



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 October 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: 13 October 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S NINETY-FOURTH 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 “94th Motion for Finding of Disclosure Violation and for Remedial Measures (September 2014)”, filed publicly on 24 September 2014 with confidential annexes (“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 14 and 25 August 2014 of several witness statements (“Statements”).¹ The Accused contends that the Statements are potentially exculpatory as they tend to contradict the evidence adduced by the Prosecution with respect to Scheduled Incident A.5.1 in the municipality of Foča.² To prove its case on this point, the Prosecution relied on adjudicated facts and witness KDZ379.³

2. The Accused suggests that the Prosecution in “apparent recognition” of the exculpatory nature of the Statements, following their disclosure, withdrew Scheduled Incident A.5.1. and indicated that it would no longer be relying on adjudicated facts 758 and 759.⁴ In addition, the Accused submits that withdrawal of a scheduled incident requires an amendment to the Third Amended Indictment (“Indictment”) which requires leave of the Chamber but that he has no objection to the withdrawal of Scheduled Incident A.5.1.⁵ Similarly he suggests that the Prosecution when it found it was “unsafe” to rely on the relevant adjudicated facts should have sought reconsideration of the Chamber’s “Decision on Prosecution’s Second Motion for Judicial Notice of Adjudicated Facts” issued on 9 October 2009 (“Adjudicated Facts Decision”).⁶ He also contends that Adjudicated Fact 757 has become irrelevant due to the withdrawal of Scheduled Incident A.5.1.⁷ The Accused thus seeks reconsideration of the Adjudicated Facts Decision and requests the withdrawal of Adjudicated Facts 757 to 759.⁸

¹ Motion, paras. 1, 7.

² Motion, paras. 7–14.

³ Motion, paras. 2–6.

⁴ Motion, para. 15.

⁵ Motion, para. 16 citing to Rules 50(A)(i)(C) and 51(A)(iii) of the Rules.

⁶ Motion, para. 17.

⁷ Motion, fn. 15.

⁸ Motion, para. 17.

3. The Accused acknowledges that the withdrawal of the scheduled incident and the relevant adjudicated facts “partially ameliorate” the prejudice he suffered.⁹ However, the Accused argues that the testimony of KDZ379, who testified about other events in Foča, remains on the record and he was prejudiced because he was unable to investigate the contradictory facts contained in the Statements and confront KDZ379 during his cross-examination.¹⁰ Therefore, he seeks a finding that the Prosecution violated its disclosure obligations pursuant to Rule 68 of the Rules by failing to disclose the Statements as soon as practicable and that he be allowed to recall KDZ379 for further cross-examination based on the Statements.¹¹

4. The Accused also asserts a flaw in the approach by the Prosecution to the disclosure of potentially exculpatory evidence and points to a number of examples where the Prosecution has failed to disclose exculpatory information in witness statements where that information “may otherwise be seen as consistent” with the Prosecution’s case.¹² The Accused submits that these examples suggest a “disconnect” between what the Prosecution considers to be exculpatory and what the Chamber finds to be exculpatory and thus it is likely that many more exculpatory statements have not been disclosed to the Accused.¹³

5. In light of the pattern of disclosure violations, the Accused requests that the Prosecution be ordered to conduct a search of all undisclosed witness statements and disclose all statements containing exculpatory material no later than 15 October 2014.¹⁴ He also asks that the Prosecution be required to certify that the searches have been conducted and all exculpatory material has been disclosed.¹⁵

6. On 8 October 2014, the Prosecution filed the “Prosecution Response to 94th Motion for Finding of Disclosure Violation and for Remedial Measures (September 2014)” (“Response”), arguing that the Motion should be dismissed.¹⁶ In the Prosecution’s submission the Accused has failed to demonstrate that the disclosure of the Statements caused him prejudice particularly given that the Prosecution had withdrawn the allegations with respect to Scheduled Incident A.5.1.¹⁷ The Prosecution acknowledges that the Statements do contain information which appears not to be consistent with Adjudicated Facts 758 and 759, and that they should have been

⁹ Motion, para. 18.

