



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: 10 March 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: 10 March 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S EIGHTY-SEVENTH 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 “87th Motion for Finding of Disclosure Violation and for Remedial Measures (February 2014)”, filed publicly on 19 February 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 Rules 66(A)(ii) and 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) in relation to its untimely disclosure of information provided by three witnesses whose evidence has been admitted pursuant to Rule 92 *bis* in this case (“Documents”).¹ The Documents consist of information reports and proofing notes pertaining to the witnesses. The Documents were only disclosed by the Prosecution on 17 February 2014 even though they had been in its possession for several months.² With respect to one of the Documents given by KDZ024 (“KDZ024 Document”), the Accused contends that it is also exculpatory and should have been disclosed pursuant to Rule 68.³

2. The Accused seeks an express finding that the Prosecution violated its disclosure obligations pursuant to Rules 66(A)(ii) and 68 by the late disclosure of the Documents.⁴ As a remedy for the late disclosure of the KDZ024 Document, the Accused requests that KDZ024 be called for cross-examination to allow the exculpatory information to be elicited or, in the alternative, that the Chamber grant his motion for the admission of Božidar Popović’s statement pursuant to Rule 92 *bis*.⁵ The Accused renews his request that he be given “open-file disclosure” with respect to the Prosecution’s evidence collection.⁶

3. On 4 March 2014, the Prosecution filed the “Prosecution Response to Karadžić’s 87th Motion for Finding of Disclosure Violation and for Remedial Measures (February 2014)”

¹ Motion, paras. 1–2.

² Motion, paras. 2–3.

³ Motion, para. 5.

⁴ Motion, paras. 1, 3, 6.

⁵ Motion, para. 7 referring to Motion to Admit Statement Pursuant to Rule 92 *bis*: Božidar Popović, 11 February 2014.

⁶ Motion, para. 9.

(“Response”). It submits that the Motion should be dismissed given that the Accused has failed to argue or demonstrate that he was prejudiced by the late disclosure of the Documents.⁷

4. The Prosecution acknowledges the Documents should have been disclosed earlier pursuant to Rule 66(A)(ii) and expresses its regret for this late disclosure.⁸ However, the Prosecution does not accept that the KDZ024 Document should have been disclosed pursuant to Rule 68 given that it is a proofing note which summarises identical information which had already been disclosed to the Accused with respect to this witness.⁹

5. In any event, the Prosecution submits that the Accused failed to show how he was prejudiced by the late disclosure of the Documents given that they add nothing of significance to material already available to the Accused.¹⁰ It argues that in the absence of prejudice, the Accused is not entitled to any remedy and that in event the remedies sought in the Motion are “impracticable, disproportionate, and unwarranted”.¹¹

6. More specifically the Prosecution submits that the Accused has failed to provide a reason why the Chamber should re-consider its decision to admit KDZ024’s evidence pursuant to Rule 92 *bis* and require that the witness be called for cross-examination.¹² In addition, the Prosecution argues that the information found in the KDZ024 Document about Božidar Popović stopping the killing of some prisoners from Manjača camp, was already contained in material previously disclosed to the Accused and also admitted pursuant to Rule 92 *bis* for KDZ024, and is thus of such limited significance that cross-examination would add little if anything to the Accused’s case.¹³

7. The Prosecution also submits that the Accused’s request that the statement of Božidar Popović be admitted pursuant to Rule 92 *bis* as a remedy for the late disclosure of the KDZ024 Document should be denied.¹⁴ The Prosecution argues that the Accused cannot circumvent the rules for admission in this manner and that the admissibility of Popović’s statement should be judged on its merits pursuant to Rule 92 *bis*.¹⁵

⁷ Response, para. 1.

⁸ Response, para. 1.

⁹ Response, para. 2.

¹⁰ Response, paras. 3–6.

¹¹ Response, paras. 1, 7.

¹² Response, para. 8.

¹³ Response, para. 8.

¹⁴ Response, para. 9.

¹⁵ Response, para. 9.

8. The Prosecution observes that the Accused's request for "open-file disclosure" has already been rejected by the Chamber on a number of occasions, and that the Accused is thus requesting reconsideration without asserting a clear error of reasoning or pointing to "any particular circumstance justifying reconsideration in order to prevent an injustice".¹⁶

II. Applicable Law

9. Rule 66(A)(ii) requires the Prosecution (within a time-limit prescribed by the Trial 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*".

10. 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.¹⁷

11. 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.¹⁸

III. Discussion

12. The Chamber finds that the Documents do fall under Rule 66(A)(ii) and that the Prosecution violated its disclosure obligations by failing to disclose this material sooner than 17 February 2014 given that they had been in the Prosecution's possession for several months before their disclosure. This is not an acceptable delay.

13. The Prosecution contends that it was not under an obligation to disclose the KDZ024 Document pursuant to Rule 68 because it was information provided in summary form which was identical to previously disclosed material.¹⁹ The Chamber does not accept this argument and

¹⁶ Response, para. 10.

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

¹⁸ *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

¹⁹ Motion, para. 2.

finds that since the KDZ024 Document contains potentially exculpatory information, it should have also been disclosed pursuant to Rule 68 as soon as practicable. However, given that this newly disclosed material adds nothing new to material already disclosed to the Accused, the Chamber finds that he was not prejudiced by the late disclosure of the KDZ024 Document.

14. While the Chamber finds that the Prosecution has violated its disclosure obligations, it is not satisfied that the Documents are of such significance that the Accused has been prejudiced by their late disclosure. In reaching that conclusion the Chamber reviewed the Documents and found them to be brief information reports which are identical to, summarise or make minor corrections to other material which had already been disclosed to the Accused. The Accused has yet again failed to even make an attempt to show how the disclosure of such duplicative or insignificant material caused him prejudice. The Chamber reminds the Accused that the filing of disclosure violation motions should not be a numerical exercise directed towards documenting every disclosure violation, and should focus on examples where there is demonstrable prejudice.²⁰

15. In the absence of prejudice to the Accused, there is no basis to grant the remedies sought with respect to the Documents.

IV. Disposition

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

- a) **GRANTS**, by majority, Judge Kwon dissenting,²¹ the Motion in part, and finds that the Prosecution violated Rules 66(a)(ii) of the Rules with respect to its late disclosure of the Documents and violated Rule 68 of the Rules with respect to the KDZ024 Document; and

²⁰ Decision on Accused's Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions, 11 March 2013, para. 24.

²¹ 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 Motion should be dismissed in its entirety.

b) **DENIES** the Motion in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this tenth day of March 2014
At The Hague
The Netherlands

[Seal of the Tribunal]