



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 March 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 March 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF “DECISION ON ACCUSED’S NINETY-THIRD
DISCLOSURE VIOLATION MOTION” ISSUED ON 13 OCTOBER 2014**

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 “93rd Motion for Finding of Disclosure Violation and for Remedial Measures (August 2014)”, filed publicly on 27 August 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 21 August 2014 of two letters (“Letters”).¹ In the Letters a Senior Trial Attorney from the Prosecution summarises potentially exculpatory evidence for disclosure in the *Slobodan Milošević* case.² The Accused contends that the Letters refer to documents which are exculpatory [REDACTED].³

2. The Accused contends that he was prejudiced by the late disclosure of the Letters because he was unable to use them to locate and present the evidence during his defence case which is now closed⁴ and seeks a finding that the Prosecution violated Rule 68 of the Rules by failing to disclose the Letters as soon as practicable.⁵ He also requests that the Chamber order the Prosecution to disclose the “information in its original form” to allow him to track down the source of the information and interview the witness who could have knowledge of the underlying facts.⁶ Further, the Accused requests that the Prosecution be ordered to search its correspondence files for each case at the Tribunal which is linked to events in this case and disclose any additional exculpatory material found in those searches.⁷

3. On 10 September 2014, the Prosecution filed confidentially the “Prosecution Response to 93rd Motion for Finding of Disclosure Violation and for Remedial Measures (August 2014)” (“Response”), arguing that the Motion should be dismissed.⁸ The Prosecution observes that the Letters summarise exculpatory material contained in interviews conducted by the Prosecution.⁹

¹ Motion, paras. 1–2.

² Motion, para. 2, Confidential Annexes A and B.

³ Motion, paras. 3–5.

⁴ Motion, para. 7.

⁵ Motion, para. 8.

⁶ Motion, para. 9. The Accused notes that he may seek to re-open his defence case once he has completed his investigation of this information.

⁷ Motion, para. 10.

⁸ Response, para. 1.

⁹ Response, para. 1.

It submits that it was not required to disclose the first of the Letters (“First Letter”) pursuant to Rule 68 as it is a summary of an interview with Tomislav Kovač.¹⁰ In addition, this interview had already been disclosed to the Accused on 7 May 2009.¹¹ Thus, the Accused failed to demonstrate a disclosure violation.¹²

4. The second of the Letters (“Second Letter”) refers to an interview [REDACTED] which was subject to Rule 70 conditions (“Interview”).¹³ The Prosecution acknowledges that due to human error the Interview had not been previously disclosed to the Accused.¹⁴ The Interview was disclosed to the Accused on 5 September 2014 even though the Rule 70 provider’s consent had been given in November 2011.¹⁵ However, the Prosecution submits that the Accused was not prejudiced by this violation because the Interview was duplicative of material already disclosed to him or evidence admitted in the case.¹⁶ In addition, the Prosecution contends that it is of marginal probative value and amounts to third-hand hearsay which the Accused has failed to show would further his case.¹⁷ The Prosecution cites to examples of where the Accused has adduced evidence or raised arguments in his Defence Final Trial Brief [REDACTED].¹⁸ In the absence of prejudice, the Prosecution argues, the Accused is not entitled to a remedy and, in any event, it has already disclosed the sources of the information referred to in the Letters.¹⁹ The Prosecution further submits that the Accused’s request that it be ordered to search its correspondence files for all related cases is unnecessary given that the failure to disclose the Letters was a result of human error and not due to a failure to identify the underlying material.²⁰

5. On 12 September 2014, the Chamber issued confidentially the “Invitation with Respect to Accused’s Ninety-Third Disclosure Violation Motion” (“Invitation”), inviting the Accused to supplement his Motion and make submissions, should he so wish, as to whether or not there was a disclosure violation with respect to the Prosecution’s disclosure of the Interview.²¹

¹⁰ Response, para. 3.

¹¹ Response, para. 3.

¹² Response, paras. 1, 3–4. The Prosecution notes that this interview with Tomislav Kovač was in the Accused’s possession before Kovač testified in this case and the Accused thus could have elicited this evidence during his testimony.

¹³ Response, paras. 10–11, Confidential Appendix A and B.

¹⁴ Response, para. 1.

¹⁵ Response, paras. 10–11.

¹⁶ Response, paras. 1, 5.

¹⁷ Response, paras. 1, 8.

¹⁸ Response, paras. 5–7.

¹⁹ Response, paras. 2, 9–12. The Prosecution also submits that it has established that the disclosure violation did not result from “unsearched correspondence” and was an error in the Rule 70 clearance and disclosure process.

