



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: 20 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: 20 July 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S 101ST 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 “101st Motion for Order of Disclosure: Đorđe Ristanić”, filed publicly on 2 July 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 Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by failing to disclose exculpatory material relating to Prosecution witness Đorđe Ristanić as soon as practicable.¹

2. On 29 May 2015, the Accused learned of a news report that Ristanić had been arrested in Bosnia and Herzegovina (“BiH”), that an investigation had originally been opened by the Tribunal against Ristanić, and that this case was referred to the BiH state prosecution.² The Accused asked for confirmation from the Prosecution and requested documentation relating to this referral.³ The Prosecution confirmed that such a referral had been made in 2009 but asked the Accused to explain the “forensic purpose” for his request.⁴

3. The Accused explained that the information he sought fell within Rules 66(B) and 68 of the Rules as it was likely to contradict Ristanić’s testimony in this case that he had done no wrong while he was in the municipal leadership in Brčko.⁵ In his submission, the failure to disclose this material was a violation of Rule 68 as it tended to contradict Prosecution evidence and affected the credibility of the witness.⁶ He argues that he was prejudiced by this violation as he could have challenged Ristanić’s credibility by reference to the referral and requests the Chamber make a finding of violation in this regard.⁷

4. The Accused also requested information on any other Prosecution witness who had been the subject of a referral to the BiH authorities for prosecution.⁸ The Prosecution responded on 1 July 2015 and informed the Accused that it has also referred the case of Momčilo Mandić and

¹ Motion, para. 1.

² Motion, para. 3.

³ Motion, para. 4.

⁴ Motion, para. 5.

⁵ Motion, para. 6.

⁶ Motion, para. 9.

⁷ Motion, paras. 10–12.

⁸ Motion, para. 7.

that it would be consulting with the BiH Chief Prosecutor before disclosing any material in order to ensure that disclosure would not prejudice further or ongoing investigations.⁹

5. The Accused seeks an order from the Chamber requiring the Prosecution to disclose the referral letter and underlying evidence pertaining to Ristanić's responsibility for crimes in Brčko.¹⁰ He also requests the Chamber order the disclosure of similar material for other Prosecution witnesses whose prosecution had been referred to the BiH authorities.¹¹

6. The Accused submits that the Prosecution's failure to disclose the information is inconsistent with Rule 68(iv) of the Rules which provides for the Prosecution to apply to the Chamber to be relieved of an obligation to disclose Rule 68 material if *inter alia* its disclosure may prejudice further or ongoing investigations.¹² He further contends that the Prosecution cannot claim that disclosure of the referral letter could prejudice any investigation given that Ristanić had already been arrested and the charges against him have been made public.¹³

7. The Accused asserts that given that further disclosure was sought relating to exculpatory material, this matter could not wait until the 30 September 2015 date set by the Chamber for the filing of the next disclosure violation motion.¹⁴ He asserts that once the relevant material is disclosed, he would include "any significant" exculpatory material in the disclosure violation motion which is to be filed on 30 September 2015.¹⁵

8. On 13 July 2015, the Prosecution filed publicly the "Prosecution Response to One Hundred First Motion for Finding of Disclosure Violation and for Order of Disclosure: Đorđe Ristanić" ("Response"), in which it opposes the Motion.¹⁶ The Prosecution argues that its referral of an incomplete investigation into Ristanić's potential criminal responsibility contained no conclusion as to his culpability, is therefore not exculpatory, and would serve no forensic purpose for the Accused.¹⁷ It also emphasises that the Accused ignores that he long possessed "ample material" and that evidence was led in this case which reflected the Prosecution's position that Ristanić was involved in and could bear responsibility for crimes committed in

⁹ Motion, paras. 5, 8.

¹⁰ Motion, paras. 13, 19.

¹¹ Motion, paras. 13, 19.

¹² Motion, paras. 14, 16.

¹³ Motion, para. 15.

¹⁴ Motion, fn. 1 referring to Decision on Accused's Ninety-Eighth and Ninety-Ninth Disclosure Violation Motions, 8 June 2015, para. 18.

¹⁵ Motion, para. 20.

¹⁶ Response, paras. 1, 18.

¹⁷ Response, paras. 2, 4.

