



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 February 2016

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 February 2016

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S 104TH AND 105TH DISCLOSURE VIOLATION MOTIONS

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 “104th Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly on 2 November 2015 (“104th Motion”) and the “105th Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly by the Accused on 1 February 2016 (“105th Motion”) (together “Motions”), and hereby issues its decision thereon.

I. Submissions

A. 104th Motion

1. In the 104th Motion, the Accused argues that the Office of the Prosecutor (“Prosecution”) violated Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by failing to disclose exculpatory material.¹ The Accused refers to three documents which in his submission are exculpatory but were only disclosed by the Prosecution in October 2015 (“104th Motion Documents”).²

2. The first document is a statement given in 1996 by a war correspondent for *Der Spiegel* (“Statement”), in which she describes an interview she conducted with the Accused.³ In this interview the war correspondent was told by the Accused *inter alia* (i) that crimes committed in camps and the expulsion of Muslims were committed by Serb refugees who he could not control and that those responsible would be punished in “his Courts”; and (ii) there were no civilians in the camps.⁴

3. The second document is a 1996 report of an interview with a BBC correspondent conducted by a member of the Prosecution (“Report”), in which he describes an interview with, Lubo Todović, the deputy president of the Foča municipality in August 1993.⁵ In this interview the correspondent was informed by Todović that there had been no ethnic cleansing of Bosnian Muslims in Foča, that the Muslims wanted to leave, and that Jelisić was an embarrassment to the Serbs and had been stopped by “Major Mauser” from committing crimes.⁶

¹ 104th Motion, para. 1.

² 104th Motion, paras. 1–2, 6, 10.

³ 104th Motion, para. 2.

⁴ 104th Motion, para. 2.

⁵ 104th Motion, para. 6.

⁶ 104th Motion, para. 6.

4. The third document is a report of an interview of the Prosecution with a Banja Luka police officer in which he states that police inspectors from Banja Luka went to camps mainly to “calm things down”, that no war crimes were committed in Banja Luka, and that Župljanin ordered inquiries into war crimes (“Interview”).⁷

5. The Accused submits that the 104th Motion Documents are exculpatory and that he was prejudiced by their late disclosure because he could have attempted to interview the relevant individuals and call them as witnesses in his case.⁸

6. The Accused requests a finding that the Prosecution violated its disclosure obligations pursuant to Rule 68 of the Rules by failing to disclose the documents as soon as practicable.⁹ He also requests that as a remedial measure, the Chamber should draw an adverse inference against the Prosecution with respect to the subjects referred to in the 104th Motion Documents.¹⁰ The Accused requests that if the Chamber imposes a sentence in its final judgement, that the sentence be accordingly reduced as a remedy and sanction for the Prosecution’s “wholesale violation of his right to a fair trial.”¹¹

7. On 16 November 2015, the Prosecution filed the “Prosecution Response to 104th Motion for Finding of Disclosure Violation and for Remedial Measures” (“104th Response”) publicly, in which it opposes the 104th Motion.¹² The Prosecution acknowledges that the 104th Motion Documents contain marginally exculpatory material and should have been disclosed earlier and expresses its regret for this failure.¹³

8. However, the Prosecution submits that the information contained in the 104th Motion Documents is of negligible probative value and/or duplicative of material already in the Accused’s possession.¹⁴ The Prosecution argues that given the failure of the Accused to show prejudice, his request for remedial measures should be denied.¹⁵ For example with respect to the Statement, the Prosecution notes that while the Accused claimed he was prejudiced, he ignores material he already possessed which contained the same information from the said witness and which he could have used to call Flattau as a witness “if he had any genuine desire to do so”.¹⁶

⁷ 104th Motion, para. 10.

⁸ 104th Motion, paras. 3–4, 7–8, 11–12.

⁹ 104th Motion, para. 14.

¹⁰ 104th Motion, para. 15.

¹¹ 104th Motion, para. 16.

¹² 104th Response, paras. 1, 17.

¹³ 104th Response, para. 1.

¹⁴ 104th Response, paras. 1–2, 4, 9–11, 13–16.

¹⁵ 104th Response, paras. 1, 8, 12, 17.

¹⁶ 104th Response, paras. 4–5.

