



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: 21 January 2014

Original: English

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**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:** 21 January 2014

**PROSECUTOR**

**v.**

**RADOVAN KARADŽIĆ**

***PUBLIC***

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**DECISION ON ACCUSED'S EIGHTY-FIFTH DISCLOSURE VIOLATION MOTION**

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**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 “85<sup>th</sup> Motion for Finding of Disclosure Violation and for Remedial Measures (December 2013)”, filed on 18 December 2013 (“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 of four documents (“Documents”) which, in his submission, contain information of an exculpatory nature.<sup>1</sup> The Documents were only disclosed by the Prosecution in December 2013 even though they had been in its possession since 2009.<sup>2</sup>

2. The Accused contends that the Documents are exculpatory with respect to allegations and events in Sarajevo (“First Document”), Zvornik (“Second Document”), and Srebrenica (“Third Document” and “Fourth Document”).<sup>3</sup>

3. The Accused submits that the First Document is exculpatory as it is consistent with his case that the shelling and sniping in Sarajevo was neither directed at civilians nor indiscriminate but was the result of legitimately returning fire.<sup>4</sup> The Accused argues that he was prejudiced by this late disclosure as he could have used the First Document in his cross-examination of Prosecution witnesses David Harland and Anthony Banbury and his direct examination of Yasushi Akashi who authored this document.<sup>5</sup>

4. With respect to the Second Document, the Accused contends that it contradicts the allegation that there was a policy or joint criminal enterprise to commit violent acts against Bosnian Muslims and shows that there was no genocidal intent in Zvornik as the authorities had the opportunity to destroy and kill Bosnian Muslims but chose not to do so.<sup>6</sup> The Accused submits that he was prejudiced by this late disclosure as he could have used it during his cross-

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<sup>1</sup> Motion, para. 1.

<sup>2</sup> Motion, para. 1.

<sup>3</sup> Motion, paras. 2–4, 6–7, 9–12.

<sup>4</sup> Motion, para. 4.

<sup>5</sup> Motion, para. 5.

<sup>6</sup> Motion, para. 7.

examination of Prosecution witnesses who testified with respect to Zvornik and to also investigate the incident referred to and call defence witnesses to testify about it.<sup>7</sup>

5. In relation to the Third Document and Fourth Document the Accused argues that they directly contradict the evidence of Srećko Aćimović about receiving a coded telegram from the Zvornik Brigade requesting a platoon of soldiers for executions in July 1995.<sup>8</sup> Aćimović's evidence was admitted pursuant to 92 *bis* of the Rules.<sup>9</sup> The Accused alleges that he was prejudiced by this late disclosure as he could have used this information to request that Aćimović be called for cross-examination and to call the two officers named in the Third Document and Fourth Document as witnesses in his defence.<sup>10</sup>

6. The Accused requests the Chamber to make a finding that the Prosecution violated Rule 68 of the Rules by the late disclosure of the Documents.<sup>11</sup> The Accused further asks that he be granted an additional four hours for his defence case and renews his request that he be given "open-file disclosure" with respect to the Prosecution's evidence collection.<sup>12</sup> The Accused also requests that Aćimović be called for cross-examination and that the First Document be admitted as an exhibit.<sup>13</sup>

7. On 7 January 2014, the Accused filed the "Supplemental Submission in Support of 85<sup>th</sup> Motion for Finding of Disclosure Violation and for Remedial Measures (December 2013)" ("Supplemental Submission") in which he attaches a newspaper editorial criticising the judiciary in the United States of America for failing to provide meaningful sanctions and remedies for disclosure violations and suggests the need for open-file disclosure.

8. On 13 January 2014, the Prosecution filed the "Prosecution Response to Karadžić's 85<sup>th</sup> Motion for Finding of Disclosure Violation and for Remedial Measures (December 2013)" ("Response"). It submits that the Motion and Supplemental Submission should be dismissed given that the Accused has failed to show that he was prejudiced by the late disclosure of the Documents.<sup>14</sup>

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<sup>7</sup> Motion, para. 8.

<sup>8</sup> Motion, paras. 9–12.

<sup>9</sup> Motion, para. 9.

<sup>10</sup> Motion, para. 13.

<sup>11</sup> Motion, para. 14.

<sup>12</sup> Motion, paras. 17–18.

<sup>13</sup> Motion, para. 17.

<sup>14</sup> Response, paras. 1, 5.

