



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: 16 December 2010

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: 16 December 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S SEVENTEENTH *BIS* AND TWENTY-EIGHTH
DISCLOSURE VIOLATION MOTIONS**

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 “Motion for Finding of Disclosure Violation and for Remedial Measures #17 *bis*”, filed on 25 November 2010 (“17th *bis* Motion”) and “Twenty-Eighth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential annexes on 29 November 2010 (“Twenty-Eighth Motion”) (together “Motions”), and hereby issues its decision thereon.

I. Submissions

1. In the Motions, the Accused argues that there have been violations of Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by the Office of the Prosecutor (“Prosecution”) by reason of the late disclosure of potentially exculpatory material to him.

A. 17th *bis* Motion

2. The 17th *bis* Motion is connected to the Accused’s “Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed on 10 September 2010 (“Seventeenth Motion”), which the Chamber ruled upon in its “Decision on Accused’s Seventeenth Motion for Disclosure Violation and for Remedial Measures” of 29 September 2010 (“Decision on Seventeenth Motion”). In that Decision, the Chamber found that the Prosecution had violated its obligation to disclose “as soon as practicable” potentially exculpatory material contained on 11 DVDs which it had received from the Serbian authorities in late January 2010, following a search of the Belgrade apartment of Dragomir Pećanac.¹ In the 17th *bis* Motion, the Accused makes reference to the disclosure by the Prosecution, on 23 November 2010, of 461 pages of additional material (“New Material”) from the DVDs seised from Pećanac’s apartment at that time, which the Prosecution had apparently inadvertently failed to disclose on 31 August 2010 along with the other Rule 68 material found on those DVDs (“DVD Material”).²

3. The Accused submits that “a preliminary review” of the New Material “indicates that it contains exculpatory material” and therefore asks the Chamber to “make a finding that the prosecution has once again violated Rule 68 by failing to provide these materials as soon as practicable”.³

¹ Decision on Seventeenth Motion, para. 20.

² 17th *bis* Motion, para. 3.

³ 17th *bis* Motion, paras. 3-4.

4. The Accused requests an extension of the winter recess by one additional day to allow him and his defence team to review the New Material and incorporate it into their preparation for upcoming witnesses.⁴

5. On 7 December 2010, the Prosecution filed the “Prosecution Response to Motion for Finding of Disclosure Violation and for Remedial Measures # 17*bis*” (“Response to 17th *bis* Motion”), seeking that the 17th *bis* Motion be dismissed. It submits that while two of the 21 documents “contain potentially exculpatory material”, the other 19 documents do not fall within the scope of Rule 68(i).⁵ According to the Prosecution, the New Material was found following a re-review of the DVD Material and “promptly” provided to the Accused after its discovery.⁶

6. The Prosecution argues that the Accused has failed to “present a *prima facie* case making out the probable exculpatory or mitigating nature of the 21 documents in question, despite it being his burden to do so when alleging that a violation of Rule 68(i) has occurred”.⁷ The Prosecution nonetheless acknowledges that two of the documents fall within the scope of Rule 68(i) and “should have been included in the previous disclosures” of material seized from the Pećanac apartment.⁸ However, the Prosecution submits that the Accused has not demonstrated any prejudice with respect to the timing of the disclosure of these two documents, which have a combined length of four pages, and that that “the Accused will have sufficient time to consider and incorporate them into his defence” without the need for an adjournment.⁹

7. The Prosecution submits that the remaining 19 documents, while possibly relevant to issues in the case, do not fall within the scope of Rule 68(i) as none of the documents “suggest the innocence or mitigate the guilt of the Accused or undermine the case presented by the Prosecution at trial”.¹⁰

B. Twenty-Eighth Motion

8. In the Twenty-Eighth Motion, the Accused submits that the Prosecution violated Rule 68 of the Rules by failing to disclose as soon as practicable three documents which were provided to him on 22 November 2010.¹¹ The first two documents are Associated Press reports (“Associated Press Reports”) which the Accused submits he could have used during his cross-

⁴ 17th *bis* Motion, para. 5.

