



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: 16 April 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: 16 April 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S EIGHTY-NINTH AND NINETIETH DISCLOSURE
VIOLATION MOTIONS**

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 “Motion for Extension of Time to Respond to Motion to Re-open Prosecution Case and 89th Disclosure Violation Motion”, filed on 13 March 2014 (“Eighty-Ninth Motion”), and the Accused’s “Response to Motion For Rebuttal Evidence and 90th Disclosure Violation Motion”, filed on 17 March 2014 (“Ninetieth Motion”) (together, “Motions”), and hereby issues its decision thereon.

I. Background and Submissions

1. The Motions were included in filings related to two motions filed by the Office of the Prosecutor (“Prosecution”) requesting the re-opening of its case and the calling of rebuttal witnesses.¹ The Chamber has already dealt with those parts of the Motions which relate to the requested re-opening and rebuttal.² This decision will therefore only address the pending disclosure violation issues referred to in the Motions.

A. Eighty-Ninth Motion

2. In the Eighty-Ninth Motion, the Accused argues that the Prosecution has violated Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) in relation to its untimely disclosure on 4 March 2014 of an April 2002 Tribunal report on efforts made to locate bodies buried at Tomašica (“Report”).³ The Accused contends that the Report is exculpatory as it shows the efforts made and the subsequent failure to find the Tomašica grave site which the Prosecution contends contains 5,000 bodies.⁴

3. The Accused contends that he was prejudiced by the late disclosure of the Report as he could have used this information to put the proposition to Bogdan Subotić on re-direct examination that exhumations had been conducted at Tomašica and no bodies found.⁵ The

¹ The Eighty-Ninth Motion was part of a filing regarding the “Prosecution Motion to Re-Open its Case with Public Appendix A and Confidential Appendix B”, 4 March 2014, and the Ninetieth Motion was part of the Accused’s response to the “Prosecution Motion to Admit Evidence in Rebuttal”, 4 March 2014.

² Decision on Prosecution Motion to Re-open its Case and Prosecution Motion for Protective Measures for Witness KDZ614, 20 March 2014; Decision on Prosecution’s Motion to Admit Evidence in Rebuttal, 21 March 2014 (“Rebuttal Decision”).

³ Eighty-Ninth Motion, para. 33.

⁴ Eighty-Ninth Motion, paras. 34–35.

⁵ Eighty-Ninth Motion, para. 36.

Accused seeks a finding that the Prosecution violated its disclosure obligations pursuant to Rule 68 by failing to disclose the Report as soon as practicable.⁶

4. On 21 March 2014, the Prosecution filed the “Prosecution Response to Karadžić’s 89th Disclosure Violation Motion” (“Eighty-Ninth Response”), arguing that the Eighty-Ninth Motion should be dismissed.⁷ It submits that the Report does not contain any Rule 68 material and was disclosed as soon as it became relevant, that the Accused has failed to demonstrate any prejudice, and that in the absence of prejudice is not entitled to any remedy.⁸

5. The Prosecution submits that there is no exculpatory value in the Report.⁹ The Report details a failed excavation in 2002 of the Tomašica site, but does not suggest that a mass grave did not exist.¹⁰ In any event, the Prosecution further submits that the Accused has failed to show any prejudice as a result of not being able to use the Report with Subotić during his testimony as it would not affect his testimony in any way or the reason Subotić first inquired into the mass grave in 1993.¹¹ The Prosecution concludes that the Eighty-Ninth Motion is frivolous as it seeks to advance a proposition, the non-existence of the Tomašica grave site, which the Accused himself acknowledges is untrue.¹²

B. Ninetieth Motion

6. In the Ninetieth Motion, the Accused argues that the Prosecution has violated Rule 68 of the Rules in relation to its untimely disclosure of three statements of witnesses the Prosecution sought to call in rebuttal, Ramo Hodžić, Dževad Lojo, and Safet Avdić (“Statements”), which the Accused contends contain exculpatory material.¹³ The Prosecution only disclosed the Statements in March 2014 even though they had been in its possession as early as 1994.

7. The Accused contends the Statements contain exculpatory material as they show i) there was no intent to destroy Bosnian Muslims in municipalities charged in Count One of the Third Amended Indictment (“Indictment”);¹⁴ ii) there was no policy to mistreat or murder prisoners at the KP Dom Foča; iii) the crimes committed were not part of a joint criminal enterprise and

⁶ Eighty-Ninth Motion, paras. 37–38.

⁷ Eighty-Ninth Response, paras. 1, 9.

⁸ Eighty-Ninth Response, para. 1.

⁹ Eighty-Ninth Response, paras. 2–3.