¹⁰ Motion, para. 18.

¹¹ Motion, paras. 19–20.

¹² Motion, paras. 22–26.

¹³ Motion, para. 27.

¹⁴ Motion, paras. 28–31.

¹⁵ Motion, para. 31.

¹⁶ Response, para. 1.

¹⁷ Response, paras. 1, 4.

disclosed earlier pursuant to Rule 68.¹⁸ It expresses regret for this late disclosure but submits that the problem which resulted in this late disclosure has now been remedied.¹⁹

7. With respect to KDZ379, the Prosecution asserts that the Statements do not contradict and in fact corroborate this witness's evidence.²⁰ The Prosecution observes that the Accused failed to show how any inconsistencies between the adjudicated facts and the Statements could impact on KDZ379's credibility or that recalling the witness for further cross-examination would serve any purpose.²¹

8. The Prosecution contends that in the absence of prejudice, the Accused is not entitled to the remedies sought, which in its submission are "unwarranted, impracticable and disproportionate".²² The Prosecution submits that "out of an abundance of caution" it remedied any possible prejudice by withdrawing the charges relating to Scheduled Incident A.5.1.²³ It further submits that there is no reason that it should be ordered to re-review all undisclosed statements for Rule 68 material as there was no basis to suggest that the late disclosure of the Statements was due to a failure to apply proper criteria for identifying exculpatory material.²⁴ It submits that this would be unduly burdensome and unwarranted and it would be impossible to complete such searches by 15 October 2014 as requested by the Accused.²⁵ In addition it submits that a request for certification that all searches are completed and all exculpatory material disclosed has no basis, would serve no purpose, and is impractical given that it continues to conduct updated searches in light of newly received materials.²⁶

9. The Prosecution submits that it is not required to request leave from the Chamber for the purposes of withdrawing Scheduled Incident A.5.1.²⁷ The Prosecution asserts that since it only withdrew a single incident, there was no need to amend the Indictment pursuant to Rule 50(A)(i)(c) nor request leave from the Chamber to do so pursuant to Rule 51(A)(iii).²⁸ The Prosecution points to the practice of trial chambers at the Tribunal and at the ICTR which have accepted the withdrawal of incidents without the need for an amendment to the indictment.²⁹

¹⁸ Response, para. 3.

¹⁹ Response, para. 3.

²⁰ Response, para. 5.

²¹ Response, paras. 6–7, 9.

²² Response, paras. 1, 8, 19.

²³ Response, para. 8.

²⁴ Response, para. 10.

²⁵ Response, para. 10.

²⁶ Response, para. 11.

²⁷ Response, paras. 2, 19.

²⁸ Response, para. 13.

²⁹ Response, para. 14.

10. The Prosecution also argues that there is no basis to the Accused's request for reconsideration of the Adjudicated Facts Decision and opposes such a request.³⁰ It disagrees with the Accused's assertion that the adjudicated facts "were unsafe". It observes that in relation to the key points, including the separation of men and shooting, the Statements are actually consistent with Adjudicated Facts 758 and 759.³¹ It argues that the Accused failed to allege an error of reasoning which would warrant reconsideration of the Adjudicated Facts Decision.³² In addition it concludes that the Chamber did not err when it took judicial notice of these adjudicated facts and in any event reconsideration is no longer necessary given that the Prosecution is no longer relying on them.³³

11. With respect to Adjudicated Fact 757, the Prosecution disagrees with the Accused's submission that it is rendered irrelevant by the withdrawal of Scheduled Incident A.5.1.³⁴ It suggests that it confirms the pattern of attacks against the non-Serb population and that the Statements support this adjudicated fact.³⁵

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 a *prima facie* case making out the probable exculpatory or mitigating nature" of the materials in question.³⁶

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.³⁷

³⁰ Response, paras. 2, 15, 19.

³¹ Response, para. 16.

³² Response, para. 18.

³³ Response, para. 18.