⁵ Response to 17th *bis* Motion, para. 1.

⁶ Response to 17th *bis* Motion, para. 2.

⁷ Response to 17th *bis* Motion, para. 5.

⁸ Response to 17th *bis* Motion, para. 6.

⁹ Response to 17th *bis* Motion, paras. 7, 14.

¹⁰ Response to 17th *bis* Motion, paras. 9-13.

¹¹ Twenty-Eighth Motion, paras. 1-2.

examination of General Michael Rose, “to advance his case that factories in Sarajevo were legitimate military targets and that General Rose had warned the Bosnian Muslim Army about offensive actions”¹² and “to advance his case that General Rose had protested to the Bosnian Muslim Army concerning offensive actions.”¹³

9. According to the Accused, the third document referred to in the Twenty-Eighth Motion “is a compilation of orders and decrees issued by Dr. Karadžić and an explanation of how these decrees demonstrated Dr. Karadžić’s efforts to comply with international humanitarian law, to outlaw paramilitaries, and to prosecute wrongdoers” (“Compilation of Orders”).¹⁴ He submits that he “would have used this document and the underlying documents to which it refers” in his cross-examination of Momčilo Mandić.¹⁵

10. The Accused submits that the exculpatory nature of the three documents is apparent from their face and that the Prosecution recognised this by disclosing them pursuant to Rule 68.¹⁶ He requests that the Chamber “make a specific finding that the prosecution has violated Rule 68 with respect to these three documents”.¹⁷ In addition, the Accused argues that he was prejudiced by this late disclosure as the documents could not be used during his cross-examination of General Rose and Momčilo Mandić, or in preparing for the trial and developing “his overall defence strategy”.¹⁸ As a remedy he requests a direction by the Chamber to the Prosecution “to postpone calling any future witness for whom Rule 68 disclosure has not been completed and to look favourably upon a motion to recall General Rose and Minister Mandić when and if such a motion is made”.¹⁹

11. The Accused also argues that the Prosecution could and should have sought consent earlier from the Government of the United States of America (“U.S. Government”), to ensure the Associated Press Reports, which had been provided to the Prosecution by the U.S. Government with Rule 70 conditions, could be disclosed to the Accused before General Rose’s testimony.²⁰ In addition, he submits that there has been abuse of the provisions of Rule 70 by the U.S. Government in providing, and by the Prosecution in accepting, “material in the public

¹² Twenty-Eighth Motion, para. 3.

¹³ Twenty-Eighth Motion, para. 4.

¹⁴ Twenty-Eighth Motion, para. 5.

¹⁵ Twenty-Eighth Motion, para. 5.

¹⁶ Twenty-Eighth Motion, paras. 3-5.

¹⁷ Twenty-Eighth Motion, para. 6.

¹⁸ Twenty-Eighth Motion, para. 7.

¹⁹ Twenty-Eighth Motion, para. 7.

²⁰ Twenty-Eighth Motion, paras. 8-9.

domain under the provisions of Rule 70”.²¹ According to the Accused, this classification of documents as confidential is contrary to the interests of justice and violates his right to a fair and expeditious trial.²² He requests that the Chamber “direct the prosecution to immediately seek the consent of all Rule 70 providers to disclose materials which are already in the public domain and to cease and desist from entering into Rule 70 agreements with respect to such material”.²³

12. On 3 December 2010, the Prosecution filed the “Prosecution’s Response to Karadžić’s Twenty-Eighth Motion for Finding of Disclosure Violation and for Remedial Measures with Appendices A-D” (“Response to Twenty-Eighth Motion”). The Prosecution recognises that the disclosure of the Associated Press Reports which had been obtained from the U.S. Government was “redundant” given that it had already obtained publicly-available versions of the same articles and disclosed them to Accused on 29 September 2010.²⁴ However, the Prosecution argues that the disclosure of the Associated Press Reports was “not a Rule 68 violation because both documents were identified as containing potentially exculpatory material in the review of a specific witness-related search and were disclosed to the Accused prior to that witness testifying”.²⁵

