



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: 18 March 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: 18 March 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S EIGHTY-EIGHTH DISCLOSURE VIOLATION MOTION

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 “88th Motion for Finding of Disclosure Violation and for Remedial Measures (March 2014)”, filed on 3 March 2014 (“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 February 2014 of official notes taken by Bosnian Serb authorities in Prijedor in 1992 from Bosnian Muslim residents (“Notes”).¹ The Accused contends that the Notes contain exculpatory information which suggests that (i) the Bosnian Serb authorities in Prijedor were making a *bona fide* effort to identify individuals engaged in criminal activity and that they were not targeting all Bosnian Muslims and (ii) that Bosnian Muslims were engaged in military-related activities which provided a legitimate reason for military and law enforcement operations in the area.²

2. The Accused contends that he was prejudiced by the late disclosure of the Notes as he could have used this information with witnesses who testified about events in Prijedor and he could have also sought to interview the individuals mentioned in the Notes and called them as defence witnesses.³ The Accused seeks an express finding that the Prosecution violated its disclosure obligations pursuant to Rule 68 by the late disclosure of the Notes.⁴ As a remedy for the late disclosure, the Accused requests that the Notes be admitted into evidence and renews his request that he be given “open-file disclosure” with respect to the Prosecution’s evidence collection.⁵

3. On 12 March 2014, the Prosecution filed the “Prosecution Response to Karadžić’s 88th Motion for Finding of Disclosure Violation and for Remedial Measures (March 2014)” (“Response”), arguing that the Motion should be dismissed.⁶ It submits that seven of the 13 documents contained in the Notes had previously been disclosed to the Accused in 2009 (“Disclosed Documents”) and were inadvertently disclosed to the Accused again in 2014.⁷ The

¹ Motion, paras. 1–2.

² Motion, para. 3.

³ Motion, para. 5.

⁴ Motion, paras. 1, 6.

⁵ Motion, paras. 9–10.

⁶ Response, para. 10.

⁷ Response, para. 1 referring to Motion, Annex B, pp. 6–13.

Prosecution expresses its regret for this confusion but argues that this cannot amount to a violation of its disclosure obligations.⁸

4. The Prosecution acknowledges that the remaining six documents (“Remaining Material”) found in the Notes contain potentially exculpatory material and regrets this late disclosure.⁹ However, the Prosecution argues that the Accused has failed to demonstrate that he was prejudiced by the late disclosure of the Remaining Material and in the absence of prejudice, he is not entitled to any remedy and that in any event the remedies sought in the Motion are “impracticable, disproportionate, and unwarranted”.¹⁰ With respect to the request for the admission of the Notes, the Prosecution submits that the Chamber already denied the admission of some of these documents through Momčilo Gruban and the Accused should not be allowed to circumvent that decision.¹¹

5. The Prosecution notes that the Remaining Material is duplicative of other material previously disclosed to the Accused including the Disclosed Documents and other documents, including official notes which relate to the alleged arming of Bosnian Muslims in Prijedor in 1992 and thus he suffered no prejudice from the late disclosure.¹²

6. The Prosecution observes that the Accused’s request for “open-file disclosure” has already been rejected by the Chamber on a number of occasions, and that the Accused is thus requesting reconsideration without asserting a clear error of reasoning or pointing to “any particular circumstance justifying reconsideration in order to prevent an injustice” and should thus be denied.¹³

II. Applicable Law

7. 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

⁸ Response, para. 1.

⁹ Response, para. 2 referring to Motion, Annex B, pp. 1–5, 14.

¹⁰ Response, paras. 2–3, 7.

¹¹ Response, para. 8 referring to Hearing, T. 47508–47512.

¹² Response, paras. 3–6

¹³ Response, para. 9.

a *prima facie* case making out the probable exculpatory or mitigating nature” of the materials in question.¹⁴

8. 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.¹⁵

III. Discussion

9. With respect to the Disclosed Documents, the Chamber finds that there was no disclosure violation since this material had already been disclosed to the Accused in 2009. As the Chamber has previously noted, the Prosecution should identify when a document has been previously disclosed and “endeavour to avoid the duplication of disclosure which causes confusion and unnecessarily adds to the time needed by the Accused to review this disclosed material”.¹⁶

10. With respect to the Remaining Material, the Chamber finds that it is potentially exculpatory with respect to events in an around Prijedor and the Prosecution violated its disclosure obligations pursuant to Rule 68 by failing to disclose this material as soon as practicable. While the Chamber finds that the Prosecution has violated its disclosure obligations, it is not satisfied that the Remaining Material is of such significance that the Accused has been prejudiced by its late disclosure. In reaching that conclusion, the Chamber reviewed the Remaining Material and found that it is largely duplicative of previously disclosed material, including the Disclosed Documents which contained information on the possession of weapons and the arming of Bosnian Muslims in Prijedor.¹⁷

11. In the absence of prejudice to the Accused, there is no basis to grant the remedies sought with respect to the Remaining Material.

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

¹⁵ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

IV. Disposition

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

- a) **GRANTS**, by majority, Judge Kwon dissenting,¹⁸ the Motion in part, and finds that the Prosecution violated Rules 68 of the Rules with respect to its late disclosure of the Remaining Material; and
- b) **DENIES** the Motion in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this eighteenth day of March 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁶ Decision on Accused's Thirtieth and Thirty-First Disclosure Violation Motions, 3 February 2011, para. 11.

¹⁷ For a list of other official notes disclosed to the Accused with respect to Prijedor, *see* Response, Appendix.

¹⁸ 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.