Brčko.¹⁸ The Prosecution argues that the Accused's request is a waste of time and resources of the parties and Chamber.¹⁹

9. It further notes that the Accused could easily have used the material he already possessed to attack Ristanić's credibility but chose not to.²⁰ The Prosecution thus submits that his request for an order for further disclosure does not reflect a genuine effort to advance his case.²¹ In this regard, the Prosecution points to the Accused's strategy and submits that if he challenged Ristanić's evidence by reference to material demonstrating his responsibility for crimes in Brčko, he would have furthered the Prosecution's case.²² In its submission this shows the facetious nature of the Accused's claim that he would have "altered his entire strategy".²³ On this point, the Prosecution notes that contrary to his submission in the Motion, the Accused tried to exculpate Ristanić from crimes committed in Brčko.²⁴ The Prosecution further notes that the Accused's claims are disingenuous with respect to Mandić, given that he is specifically identified as an alleged joint criminal enterprise member in this case.²⁵

10. The Prosecution argues that since there is no disclosure violation, and in any event no prejudice, no remedies are warranted.²⁶ The Prosecution notes that it is continuing to liaise with the BiH Chief Prosecutor in an effort to disclose the material to the Accused and contrary to the Accused's assertion does not contend that the material is not subject to disclosure.²⁷

11. The Prosecution concludes that the Motion is "plainly at odds" with the Chamber's instruction that unless an urgent remedy was sought a disclosure violation motion should not be filed before 30 September 2015.²⁸

II. Applicable Law

12. 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

¹⁸ Response, paras. 2, 5–8.

¹⁹ Response, para. 15.

²⁰ Response, para. 2.

²¹ Response, para. 15.

²² Response, paras. 2, 9.

²³ Response, paras. 2, 10.

²⁴ Response, para. 9.

²⁵ Response, paras. 12–13.

²⁶ Response, para. 14.

²⁷ Response, para. 16.

²⁸ Response, para. 17.

a *prima facie* case making out the probable exculpatory or mitigating nature” of the materials in question.²⁹

13. 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.³⁰

III. Discussion

14. The Chamber finds that the Accused’s assertion as to why he could not wait until the 30 September 2015 deadline set by the Chamber for the filing of the next disclosure violation motion to be entirely unconvincing. Having considered the surrounding circumstances of the Motion, the Chamber is of the view that it is clearly not an urgent issue which warranted a departure from the Chamber’s instruction in this regard. On that basis, the Chamber dismisses the Motion in its entirety.

15. However, out of judicial economy the Chamber has also has regard to the merits of the Motion to prevent re-litigation of this issue at a later date. The Chamber does not consider that the referral of an incomplete investigation into a witness’s potential criminal responsibility, with no conclusion as to his culpability, falls within the scope of material which needs to be disclosed pursuant to Rule 68 of the Rules. The Prosecution therefore did not violate Rule 68 of the Rules by failing to disclose this material earlier.

16. In any event, the Chamber notes that the Accused already possessed material which reflected the Prosecution’s position that Ristanić was involved in and could bear responsibility for alleged crimes in Brčko. The Accused failed to use that material and contrary to his assertion actually conducted his cross-examination in a manner which sought to exculpate Ristanić from the alleged crimes. It is now completely disingenuous to claim that if he had the material in question, he would have conducted his cross-examination in a different manner to confront Ristanić with material which suggested his involvement in those alleged crimes. The Chamber expresses its concern that the Accused continues to pursue peripheral issues such as this, which clearly do not advance his case and simply wastes the valuable resources of the parties and the Chamber. This is yet another example of how the Accused failed to adhere to the Chamber’s repeated instruction that the filing of disclosure violation motions is not a numerical

²⁹ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”), para. 179.

exercise and that he should focus on motions where there is demonstrable prejudice.³¹ The Accused's legal adviser is reminded of his obligations in this regard and that he should caution the Accused against the pursuit of frivolous motions which do not advance his case.

IV. Disposition

17. For the foregoing reasons, the Chamber, pursuant to Rules 54, 68, 68 *bis* and 89 of the Rules, hereby **DISMISSES** the Motion.

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



Judge O-Gon Kwon
Presiding

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

[Seal of the Tribunal]

³⁰ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

³¹ See for example Decision on Accused's Ninety-Eighth and Ninety-Ninth Disclosure Violation Motions, 8 June 2015, para. 18.