The Prosecution also notes that the Defence was informed by the Prosecution that this duplicative material had already been disclosed prior to filing the 104th Motion and that therefore the Accused's arguments in this regard are disingenuous.¹⁷

B. 105th Motion

9. In the 105th Motion the Accused argues that the Prosecution violated Rules 66(A)(ii), and 68 with respect to the late disclosure of four documents which were only disclosed to him in October, November, and December 2015 ("105th Motion Documents").¹⁸

10. The first document is an information report of an interview by the Prosecution with witness Vitomir Žepenić in which he said that the Bosnian government intelligence service was responsible for the shelling of Markale Market ("Information Report").¹⁹ When Žepenić was contacted by the Accused's Legal Adviser, Žepenić indicated that he was referring to the shelling on 27 May 1992 of Vase Miskina Street.²⁰ The Accused submits that the Information Report should have been disclosed on 9 May 2009 which was the deadline for the disclosure of Rule 66(A)(ii) statements given that he was originally listed as a Prosecution witness.²¹ In addition he submits that it is exculpatory as it shows the Bosnian government shelled its own people and thus cast doubt on shelling incidents in Sarajevo including those at Markale Market.²²

11. The Accused notes that even though the Prosecution ultimately did not call Žepenić as a witness, he called him as a witness for the Defence, but never asked him about his knowledge of the Markale Market or Vase Miskina shellings.²³ He submits that the late disclosure of the Information Report therefore caused him prejudice because he was prevented from eliciting this information when Žepenić testified.²⁴

12. The second document is a report authored by Piers Tucker in which he refers to attempts of the Bosnian government forces seeking to precipitate international military intervention, and describes that there was strong evidence that some attacks have been deliberately staged to blame the Serbs ("Tucker Report").²⁵ The Accused submits that the Tucker Report is

¹⁷ 104th Response, para. 6.

¹⁸ 105th Motion, para. 1.

¹⁹ 105th Motion, para. 2.

²⁰ 105th Motion, para. 5.

²¹ 105th Motion, para. 2.

²² 105th Motion, para. 6.

²³ 105th Motion, para. 7.

²⁴ 105th Motion, para. 7.

²⁵ 105th Motion, paras. 9–11.

exculpatory as it shows that the Bosnian government may have been responsible for crimes for which he has been indicted.²⁶ The Accused submits that he was prejudiced by this disclosure violation as he was prevented from eliciting this information during his cross-examination of Tucker and from admitting the Tucker Report as an exhibit.²⁷

13. The third document is a transcript of a media interview with the Deputy President of Foča, Ljubomir Todović which was conducted in August 1993 and provided to the Prosecution in 1996 (“Media Interview”).²⁸ In this interview Todović stated that the Bosnian Muslims in Foča requested to leave and were not expelled and that the government did not encourage or condone crimes in Foča and that no civilians were imprisoned.²⁹ The Accused submits that he was prejudiced by this violation as he could have interviewed Todović and called him as a witness in his case.³⁰

14. The fourth document is a report of an interview with Slavko Maksimović in 1992, who was an Orthodox priest in Brčko (“Maksimović Interview”).³¹ In the interview Maksimović states *inter alia* that the Luka Camp was a place where people were taken for protection from undisciplined soldiers and no organised violence took place there.³² The Accused submits that this material is exculpatory and he was prejudiced by this late disclosure as he could have interviewed Maksimović and called him as a witness in his case.³³

15. The Accused seeks a finding that the Prosecution violated its disclosure obligations pursuant to Rule 68 with respect to the 105th Motion Documents and also violated its obligations pursuant to Rules 66(A)(ii) by the late disclosure of the Information Report.³⁴ In addition he requests that the Chamber (i) allow him to re-open his defence case to recall or call the witnesses in question; alternatively (ii) admit the 105th Motion Documents from the bar table or pursuant to Rule 92 *bis* (with respect to the Information Report); or (iii) draw an adverse inference against the Prosecution on the issues affected by the disclosure violations.³⁵

16. In addition the Accused requests the Chamber to hold an evidentiary hearing to determine why the Prosecution failed to comply on multiple occasions with its disclosure

²⁶ 105th Motion, para. 12.

²⁷ 105th Motion, para. 13.

²⁸ 105th Motion, para. 15.

²⁹ 105th Motion, para. 16.

³⁰ 105th Motion, para. 17.

³¹ 105th Motion, paras. 19.

³² 105th Motion, paras. 20.

³³ 105th Motion, paras. 21.

³⁴ 105th Motion, paras. 8, 14, 18, 22.