13. The Prosecution also submits that the Accused has not demonstrated any prejudice with respect to the disclosure of the Associated Press Reports, and his claim that he could have used the documents during his cross-examination of General Rose is “contradicted by the fact that the articles were disclosed to the Accused” before General Rose testified and that neither were used during his cross-examination.²⁶

14. The Prosecution submits that the Compilation of Orders “are verbatim extracts from a book” which had been disclosed to the Accused pursuant to Rule 68 on 14 April 2009, and that of the 50 extracts in the Compilation of Orders, only one was not included in this book.²⁷ It acknowledges however that it is obliged to disclose Rule 68 material even “if there exists other information of generally similar nature”²⁸ which has already been disclosed to the Accused and that therefore “technically the document should have been disclosed earlier”.²⁹

²¹ Twenty-Eighth Motion, paras. 1, 11.

²² Twenty-Eighth Motion, paras. 11-12.

²³ Twenty-Eighth Motion, para. 13.

²⁴ Response to Twenty-Eighth Motion, para. 5.

²⁵ Response to Twenty-Eighth Motion, para. 6.

²⁶ Response to Twenty-Eighth Motion, para. 7.

²⁷ Response to Twenty-Eighth Motion, para. 8.

²⁸ Response to Twenty-Eighth Motion, para. 9, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgement, 29 July 2004, para. 266 (“*Blaškić Appeals Judgement*”).

²⁹ Response to Twenty-Eighth Motion, para. 9.

15. However, the Prosecution submits that the Accused has not demonstrated any prejudice with respect to the disclosure of the Compilation of Orders and his claim that he could have used the document during his cross-examination of Momčilo Mandić is “contradicted by the fact that the Accused had this exact information and the underlying orders to which it refers” more than one year before this witness testified and “well before the start of the trial”.³⁰

16. The Prosecution also argues that the Accused’s has failed to substantiate how the provisions of Rule 70 have been abused by it or the Rule 70 provider.³¹ In support of this submission, the Prosecution highlights that the Accused did not dispute that “the material was provided to the Prosecution on a confidential-basis”.³² In addition the Prosecution submits that it has endeavoured to “expedite disclosure of publicly-available information to the Accused without contravening agreements with Rule 70 providers”.³³ Finally the Prosecution argues that an order requiring it to immediately seek the consent of all Rule 70 providers for the disclosure of material already in the public domain “is not grounded in any of the Tribunal’s Rules, has no precedent, is unnecessary and is unworkable”.³⁴

II. Applicable Law

17. 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”.³⁵ 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.³⁶ The Trial Chamber has previously outlined the Appeals Chamber’s jurisprudence on the scope and application of the obligation to disclose “as soon as practicable” exculpatory material under Rule 68.³⁷ That discussion will not be repeated here.

18. Rule 70(B) provides that if the Prosecution is in possession of information which has been provided to it on “on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the

³⁰ Response to Twenty-Eighth Motion, para. 10 .

³¹ Response to Twenty-Eighth Motion, para. 11.

³² Response to Twenty-Eighth Motion, para. 11.

³³ Response to Twenty-Eighth Motion, para. 11.

³⁴ Response to Twenty-Eighth Motion, para. 11.

³⁵ Decision on the Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009, para 19, citing *Blaškić* Appeals Judgement, para. 267.

³⁶ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179 (“*Kordić and Čerkez* Appeals Judgement”).

³⁷ Decision on Seventeenth Motion, paras. 14-17.