¹⁰ Eighty-Ninth Response, paras. 2–3.

¹¹ Eighty-Ninth Response, paras. 4, 6–8.

¹² Eighty-Ninth Response, paras. 8–9.

¹³ Ninetieth Motion, paras. 4–5, 7, 10.

¹⁴ Ninetieth Motion, paras. 6, 9, 12–13.

were also not planned, instigated or ordered by the Accused;¹⁵ and iv) the events in Foča municipality do not meet the prerequisite for crimes against humanity as they took place in the context of armed clashes and not during an attack on the civilian population.¹⁶

8. More particularly, the Accused argues the statement given by Hodžić (“Hodžić Statement”) is exculpatory because it contains information that a detainee was arrested, not mistreated, and then exchanged, and thus shows there was no intent to destroy the Bosnian Muslims in Bratunac municipality.¹⁷ According to the Accused, the statement given by Lojo (“Lojo Statement”) is exculpatory because it contains information that the warden at KP Dom in Foča, Milorad Krnojelac, “behaved correctly” during a meeting with prisoners, and indicated that he and the Foča Crisis Staff members considered allowing prisoners to leave to Montenegro.¹⁸ He also argues that the statement given by Avdić (“Avdić Statement”) is exculpatory because it shows that events in Foča were part of an armed conflict between Bosnian Muslims and Bosnian Serbs.¹⁹ He further submits that Bosnian Muslims were released from KP Dom and allowed to return home, which shows there was no intent to destroy the Bosnian Muslims in Foča municipality.²⁰ Finally, he contends that the Avdić Statement is exculpatory as it shows that the food in KP Dom improved after Bosnian Muslim detainees met with Krnojelac.²¹

9. The Accused seeks a finding that the Prosecution violated its disclosure obligations pursuant to Rule 68 by its failure to timely disclose the Statements.²² As a sanction, the Accused requests that the Chamber preclude the Prosecution from calling the three witnesses in its rebuttal case.²³ The Accused further requests the Chamber to order the Prosecution to disclose to him the statements of all persons it has interviewed about the events that are the subject of the Indictment.²⁴

10. On 21 March 2014, the Prosecution filed the “Prosecution Response to Karadžić’s 90th Motion for Finding of Disclosure Violation” (“Ninetieth Response”), arguing that the Ninetieth Motion should be dismissed, and the requested remedies denied, given that the Accused has failed to establish the Statements contain Rule 68 material and has neither alleged, nor

¹⁵ Ninetieth Motion, paras. 9, 13.

¹⁶ Ninetieth Motion, para. 11.

¹⁷ Ninetieth Motion, para 6.

¹⁸ Ninetieth Motion, para. 8.

¹⁹ Ninetieth Motion, para. 11.

²⁰ Ninetieth Motion, para. 12.

²¹ Ninetieth Motion, para 13.

²² Ninetieth Motion, para. 14.

²³ Ninetieth Motion, para. 18.

demonstrated, that he was prejudiced by the disclosure.²⁵ The Prosecution asserts that the Accused's efforts to exclude the very evidence which he alleges is exculpatory "highlights the lack of prejudice".²⁶

11. The Prosecution argues that the Accused's contentions that the Statements are exculpatory are based on misconceptions regarding the Prosecution's case, and rather the Statements corroborate the evidence presented in support of its case.²⁷ Specifically, the Prosecution argues the Statements contain evidence consistent with its case regarding (1) the large-scale forcible transfer and deportation of non-Serbs from municipalities; (2) the killing, abuse, and mistreatment of detainees at KP Dom; and (3) the presence of resistance to the Bosnian Serb attack of Foča and the release of a number of Bosnian Muslims from the KP Dom.²⁸

12. The Prosecution further argues that even if the Statements have marginal exculpatory value, the Accused has failed to articulate any prejudice arising from the late disclosure, and in fact there was no prejudice because the alleged exculpatory material "adds nothing new or of any significance to material already in the Accused's possession" and is duplicative of evidence already elicited in the case.²⁹ It asserts that the remedies requested are disproportionate to any disclosure violation and counter-productive to the Accused's case.³⁰ In any event, the Prosecution concludes that in the absence of prejudice the Accused is not entitled to any remedies and that by seeking a remedy excluding the allegedly exculpatory material the Accused implicitly acknowledges the Statements are of no value to him.³¹

II. Applicable Law

13. 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

²⁴ Ninetieth Motion, para. 17.

²⁵ Ninetieth Response, para. 1.

²⁶ Ninetieth Response, para. 1.

²⁷ Ninetieth Response, paras. 2–12.

²⁸ Ninetieth Response, paras. 2–12.