³⁵ 105th Motion, paras. 8, 14, 18, 22.

obligations and to assure itself that all Rule 68 material has now been disclosed.³⁶ In this regard he notes that the Prosecution has confirmed that it has identified additional Rule 68 material which it cannot disclose pending consent from the Rule 70 provider.³⁷ The Accused asks that the Chamber set a deadline before the issuance of its judgement for the Prosecution to disclose all remaining Rule 68 material or to provide the Accused with the substance of the Rule 68 information.³⁸

17. The Accused repeats his request that if the Chamber imposes a sentence in its final judgement, that the sentence be accordingly reduced as a remedy and sanction for the Prosecution's continuing violation of its disclosure obligations.³⁹

18. On 15 February 2016, the Prosecution filed the "Prosecution Response to 105th Disclosure Violation Motion" ("105th Response"), in which it argues that the 105th Motion should be denied.⁴⁰ The Prosecution acknowledges that the 105th Motion Documents contains marginally exculpatory material and therefore should have been disclosed earlier, expresses its regret for this failure, and seeks to explain why these errors were made.⁴¹

19. The Prosecution argues that the Accused has shown no prejudice with respect to the 105th Motion Documents which contain material of "negligible probative value" and/or duplicative of material already in evidence or in the Accused's possession.⁴² More specifically, with respect to the Information Report the Prosecution also points to contradictions which in its submission undermine its probative value.⁴³ With respect to the Media Interview the Prosecution notes that contrary to the Accused's assertion in the motion, it contains material which would contradict his own case with respect to events at Luka Camp.⁴⁴ In the absence of prejudice to the Accused, the Prosecution contends that the Accused's requested remedies should be denied.⁴⁵

20. The Prosecution also asserts that there is no basis for the Accused's request for an evidentiary hearing or for a deadline for the disclosure of all remaining Rule 68 information.⁴⁶

³⁶ 105th Motion, paras. 23.

³⁷ 105th Motion, paras. 24.

³⁸ 105th Motion, paras. 24.

³⁹ 105th Motion, para. 25.

⁴⁰ 105th Response, para. 1.

⁴¹ 105th Response, paras. 1, 3, 6, 15.

⁴² 105th Response, paras. 1, 2, 4, 10, 13.

⁴³ 105th Response, paras. 4-5.

⁴⁴ 105th Response, para. 16.

⁴⁵ 105th Response, paras. 1, 5, 12-13, 17.

⁴⁶ 105th Response, para. 18.

In this regard the Prosecution asserts *inter alia* that the Accused fails to explain why an evidentiary hearing is warranted to address untimely disclosure which is already addressed “in written motion practice”.⁴⁷ It also asserts that it is seeking clearance on an “expedited basis” for outstanding Rule 70 documents which have been identified as potentially exculpatory.⁴⁸ It concludes that the Chamber has repeatedly found that the Accused had engaged in a “purely numerical exercise” through many of the disclosure violation motions in this case and that this could not possibly warrant a reduction in any potential sentence given the “vast array of serious crimes” with which the Accused is charged.⁴⁹

21. On 17 February 2016, the Accused filed the “Request for leave to reply: 105th Motion for Motion for Finding of Disclosure Violation and for Remedial Measures” (“Request to Reply”), in which he seeks leave to reply to the 105th Response.⁵⁰ The Accused submits that the Prosecution in the 105th Response contends that the Chamber should consider the lack of credibility of the information in question in deciding whether or not the Accused was prejudiced by the disclosure violation.⁵¹ The Accused seeks leave to reply on whether the credibility of the withheld evidence is a proper consideration for determining prejudice arising from a disclosure violation.⁵²

22. On 18 February 2016, the Prosecution filed the “Prosecution Response to Request for Leave to Reply: 105th Motion for Finding of Disclosure Violation and for Remedial Measures” (“Response to Request to Reply”), in which it submits that the Request should be denied.⁵³ It argues *inter alia* that the credibility or probative value of the evidence is a key factor in determining the existence of prejudice, and it was for the Accused to explain how such evidence would have advanced his case in a meaningful way in spite of contradictions.⁵⁴

II. Applicable Law

23. Rule 66(A)(ii) of the Rules requires the Prosecution (within a time-limit prescribed by the Chamber or pre-trial Judge) to make available to the Defence “copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*”. The

⁴⁷ 105th Response, para. 18.

⁴⁸ 105th Response, para. 18.

⁴⁹ 105th Response, para. 19.

⁵⁰ Request to Reply, paras. 2–3.

⁵¹ Request to Reply, para. 4.

⁵² Request to Reply, para. 6.

⁵³ Response to Request to Reply, paras. 1, 4.

⁵⁴ Response to Request to Reply, paras. 2–3.

applicable deadline for the disclosure of all material falling within Rule 66(A)(ii) in this case was 7 May 2009.⁵⁵

24. 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.⁵⁶

25. 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.⁵⁷

III. Discussion

A. 104th Motion

26. Having reviewed the material referred to in the 104th Motion, the Chamber finds that the Statement, the Report and the Interview contain potentially exculpatory material and should thus have been disclosed by the Prosecution pursuant to Rule 68 of the Rules as soon as practicable. Given that these documents were in the Prosecution’s possession for a number of years but were only disclosed in October 2015, the Chamber finds that the Prosecution violated its disclosure obligations in this regard.