²⁰ Response, para. 12.

²¹ Invitation, para. 3.

6. On 15 September 2014, the Accused filed confidentially the “Supplemental Submission in Support of 93rd Motion for Finding of Disclosure Violation and for Remedial Measures” (“Supplemental Submission”). As requested by the Chamber in its Invitation, he also provided copies of the Interview and an amended version of the Interview which had been disclosed to him by the Prosecution.²² The Accused submits that late disclosure of the Interview violated Rule 68 of the Rules which the Prosecution “appears to concede”.²³ In the Accused’s submission, the Interview is potentially exculpatory [REDACTED].²⁴ The Accused seeks a finding that the Prosecution violated Rule 68 by failing to disclose the Interview and the Letters.²⁵ He concludes that he was prejudiced by these violations because he was prevented from “obtaining and introducing evidence” to contradict the Prosecution’s case.²⁶

7. On 17 September 2014, the Prosecution communicated via e-mail that it did not wish to file any further response with respect to the Supplemental Submission.

8. On 26 September 2014, the Accused filed confidentially the “Second Supplemental Submission in Support of the 93rd Motion for Finding of Disclosure Violation and for Remedial Measures” (“Second Submission”). On 24 September 2014, the Prosecution disclosed a redacted cable sent [REDACTED] in June 1996 (“Cable”) [REDACTED].²⁷ The Cable had been in the Prosecution’s possession since 10 September 2003.²⁸ The Accused contends that the Cable contains exculpatory information [REDACTED] and the failure to disclose the Cable was a violation of Rule 68.²⁹ The Accused seeks a finding of violation with respect to the Cable and argues that he was prejudiced as he was unable to obtain and introduce this evidence which contradicts the Prosecution’s case.³⁰ He repeats his request for a finding of violation with respect to the late disclosure of the Letters and the Interview and requests that the Chamber hold a hearing to determine the reasons for the disclosure violations.³¹ In his submission the latest disclosure violation casts doubt on the Prosecution’s explanation and suggests that the Prosecution was “negligent at best”.³² The Accused concludes that the continuing violations at this late stage indicate that the approach taken by the Chamber has failed to solve the problem

²² Supplemental Submission, Confidential Annex C and D.

²³ Supplemental Submission, para. 3.

²⁴ Supplemental Submission, para. 4.

²⁵ Supplemental Submission, para. 6.

²⁶ Supplemental Submission, para. 6.

²⁷ Second Submission, para. 2.

²⁸ Second Submission, para. 3.

²⁹ Second Submission, para. 4.

³⁰ Second Submission, para. 5.

³¹ Second Submission, paras. 5–6.

³² Second Submission, para. 6.

and has resulted in a violation of the Accused's "rights to exculpatory information and a fair trial".³³

9. On 10 October 2014, the Prosecution filed confidentially the "Prosecution Supplemental Response to Second Supplemental Submission in Support of 93rd Motion for Finding of Disclosure Violation and for Remedial Measures" ("Supplemental Response"). The Prosecution acknowledges that the Cable should have been disclosed earlier pursuant to Rule 68 of the Rules and expresses regret for this failure.³⁴ The Prosecution asserts that the Accused has failed to show prejudice by this late disclosure and repeats the submissions already outlined in the Response as to why this information is duplicative or of marginal probative value.³⁵ It also repeats that in the absence of prejudice the Accused is not entitled to a remedy.³⁶

10. The Prosecution also explains that the disclosure violations were a product of "human error" and not a systemic issue in its disclosure practices.³⁷ It provides further detail as to why the Cable which was referred to in the Interview was not identified earlier and the steps taken to ensure that all disclosable material referred to in the Interview was disclosed to the Accused.³⁸ The Prosecution thus concludes that the request for a hearing has no basis and would serve no purpose.³⁹

II. Applicable Law

11. 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.⁴⁰

12. 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

³³ Second Submission, para. 7.

³⁴ Supplemental Response, para. 3.

³⁵ Supplemental Response, paras. 5–7.

³⁶ Supplemental Response, para. 8.

³⁷ Supplemental Response, paras. 8–9.

³⁸ Supplemental Response, para. 10.

³⁹ Supplemental Response, para. 11.

⁴⁰ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), para. 179.

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.⁴¹

III. Discussion

13. With respect to the Letters, the Chamber does not consider that these documents fall within the scope of Rule 68 of the Rules. They simply include a summary by the Prosecution of potentially exculpatory underlying documents for the purposes of disclosure. The Chamber does not consider that such a summary of underlying documents is potentially exculpatory and, therefore, dismisses the Motion with respect to the Letters.

