rule 68 of the Rules by failing to disclose the Statement as soon as practicable.

16. The observations made by Okun with respect to the Accused's command and control in the Statement are vague and expressed in general terms. For example, Okun simply states that the most difficult period to establish command and control was between February and May 1992 and "it was hard to say" when asked to provide examples of command and control by the Accused.³¹ However, notwithstanding this observation, the Accused should have had an opportunity to cross-examine Okun on the issue of the Accused's command and control by reference to the Statement. The Prosecution's disclosure violation prevented the Accused from doing that and he was thus prejudiced. The witness has since died.

17. In order to alleviate this prejudice, the Chamber declares, *proprio motu*, that it will not rely on portions of Okun's evidence which pertain to the Accused's command and control in its determination on the charges against the Accused in the Indictment. In this regard the Chamber decides that it will not rely on certain portions of i) Okun's testimony heard in this case,³² ii) his testimony in the *Prosecutor v. Krajišnik* case admitted in this case pursuant to Rule 92 *ter* as P776,³³ and iii) his diary admitted in this case as P785³⁴. The portions of Okun's evidence referred to above do not strictly relate to the period between February and May 1992 discussed in the Statement. However, the Chamber is of the view that given the nature of the disclosure violation and the evidence in question, it is in the interests of justice that those portions of Okun's evidence not be relied upon given that the Accused was deprived of an opportunity to challenge Okun during his cross-examination by reference to the Statement.

18. With respect to the Accused's request for an evidentiary hearing, the Chamber finds that there is nothing to suggest bad-faith on the part of the Prosecution with respect to this error which could warrant such a hearing. The Prosecution's Response also clearly indicates that it has looked seriously into what was the reason for this error in disclosure. This included contacting former employees and checking their disclosure records. The Prosecution's

³¹ Motion, Annex A, Statement, pp. 2, 4.

³² Hearing, T. 1510 (line 3) to 1511 (line 1) (23 April 2010), T. 1737 (line 16) to T. 1738 (line 25) (27 April 2010).

³³ Herbert Okun, P776 (Transcript from *Prosecutor v. Krajišnik*), T. 4192 (line 19) to 4193 (line 17).

³⁴ P785 (Second notebook of Herbert Okun's ICFY diary), e-court p. 25. The Chamber will not rely on the portion which reads "Kara – 5% not under control; I control. We can do anything, army has unified command. I have full power".

conclusion that it could not determine the source or the reason for the error is an embarrassing acknowledgement with respect to its disclosure practices. However, the Chamber does not consider that an evidentiary hearing would help shed any more light on this issue or be of assistance in ensuring full compliance by the Prosecution with its disclosure obligations at this stage.

IV. Disposition

19. For the foregoing reasons, the Chamber, pursuant to Rules 54, 66(A)(ii), 68, 68 *bis* and 89 of the Rules, hereby:

- (a) **DENIES** the Request;
- (b) **GRANTS** the Motion in part and finds that the Prosecution violated Rule 66(A)(ii) and Rule 68 of the Rules with respect to its late disclosure of the Statement;
- (c) **DECLARES** *proprio motu* that it will not rely on the portions of Okun's testimony, P776, and P785 referred to in footnotes 32 to 34 above; and
- (d) **DENIES** the remainder of the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this thirteenth day of July 2015
At The Hague
The Netherlands

[Seal of the Tribunal]