27. However, the Chamber finds that the Accused was not prejudiced by these disclosure violations. In reaching that conclusion the Chamber noted that the material contained in these documents is of negligible probative value and/or duplicative of material already in the Accused’s possession. In addition, to a great extent the information contained in the 104th Motion Documents are self-serving denials of crimes or involved the shifting of blame for certain events, which the Chamber finds to have little if any probative value.

28. The Chamber finds that the Accused’s claims that he was prejudiced by this late disclosure to be completely at odds with the reality that he already possessed very similar

⁵⁵ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

⁵⁶ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”), para. 179.

⁵⁷ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

material which he chose not to use. Particularly with respect to the Statement, the Chamber notes that the Accused persisted with making a claim of prejudice, even though the Prosecution had informed the Defence that duplicative material from the same witness had already been disclosed to him.⁵⁸ This is a further indication that the Accused has not taken the Chamber's instruction seriously and continues to file disclosure violation motions as a numerical exercise, even where it is clear to him that there is no prejudice.

29. In the absence of prejudice to the Accused, the requested remedies and sanctions are denied.

B. 105th Motion

30. At the outset, the Chamber considered the Accused's arguments raised in the Request to Reply and found that it had the necessary information to rule on the 105th Motion without any further submissions in this regard. The Request to Reply is therefore denied.

31. Having reviewed the Information Report, the Chamber finds that it contains potentially exculpatory material which should have been disclosed by the Prosecution as soon as practicable pursuant to Rule 68 of the Rules. In addition given that Žepenić was originally listed as a Prosecution witness, the Information Report, which is a report of an interview, should have also been disclosed pursuant to Rule 66(A)(ii) of the Rules by 9 May 2009. The Chamber therefore finds that the Prosecution violated Rule 66(A)(ii) and Rule 68 of the Rules with respect to the late disclosure of the Information Report.

32. The Chamber also finds that the Tucker Report, Media Interview and Maksimović Interview contain potentially exculpatory material and should have been disclosed by the Prosecution as soon as practicable pursuant to Rule 68 of the Rules. Given that this material was in the Prosecution's possession for a number of years and was not disclosed until 2015, the Chamber finds that the Prosecution violated Rule 68 of the Rules with respect to this late disclosure.

33. However, the Chamber finds that the Accused was not prejudiced by these disclosure violations. In reaching that conclusion the Chamber found that the 105th Motion Documents did not contain any material which was of significance. The 105th Motion Documents only included information of marginal probative value and/or information which was duplicative of material which the Accused already possessed. This again demonstrates the failure by the Accused to focus on significant material which has a genuine impact on his case.

⁵⁸ 104th Response, para. 6.
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34. In the absence of prejudice to the Accused, the requested remedies and sanctions are denied.

35. The Motions are the latest in the long sequence of motions filed by the Accused which demonstrates that he has failed to pay regard to the Chamber's repeated instruction that the filing of disclosure violation motions should not be a purely numerical exercise and that he should instead focus on disclosure violations where there is demonstrable prejudice.⁵⁹ The Chamber considers this process to be a waste of valuable judicial resources which in no way advances the interests of the Accused. Having regard to these factors and given that the Chamber has scheduled the pronouncement of the Judgement in this case on 24 March 2016,⁶⁰ the Chamber instructs the Accused, that should he choose to file a further disclosure violation motion, a consolidated motion should be filed by 26 February 2016.

⁵⁹ June 2015 Decision, para. 18; Decision on Accused's Second Motion for New Trial for Disclosure Violations, 14 August 2014, para. 15.

⁶⁰ Scheduling Order for Pronouncement of the Judgement, 18 February 2016.

IV. Disposition

36. For the foregoing reasons, the Chamber, pursuant to Rules 54, 66(A)(ii), 68, 68 *bis* and 89 of the Rules, hereby:

- (a) **DENIES** the Request to Reply;
- (b) **GRANTS** by majority, Judge Kwon dissenting,⁶¹ the Motions in part and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the 104th Motion Documents and 105th Motion Documents; and violated Rule 66(A)(ii) of the Rules with respect to its late disclosure of the Information Report; and
- (c) **DENIES** the remainder of the Motions.

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



Judge O-Gon Kwon
Presiding

Dated this eighteenth day of February 2016
At The Hague
The Netherlands

[Seal of the Tribunal]

⁶¹ 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 Rules 66(A)(ii) and 68 of the Rules, in the absence of prejudice to the Accused, he considers that the Motions should be dismissed in their entirety.