Prosecutor without the consent of the person or entity providing the initial information [...]”. The Appeals Chamber has recognised that while the Chamber has the authority to assess whether information has been provided in accordance with Rule 70(B), “such enquiry must be of a very limited nature: it only extends to an examination of whether the information was in fact provided on a confidential basis [...]”.³⁸

19. 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.³⁹

III. Discussion

A. 17th *bis* Motion

20. As noted by the Prosecution, the Accused has failed to present a *prima facie* case demonstrating the potential exculpatory or mitigating nature of any of the documents referred to in the 17th *bis* Motion. These documents include lists of names of persons from Srebrenica, documents pertaining to crimes committed against Serbs between 1992 and 1995, and documents which relate to the demilitarisation of Srebrenica and combat operations around Srebrenica in 1995.⁴⁰ While the Chamber was not provided with and could not review copies of the documents themselves, having considered the information provided by the parties, the Chamber is not satisfied that 19 of those documents fall within the scope of Rule 68⁴¹, despite the fact that they were apparently provided to the Accused by the Prosecution pursuant to Rule 68, in an abundance of caution.⁴² The Chamber had no information to indicate that any of the 19 documents “may suggest the innocence or mitigate the guilt of the Accused or undermine the credibility of the Prosecution’s evidence”. Therefore, the Chamber finds that there was no violation of Rule 68 by the Prosecution with respect to the disclosure of these 19 documents.

21. The Prosecution has acknowledged that items 6 and 7 in Appendix A to the 17th *bis* Motion do contain potentially exculpatory or mitigating material and that they should have been disclosed pursuant to Rule 68 along with its previous disclosure of the DVD Material. Therefore, items 6 and 7 should have been disclosed to the Accused “as soon as practicable”.

³⁸ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR 108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 29.

³⁹ *Kordić and Čerkez Appeals Judgement*, para. 179; *Blaškić Appeals Judgement*, para. 268.

⁴⁰ Response to 17th *bis* Motion, paras. 9-13.

⁴¹ These are items 1-5 and 8-21 in Annex A to the 17th *bis* Motion.

The Chamber has already held that the Prosecution violated Rule 68 by failing to disclose the DVD Material before 31 August 2010.⁴³ In the absence of any new arguments from the Prosecution, the Chamber finds that the disclosure of items 6 and 7 on 23 November 2010, which were found in the same collection of documents as the DVD Material, was also a violation of the obligation to disclose potentially exculpatory documents as soon as practicable pursuant to Rule 68. However, having considered the subject matter and length of the two documents in question, the Chamber is not satisfied that the Accused has demonstrated that he has been prejudiced by their late disclosure, and finds that he will have sufficient time to consider them, particularly given that the Chamber has already extended the winter recess and will not resume sitting until 13 January 2011.

B. Twenty-Eighth Motion

22. The Associated Press Reports include comments which suggest that, in 1994, the Bosnian Muslim Army (ABiH) was using factories in Sarajevo for the production of weapons and ammunition, and comments by General Rose about protests made to the Bosnian Muslim leadership regarding ABiH offensives. The Chamber finds that this material is potentially exculpatory and should have been disclosed to the Accused “as soon as practicable”. The Chamber is satisfied that when the Prosecution realised that the Associated Press Reports were news articles, they took all reasonable steps to ensure that public versions of these articles were found and disclosed to the Accused before clearance for disclosure was received by the Rule 70 provider. It follows that in assessing whether the Associated Press Reports were disclosed “as soon as practicable” the Chamber considers that the date of disclosure was the date when the publicly available versions were provided to the Accused (29 September 2010) and not the date when they were disclosed to him again following the receipt of clearance from the Rule 70 provider (22 November 2010).

23. The Associated Press Reports date back to August 1994 and were not disclosed to the Accused until 29 September 2010. However, the Prosecution has not stated when they came into its possession. In light of this lack of clarification by the Prosecution and the date of the reports, the Chamber considers it appropriate to presume that the Prosecution did not recently acquire them. The Prosecution’s submission that the Associated Press Reports were “identified as containing potentially exculpatory material in the review of a specific witness-related

⁴² Disclosure Batch 363, letter dated 31 August 2010, Confidential Annex A, Seventeenth Motion; Disclosure Batch 461, letter dated 23 November 2010, Annex A, 17th *bis* Motion.

