



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: 4 March 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: 4 March 2016

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S 106TH DISCLOSURE VIOLATION MOTION

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 “106th Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly on 26 February 2016 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the 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 four documents which in his submission are exculpatory but were only disclosed by the Prosecution in February 2016 (“Documents”).² The Accused submits that this material was disclosed by the Prosecution pursuant to Rule 68 in a batch of approximately 1,000 documents which he is continuing to review.³

2. The first document is a statement given by Simo Mišković, the former president of the SDS in Prijedor in 1998 in which he states, *inter alia*, that the SDS never aimed at “ethnic cleansing or domination” (“First Document”).⁴ The Accused claims he was prejudiced by the Prosecution’s failure to disclose this exculpatory material as he could have used it as prior consistent statement when the witness testified in this case.⁵

3. The second document is a statement of Milan Anđić in 1997 in which he claims that Nusret Sivac had written falsehoods about events in Omarska and Kozarac (“Second Document”).⁶ The Accused submits he was prejudiced by this disclosure violation as he could have interviewed and called Anđić as a witness to challenge Sivac’s evidence in this case.⁷

4. The third and fourth documents are statements of witnesses whose identities have been redacted (“Third Document” and “Fourth Document”, respectively).⁸ In both of these documents the witnesses claim that Mlādo Radić was not a commander of Omarska camp and

¹ Motion, para. 1.

² Motion, para. 2.

³ Motion, paras. 2–3.

⁴ Motion, paras. 4–5.

⁵ Motion, para. 7.

⁶ Motion, paras. 9–10.

⁷ Motion, paras. 10–13.

⁸ Motion, paras. 14–15.

that they had never heard about him harming any of the prisoners.⁹ The Accused submits that this contradicts Adjudicated Fact 1156 which provides that Radić was present during beatings of detainees.¹⁰ He submits that he was prejudiced by this disclosure violation as he could have made efforts to identify and interview the witnesses in question and obtain written statements pursuant to Rule 92 *bis* which would have rebutted Adjudicated Fact 1156.¹¹

5. The Accused requests that the Chamber make a finding that the Prosecution violated its disclosure obligations pursuant to Rule 68 with respect to the Documents.¹² With respect to the First Document he requests that the Chamber (i) allow him to re-open his case to admit the First Document and (ii) draw an adverse inference with respect to the issues affected.¹³ With respect to the Second Document the Accused requests that the Chamber exclude the testimony of Nusret Sivac or allow him to re-open his case to call Milan Anđić as a witness.¹⁴ With respect to the Fourth Document and Fifth Document, the Accused further requests that the Chamber strike Adjudicated Fact 1156 or allow him to re-open his case to obtain the written statements of the two witnesses and offer them pursuant to Rule 92 *bis*.¹⁵

6. The Accused repeats his request for an evidentiary hearing to determine why the Prosecution has failed to comply on multiple occasions with its disclosure obligations pursuant to Rule 68 and to allow the Chamber to assure itself that all Rule 68 material has been disclosed before issuing its judgement.¹⁶

7. On 26 February 2016, the Chamber instructed the Prosecution by e-mail that pursuant to Rule 126 *bis* of the Rules, it should file an expedited response to the Motion no later than 4 March 2016. In accordance with this instruction, on 3 March 2016, the Prosecution publicly filed the “Prosecution Response to 106th Motion for Finding of Disclosure Violation and for Remedial Measures” (“Response”) with a confidential appendix.

8. The Prosecution submits that the Motion should be denied and notes that two of the four documents referred to in the Motion had long been in the possession of the Accused.¹⁷ The

⁹ Motion, para. 16.

¹⁰ Motion, para. 17.

¹¹ Motion, para. 19.

¹² Motion, paras. 8, 13, 20.

¹³ Motion, para. 8.

¹⁴ Motion, para. 13.

¹⁵ Motion, para. 20.

¹⁶ Motion, paras. 22–23.

¹⁷ Response, paras. 1, 12.

Prosecution asserts that while the Documents contain material of marginal exculpatory value, they are of negligible probative value and/or duplicative of material already in the Accused's possession or in evidence.¹⁸ Given that the Accused has failed to establish any prejudice, it submits the requested remedies should be denied.¹⁹

9. The Prosecution points to specific examples of duplicative material which were in the Accused's possession or publicly available which he could have used if he "had any genuine desire to do so".²⁰ It also points to contradictions between the Accused's submissions in the Motion and his own case with respect to specific issues.²¹

10. The Prosecution also asserts that the Accused's request for an evidentiary hearing should be denied given that the Motion is yet another example of a "numerical exercise and a waste of judicial resources by the Accused".²² It also notes that the Accused has failed to offer a reason why an evidentiary hearing was required when written motion practice have been sufficient to dispose of previous motions.²³

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.²⁴

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 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.²⁵

¹⁸ Response, paras. 1–2.

¹⁹ Response, paras. 1, 4, 9, 15.

²⁰ Response, paras. 3–4, 8, 13 and confidential Appendix A.

²¹ Response, para. 14.

²² Response, para. 16.

²³ Response, para. 16.

²⁴ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("Kordić and Čerkez Appeal Judgement"), para. 179.

²⁵ *Kordić and Čerkez Appeal Judgement*, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

III. Discussion

13. At the outset the Chamber notes that the Third Document and Fourth Document were already disclosed to the Accused several years ago, and that therefore there is no disclosure violation in this regard. The Chamber finds that this is emblematic of the Accused's approach to disclosure violations, and demonstrates that these motions have been filed as a numerical exercise without any regard to actual prejudice or genuinely advancing his case.

14. Having reviewed the remaining material referred to in the Motion, the Chamber finds that the First Document and Second Document contain potentially exculpatory material and should thus have been disclosed by the Prosecution pursuant to Rule 68 of the Rules as soon as practicable. The failure to do so amounted to a disclosure violation. However, the Chamber finds that the Accused was not prejudiced by this violation given that the material contained in these documents was of negligible probative value and/or duplicative of material already available to the Accused. In addition, to a great extent the information contained 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. The Chamber finds that the First Document and Second Document add nothing new or of significance and that the Accused's claim of prejudice is completely baseless.

15. In the absence of prejudice to the Accused, the requested remedies are denied.

IV. Disposition

16. 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,²⁶ the Motion in part and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the First Document and Second Document; and
- (b) **DENIES** the remainder of the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this fourth day of March 2016
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ 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.