



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: 14 October 2011

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: 14 October 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S FIFTY-NINTH 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 “Fifty-Ninth Motion for Finding of Disclosure Violation (September 2011)”, filed publicly with confidential annexes on 28 September 2011 (“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 the disclosure on 1 September 2011 of a statement of a Bosnian Muslim commander from Zvornik dated 31 August 1996 (“Statement”) and the disclosure on 26 September 2011 of 49 items which he asserts pertain to the credibility of witness KDZ523 (“KDZ523 Documents”).¹ He requests a specific finding that the Prosecution has violated its disclosure obligations with respect to this late disclosure.²

2. He contends that the Statement contains “material of an exculpatory nature” as it confirms that before the war broke out in April 1992 Muslims had organised armed groups in Zvornik which possessed firearms and weapons.³ The Accused submits that the Statement was disclosed after witnesses KDZ064, KDZ555, KDZ340, KDZ029, and Dragan Vidović had testified about the events in Zvornik and that he was prejudiced by the inability to elicit the exculpatory information in the Statement through these witnesses.⁴ In addition, the Accused claims that he was prejudiced because he could not include the Statement in his pre-trial defence strategy.⁵

3. With respect to the KDZ523 Documents, the Accused observes that the Chamber has already found that the Prosecution “was not justified in delaying the disclosure of Witness KDZ523’s identity and statements to the defence”.⁶ He submits that he was prejudiced by the late disclosure of the KDZ523 Documents as he was unable to use them with other witnesses who have testified about events in Prijedor, elicit the information contained therein, or include their content in his pre-trial defence strategy.⁷ The Accused requests a specific finding that the

¹ Motion, paras. 1–2.

² Motion, paras. 1, 7.

³ Motion, para. 3.

⁴ Motion, paras. 3–4.

⁵ Motion, para. 4.

⁶ Motion, para. 5, citing Decision on Accused’s Motion for Modification of Delayed Disclosure: Witnesses KDZ320, KDZ456, KDZ523 and KDZ532, 23 September 2011, confidential (“Delayed Disclosure Decision”).

⁷ Motion, para. 6.

Prosecution has violated Rule 68 of the Rules with respect to the disclosure of the Statement and KDZ523 Documents.⁸ He also reserves the right to file a consolidated motion to recall witnesses at the conclusion of the Municipalities component of the Prosecution's case.⁹

4. On 7 October 2011, the Prosecution filed confidentially the "Prosecution's Response to Karadžić's Fifty-Ninth Motion for Finding of Disclosure Violation" ("Response"). It submits that the Motion should be dismissed on the basis that the Accused failed to establish that the Statement falls under Rule 68 of the Rules.¹⁰ It contends that the possession of weapons and the organisation of armed forces by some Muslims in Zvornik are not exculpatory but merely "incidental to the existence of an armed conflict" as it does not suggest the innocence of the Accused or undermine the Prosecution's case with respect to the events charged in the municipality of Zvornik.¹¹

5. The Prosecution further contends that, in any event, the Accused failed to demonstrate any prejudice in relation to the late disclosure of the Statement given that he had "cross-examined Zvornik witnesses extensively regarding the arming of some Muslims".¹² It also observes that the Accused failed to elicit the information contained in the Statement through Petko Panić who testified on 19 and 20 September 2011, after the Statement was disclosed to the Accused, about his involvement in disarming Muslims and that he retains the ability to introduce the Statement during his defence case.¹³ The Prosecution also contends that the Accused in the interests of judicial economy "should be directed to state the alleged violation, claim specific prejudice, and seek all attendant remedies at the same time", rather than reserving the right to request the recall of witnesses on the basis of Rule 68 violations.¹⁴

6. With respect to the KDZ523 Documents the Prosecution submits that the Chamber should decline to make a declaratory finding given the failure to "demonstrate any prejudice which has not already been remedied by the Trial Chamber" and the fact that "the Prosecution has acknowledged and explained the breach".¹⁵ The Prosecution observes that it has acted in good faith even though it may have made an error with respect to the delayed disclosure of KDZ523's identity.¹⁶ It further contends that the Chamber has already remedied any prejudice

⁸ Motion, paras. 1–2, 7.

⁹ Motion, para. 8.

¹⁰ Response, paras. 1–2.

¹¹ Response, paras. 4–5.

¹² Response, para. 6.

¹³ Response, para. 6.

¹⁴ Response, para. 7.

¹⁵ Response, para. 1.