14. However, the Chamber did consider whether there was a violation with respect to the disclosure of the underlying documents referred to in the Letters. The interview with Tomislav Kovač, which is referred to in the First Letter, had been disclosed to the Accused in May 2009. The Chamber therefore finds that there was no disclosure violation in this regard.

15. The Chamber now turns to the Interview referred to in the Second Letter. [REDACTED];⁴² [REDACTED];⁴³ [REDACTED];⁴⁴ [REDACTED];⁴⁵ [REDACTED];⁴⁶ [REDACTED];⁴⁷ and [REDACTED].⁴⁸ Having reviewed these references in light of the full Interview and the amended version of the Interview, the Chamber considers that the Interview does contain some potentially exculpatory material.

16. The Interview was only disclosed to the Accused on 5 September 2014, even though the Rule 70 provider gave consent for its disclosure in November 2011. This delay is clearly unacceptable, and contrary to the Prosecution's submission, reflects badly on its disclosure practices. The Chamber therefore finds that the Prosecution violated its disclosure obligations pursuant to Rule 68 of the Rules by failing to disclose the Interview as soon as practicable after having received the Rule 70 provider's consent. [REDACTED]. To that extent the Chamber finds that the Cable is also potentially exculpatory and the Prosecution violated Rule 68 of the Rules by failing to disclose this document until 24 September 2014 even though it had been in its possession since September 2003.

⁴¹ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

⁴² Supplemental Submission, Confidential Annex C, p. 4.

⁴³ Supplemental Submission, Confidential Annex C, p. 5.

⁴⁴ Supplemental Submission, Confidential Annex C, p. 5. [REDACTED]

⁴⁵ Supplemental Submission, Confidential Annex C, p. 6.

⁴⁶ Supplemental Submission, Confidential Annex C, p. 7.

⁴⁷ Supplemental Submission, Confidential Annex C, p. 8.

⁴⁸ Supplemental Submission, Confidential Annex C, p. 11.

17. The Prosecution's disclosure violation prevented the Accused from having an opportunity to use the Interview and Cable during his case. As a result the Accused is in the process of seeking additional documents related to the Interview [REDACTED].⁴⁹ However, the Chamber notes that the Interview is, to a great extent, duplicative of other evidence elicited by the Accused [REDACTED].⁵⁰ Accordingly, the Chamber does not consider that the content of the Interview adds anything new or of significance to the Accused's case and therefore finds that there was no prejudice with respect to disclosure of material [REDACTED].

18. The Chamber notes that the references in the Interview and Cable, [REDACTED] are not duplicative. However, the Chamber finds that this evidence is highly qualified [REDACTED] and is of such low probative value that the Accused was not prejudiced by its late disclosure. [REDACTED] Having regard to the context [REDACTED] even if [REDACTED] had directly testified about the content of the Interview or Cable, it would remain hearsay evidence of very low probative value. The Chamber therefore finds that the Accused suffered no prejudice as a result of this disclosure violation.

19. In the Motion, the Accused requests that the Chamber order the Prosecution to (i) disclose the material referred to in the Letters in order to allow him to track down the source of the information, and (ii) search its correspondence files for each case at the Tribunal which is linked to events in this case and disclose any additional exculpatory material found in those searches. On the other hand, the Prosecution asserts that this disclosure violation was a product of human error, and does not reveal a flaw in its method for searching for potentially exculpatory material.

20. Given that the Prosecution has disclosed the material referred to in the Letters, including the Interview, the first part of the Accused's request is now moot. As for the second part, even though the Chamber is of the view that the Accused was not prejudiced by the disclosure violation, it is not satisfied with the Prosecution's explanation as to why the Interview and Cable were not disclosed earlier. The Chamber will, therefore, order the Prosecution to file a report (i) confirming whether it has conducted searches of all correspondence files for all related cases for the purposes of Rule 68 disclosure; and (ii) explaining what measures have been taken to ensure that the human error in the "Rule 70 clearance and disclosure process" has been rectified to confirm that similar errors have not been and will not continue to be made.

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

IV. Disposition

21. 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,⁵¹ the Motion in part and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the Interview and Cable;
- (b) **ORDERS** the Prosecution to file a report as outlined in paragraph 19 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 twentieth day of March 2015
At The Hague
The Netherlands

[Seal of the Tribunal]

⁵¹ 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.