²⁹ Ninetieth Response, paras. 13–16.

³⁰ Ninetieth Response, para. 18.

³¹ Ninetieth Response, paras. 17, 19.

a *prima facie* case making out the probable exculpatory or mitigating nature” of the materials in question.³²

14. 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.³³

III. Discussion

A. Eighty-Ninth Motion

15. Having reviewed the Report, the Chamber is not convinced that its content, including evidence of failed excavations at different locations at the Tomašica site and the failure to locate the alleged mass grave site in 2002, is potentially exculpatory. The Chamber therefore denies the Eighty-Ninth Motion in its entirety. The Chamber notes that the Eighty-Ninth Motion borders on the frivolous and repeats its instruction that the Accused should not consider filing disclosure violation motions to be a numerical exercise and should focus on examples where there is demonstrable prejudice.³⁴

B. Ninetieth Motion

16. The Chamber initially notes that the portion of the Ninetieth Motion seeking to preclude the Prosecution from calling any of the three witnesses in its rebuttal case is moot as the Chamber has denied the Prosecution’s rebuttal motion.³⁵

17. Having reviewed the Hodžić Statement, the Chamber is not satisfied that a reference to the exchange of Bosnian Muslim detainees is potentially exculpatory given that it is consistent with the Prosecution’s allegations with respect to the large-scale forcible transfer and/or deportation of non-Serbs from municipalities, including municipalities where genocide is alleged. However, the Chamber finds the Hodžić Statement is potentially exculpatory to the extent that it suggests that the witness was not beaten or mistreated in Pale while awaiting a prisoner exchange.

³² *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”), para. 179.

³³ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

³⁴ Decision on Accused’s Eighty-Seventh Disclosure Violation Motion, 10 March 2014, para 14; Decision on Accused’s Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions, 11 March 2013, para. 24.

³⁵ Rebuttal Decision.

18. With respect to the Lojo Statement, the Chamber is not satisfied that the information which simply suggests that Krnojelac and the Foča Crisis Staff considered exchanging or releasing some detainees is potentially exculpatory. However, the Chamber finds that the Lojo Statement is potentially exculpatory to the extent that it suggests that Krnojelac behaved “correctly” during a meeting with the witness and that the witness never heard of Krnojelac using his authority to abuse detainees.³⁶

19. The Chamber does not find that the information in the Avdić Statement which suggests that there were attacks against Bosnian Serbs in Foča is potentially exculpatory or that it shows that the alleged crimes which took place in the municipality were not part of an attack against the civilian population. However, the Chamber finds that information suggesting that some Bosnian Muslims were released from detention and that detainees’ food at the KP Dom Foča improved after the witness spoke about this issue to Krnojelac in July 1992 is potentially exculpatory.

20. The Chamber therefore finds that the Prosecution violated its disclosure obligations pursuant to Rule 68 of the Rules by failing to disclose the Statements as soon as practicable. However, having reviewed the Statements, the Chamber is not convinced that they are of such significance that the Accused was prejudiced by their late disclosure. In this regard, the Chamber notes that the potentially exculpatory material found in the Statements is equivocal at best particularly in light of other references in the Statements which are far from exculpatory. Additionally, the Statements add nothing new or of any significance to material already in the Accused’s possession or admitted into evidence.³⁷ In the absence of prejudice to the Accused there is no basis to grant the requested remedies.

IV. Disposition

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

³⁶ 65 *ter* number 26087 pp. 2, 4.

³⁷ D3314 (Witness statement of Radojica Mladenović dated 1 April 2013), para. 56; D2767 (Witness Statement of Milutin Vujičić dated 14 January 2013), para. 5; KDZ239, T. 18917 (15 September 2011); P3344 (Letter from KPD Foča’s Acting Warden to Foča Crisis Staff, 15 May 1992); P3345 (List of people to be released from KPD Foča, 7 May 1992), pp 1–2; P3347 (Order of Foča Military Post, 7 September 1992); D3318 (Foča Crisis Staff certificate of release, 26 April 1992); D4307 (Witness Statement of Mitar Rašović dated 2 February 2014), para. 20; Mitar Rašović, T. 46756–46759, T. 46794–46795, T. 46809–46810 (11 February 2014); D2716 (Testimony of Milorad Krnojelac in *Prosecutor v. Krnojelac*), T. 7630–7634, 7664–7665, 7904, 8096–8101.

- a) **GRANTS** by majority, Judge Kwon dissenting,³⁸ the Ninetieth Motion in part, and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the Statements; and
- b) **DENIES** the Motions in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this sixteenth day of April 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁸ 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 Motions should be dismissed in their entirety