¹⁶ Response, paras. 8–11.

resulting from this oversight and delayed disclosure given that KDZ523's testimony has been postponed until after the 2011 winter recess to allow the Accused and his team sufficient time to review the KDZ523 Documents.¹⁷ It also cites to a recent decision of the Chamber in which it held that there was no need to make a declaratory finding that the Accused had breached an order of the Chamber where the breach had been acknowledged and explained.¹⁸

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”.¹⁹ 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.²⁰

8. The Chamber reiterates that regardless of the Prosecution's internal practices, there is a clear obligation to disclose potentially exculpatory material “as soon as practicable” and that the “ongoing nature of the obligation relates only to the fact that as new material comes into the possession of the Prosecution it should be assessed as to its potentially exculpatory nature and disclosed accordingly”.²¹

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.²²

III. Discussion

10. Having reviewed the Statement, the Chamber observes that it does include references to the possession of weapons by Muslims in Zvornik by 8 April 1992 and the fact that they had formed armed groups by 9 April 1992.²³ While the Statement does suggest that this organisation of Muslim forces occurred immediately after the Bosnian Serb attack on Zvornik on 8 April

¹⁷ Response, para. 12, citing Delayed Disclosure Decision para. 22.

¹⁸ Response, para. 14, citing Decision in Relation to Selection of Cases for DNA Analysis, 23 September 2011, p. 6.

¹⁹ Decision on the Accused's Motion to Set Deadlines for Disclosure, 1 October 2009, para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 267.

²⁰ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179.

²¹ Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010, para. 11.

²² *Kordić and Čerkez* Appeal Judgement, para. 179; *Blaškić* Appeal Judgement, para. 268.

²³ Motion, Confidential Annex A, pp. 5–7.

1992, the extent to which the Muslim population in and around Zvornik was armed at that time is relevant to the charges against the Accused and the information contained in the Statement is, in that sense, potentially exculpatory. The Chamber notes that the Statement was only disclosed to the Accused on 1 September 2011 even though it dates back to 1996. The Chamber therefore finds that the Prosecution has violated its obligation under Rule 68 of the Rules by failing to disclose the Statement as soon as practicable.

11. While the Prosecution violated its disclosure obligations under Rule 68 of the Rules by the late disclosure of the Statement, the Chamber finds that the Accused has suffered no prejudice as a result of this violation. In reaching this conclusion, the Chamber reviewed the Statement and observed that its content is limited in length and not of such significance that its late disclosure has had a detrimental impact on the Accused's overall preparation for trial or his approach to the cross-examination of witnesses. The Chamber notes that the Accused has already cross-examined witnesses regarding the arming of Muslims in Zvornik and observes that he had an opportunity to elicit the favourable information through the witness Petko Panić but had failed to do so.²⁴

12. With respect to the KDZ523 Documents, while they were disclosed as "material [which] may fall within the ambit of Rule 68 or may be of relevance for the defence case", the Accused has failed to present a *prima facie* case making out the probable exculpatory or mitigating nature of each of these documents. The Chamber is therefore not in a position to assess whether or not all or some of these documents were disclosed by the Prosecution in violation of Rule 68. The Chamber has previously suspended proceedings or in this case postponed the testimony of a witness to give the Accused time to review recently disclosed material independent of whether or not that disclosure amounts to a violation of the Prosecution's disclosure obligations.²⁵ The Chamber in postponing the testimony of KDZ523 has already taken steps to alleviate any prejudice resulting from the late disclosure of material pertaining to KDZ523 and noted the impact of this oversight on the Accused.²⁶

13. The Chamber sees no merit in the Prosecution's suggestion that the Accused should be directed to submit disclosure violation motions and motions to recall pertaining to the same witnesses concurrently. It may be the case that, at the conclusion of a discrete component of the

²⁴ Hearing, T. 1331–1338, 1347–1350 (21 April 2010); T. 17334–17336 (17 August 2011); T. 17499–17504, 17585 (19 August 2011).

²⁵ Hearing T. 11474–11476 (10 February 2011); Decision on Accused's Motion for Fourth Suspension of Proceedings, 16 February 2011, para. 7; Decision on Accused's Motion for Fifth Suspension of Proceedings, 17 March 2011, para. 9; Delayed Disclosure Decision, para. 24.

²⁶ Delayed Disclosure Decision, paras. 22–24.

Prosecution's case, and having heard evidence on the issue, the Accused will form a view as to whether there is good cause for a witness to be recalled.

IV. Disposition

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

- a) **GRANTS**, by majority, Judge Kwon dissenting²⁷, the Motion in part, and finds that the Prosecution has violated Rule 68 of the Rules with respect to the late disclosure of the Statement; 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 fourteenth day of October 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁷ 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.