⁴³ Decision on Seventeenth Motion, paras. 19-20.

search”⁴⁴ and were disclosed to the Accused prior to the witness testifying, is not sufficient to demonstrate that this material was disclosed as soon as practicable. On the understanding that a substantial number of months, if not years, passed between the Prosecution’s acquisition of the Associated Press Reports and their disclosure to the Accused, and the absence of any explanation for this delay, beyond the Prosecution’s allusion to conducting witness-related Rule 68 searches, the Chamber finds that they were not disclosed “as soon as practicable” and that, therefore, the Prosecution violated its Rule 68 obligation in relation thereto. The Chamber repeats its previous finding that the Prosecution’s practice of searching for material that would fall within the terms of Rule 68 on a “rolling basis” does not appear consonant with its obligation to disclose such material “as soon as practicable” and that the ongoing nature of the Rule 68 obligation is related only to the fact that the Prosecution must continue to disclose new material that is generated or comes into its possession throughout the pre-trial, trial, and appeals phases of a case.⁴⁵

24. However, given that public versions of the Associated Press Reports had been disclosed to the Accused before General Rose’s testimony, the Chamber finds that the Accused’s submission that he was prejudiced because he was unable to use them during his cross-examination of this witness has no merit. In addition, having reviewed the length and content of the Associated Press Reports, the Chamber is not satisfied that they are of such significance that their late disclosure prejudiced the Accused’s development of his overall defence strategy.

25. The Chamber notes that the provisions of Rule 70 are clearly not intended to apply to documents which are already in the public domain. However, upon receiving the Associated Press Reports from the U.S. Government, the Prosecution correctly identified their public nature and provided the Accused with publicly available versions, before consent was obtained from the U.S. Government to disclose the versions it had provided. Given the good faith demonstrated by the Prosecution in the disclosure of public versions of the Associated Press Reports, the Chamber sees no basis to “direct the prosecution to immediately seek the consent of all Rule 70 providers to disclose materials which are already in the public domain and to cease and desist from entering into Rule 70 agreements with respect to such material”.⁴⁶ However, the Chamber observes that the disclosure by the Prosecution of the same documents on more than one occasion clearly causes confusion and involves an unnecessary duplication of material which the Accused and his team is required to review.

⁴⁴ Response to Twenty-Eighth Motion, para. 6.

⁴⁵ Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010, para. 11.

⁴⁶ Twenty-Eighth Motion, para. 13.

26. Having reviewed the Compilation of Orders, the Chamber finds that it contains potentially exculpatory material which should have been disclosed to the Accused as soon as practicable pursuant to Rule 68. The material contained in the Compilation of Orders is largely the same as that found in a book which had been disclosed to the Accused on 14 April 2009. Nonetheless, the Prosecution is still obliged to disclose potentially exculpatory material pursuant to Rule 68 “even if there exists information of a generally similar nature”.⁴⁷

27. While the Prosecution states that the Compilation of Orders was found in the apartment of Miroslav Toholj, the document is undated and it is not clear when it actually came into the possession of the Prosecution. It follows that the Chamber cannot assess whether the Compilation of Orders was disclosed by the Prosecution to the Accused “as soon as practicable” in accordance with its Rule 68 obligation. In any event, given that the content of the Compilation of Orders was largely contained in a book that had been disclosed to the Accused before the start of trial, the Chamber finds that the Accused’s submission that he was prejudiced given the inability to use this document during his cross-examination of Momčilo Mandić, or in the development of his overall defence strategy has no merit.

IV. Disposition

28. For the foregoing reasons, the Trial Chamber notes the disclosure violations identified above and, pursuant to Rules 54, 68, and 68 *bis* of the Rules, hereby **DENIES** the Motions.

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



Judge O-Gon Kwon
Presiding

Dated this sixteenth day of December 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴⁷ *Blaškić* Appeals Judgement, para. 266.