³⁴ Response, para. 17.

³⁵ Response, para. 17.

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

³⁷ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

III. Discussion

14. The Chamber finds that given the Statements are to some extent inconsistent with Adjudicated Facts 758 and 759, and the allegations pertaining to Scheduled Incident A.5.1, this material should have been disclosed to the Accused pursuant to Rule 68. The Chamber notes that the Prosecution itself has acknowledged that the Statements should have been disclosed earlier. The Chamber therefore finds that the Prosecution violated its disclosure obligations by failing to disclose the Statements as soon as practicable given that they date back to 1992 but were only disclosed to the Accused in August 2014.

15. However, the Chamber finds that the Accused was not prejudiced by this disclosure violation. In reaching that conclusion the Chamber noted that the Prosecution has withdrawn Scheduled Incident A.5.1. This alleviates any potential prejudice the Accused may have suffered as a result of this disclosure violation. In addition, contrary to the Accused's assertion, the Chamber is not satisfied that the material contained in the Statements could have an impact on KDZ379's credibility or that it would have been of assistance in cross-examining KDZ379, given that his testimony with respect to Scheduled Incident A.5.1 was limited. In the absence of prejudice to the Accused, there is no basis to order the remedies requested by the Accused.

16. However, notwithstanding the absence of prejudice to the Accused, the Chamber is concerned about the late stage of these repeated violations and is not satisfied with the Prosecution's explanation as to why the Statements were not previously disclosed. The Chamber will, therefore, order the Prosecution to file a report which (i) explains how the Statements were not identified in earlier searches; and (ii) substantiates its assertion that it has remedied the problem which resulted in this disclosure violation. The Chamber does not consider citing to "human error" or similar explanations as satisfactory.

17. With respect to the Adjudicated Facts Decision, the Accused has failed to demonstrate that the disclosure violation with respect to the Statements calls for a reconsideration of that decision. The Accused has not argued a clear error of reasoning with respect to the Adjudicated Facts Decision. In addition the Chamber notes that while the Statements may to some extent be inconsistent with Adjudicated Facts 758 and 759, given that the Prosecution has withdrawn the relevant scheduled incident, the Chamber does not consider that reconsideration is necessary in order to prevent an injustice. Further, in light of the Prosecution's submission that it no longer relies on Adjudicated Facts 758 and 759, the Chamber will not consider them for the purposes of this case. Judicial notice of these two adjudicated facts which have now become irrelevant are effectively withdrawn. With respect to Adjudicated Fact 757, the Chamber does not agree with

the Accused's submission that it "becomes irrelevant" due to the withdrawal of Scheduled Incident A.5.1. While Adjudicated Fact 757 is linked to the withdrawn scheduled incident, it remains relevant to other allegations in the municipality. Accordingly, the Chamber does not consider that there is a basis to reconsider its decision to take judicial notice of Adjudicated Fact 757.

18. Finally, the Chamber has had regard to the practice in other cases,³⁸ and the approach taken to the withdrawal of charges in this case.³⁹ The Chamber therefore does not consider that the Prosecution should be required to go through the formality of amending the Indictment or seeking leave from the Chamber to do so for the purposes of withdrawing the individual charge found in Scheduled Incident A.5.1. The Prosecution's "Notice of withdrawal of Incident A.5.1." filed on 18 August 2014 is sufficient in this regard.

³⁸ *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, Prosecution Submission Concerning Paragraphs 31.1b and 31.1c of the Indictment, 18 February 2008; *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, Judgement, Annex 2 (Procedural History), para. 17; *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-PT, 23 February 2005, paras. 31, 34.

³⁹ *See*: Closing Arguments, T. 48034 (7 October 2014).

IV. Disposition

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

- (a) **GRANTS** by majority, Judge Kwon dissenting,⁴⁰ the Motion in part and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the Statements;
- (b) **ORDERS** the Prosecution to file a report as outlined in paragraph 16 above by 27 October 2014; and
- (c) **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 October 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴⁰ 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.