9. The Prosecution claims that the Documents are “generally duplicative” of other material already disclosed to the Accused and were discovered following searches undertaken for the purpose of other cases before the Tribunal.<sup>15</sup>

10. The Prosecution acknowledges that the First Document, Third Document, and Fourth Document should have been disclosed pursuant to Rule 68 and expresses its regret for this error.<sup>16</sup>

11. With respect to the Second Document, the Prosecution argues that it does not fall under Rule 68 of the Rules.<sup>17</sup> The Prosecution submits that evidence that a Muslim resident of the Federal Republic of Yugoslavia (“FRY”) was allowed to leave Zvornik by Bosnian Serb authorities does not contradict the allegations of genocide in the municipality.<sup>18</sup> In support of this submission the Prosecution contends that its case is not that the Bosnian Serb authorities in Zvornik sought to kill every Muslim in the area and therefore even if the Second Document shows that the authorities had the opportunity to kill a Muslim found in the municipality and chose not to do this is “beside the point”.<sup>19</sup>

12. In any event, the Prosecution submits that the Accused suffered no prejudice as a result of the late disclosure of the Documents given that the newly disclosed material is duplicative or adds nothing new or of significance to material already in the Accused’s possession or publicly available.<sup>20</sup> In addition, the Prosecution cites examples of where the Accused has already elicited similar evidence from witnesses who have testified to date or has cross-examined witnesses on the issues raised in the Documents.<sup>21</sup>

13. With respect to the Third Document and Fourth Document, the Prosecution submits that their timely disclosure would not have altered the Accused’s strategy, since he already opposed the admission of Aćimović’s evidence pursuant to Rule 92 *bis* and requested that he be cross-examined.<sup>22</sup> The Prosecution submits that the Accused fails to argue, let alone establish, that the timely disclosure of the Third Document and Fourth Document would warrant reconsideration of the Chamber’s decision to admit Aćimović’s evidence pursuant to Rule 92 *bis*.<sup>23</sup> The Prosecution further submits that based on the information already available to the Accused, he

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<sup>15</sup> Response, para. 2.

<sup>16</sup> Response, para. 2.

<sup>17</sup> Response, para. 3.

<sup>18</sup> Response, para. 3.

<sup>19</sup> Response, para. 4.

<sup>20</sup> Response, paras. 5–6, 8, 10–12.

<sup>21</sup> Response, paras. 7, 9.

<sup>22</sup> Response, para. 14.

could have called the two officers named in the Third Document and Fourth Document to testify in his case.<sup>24</sup>

14. The Prosecution submits that the remedies sought by the Accused are impracticable, disproportionate and unwarranted, and that in the absence of prejudice, no remedy is warranted.<sup>25</sup> The Prosecution further argues that there are no grounds to grant additional time for the defence case given that (i) the Accused already possessed substantially similar information which he put to witnesses or declined to do so; and (ii) the disclosed information is of such limited significance that putting the material to witnesses would have added little to his case.<sup>26</sup> In the alternative, the Prosecution contends that if the Chamber considers that additional time is needed, rather than granting an additional four hours, the time taken for example for the cross-examination of Aćimović could not be counted against the 325 hours allotted to the Accused to present his defence.<sup>27</sup>

15. The Prosecution does not object to the admission of the First Document into evidence should it be tendered through a bar table motion or through an appropriate Defence witness.<sup>28</sup>

16. 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".<sup>29</sup>

## **II. Applicable Law**

17. 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.<sup>30</sup>

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<sup>23</sup> Response, paras. 14–15.

<sup>24</sup> Response, para. 14.

<sup>25</sup> Response, para. 1.

<sup>26</sup> Response, para. 15.

<sup>27</sup> Response, para. 16.

<sup>28</sup> Response, para. 18.

<sup>29</sup> Response, para. 17.

<sup>30</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), para. 179.

18. 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.<sup>31</sup>

### **III. Discussion**

19. At the outset the Chamber notes that the Supplemental Submission was neither called for nor warranted in this case and borders on the frivolous. The Chamber shall therefore not consider it further.

20. Having reviewed the Documents, the Chamber finds that they are potentially exculpatory or affect the credibility of Prosecution witnesses and should have thus been disclosed as soon as practicable pursuant to Rule 68 of the Rules. While the Prosecution contests the exculpatory nature of the Second Document, the Chamber finds that while the document may be consistent with the Prosecution's allegations, to the extent that it shows that Bosnian Serb authorities assisted a Muslim citizen to cross a bridge from Zvornik to the FRY, it is potentially exculpatory. Given that the Documents were in the Prosecution's possession since 2009 but were only disclosed in December 2013, the Chamber finds that the Prosecution violated its disclosure obligations with respect to this delayed disclosure.

21. The Chamber finds that the Prosecution's explanation that this material was "discovered as a result of searches undertaken for the purpose of other cases before this Tribunal" to be unsatisfactory. The Chamber instructs the Prosecution in its next monthly periodic disclosure report to explain (1) why the searches undertaken for the purposes of other cases were not undertaken in this case; (2) if those searches were undertaken, why were the Documents not identified and disclosed; (3) what measures have been taken to ensure that similar mistakes are not repeated and to ensure that the Prosecution has fully complied with its disclosure obligations, particularly given that the case is approaching the end of the defence phase.<sup>32</sup>

22. 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 this conclusion the Chamber considered that the Accused

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<sup>31</sup> *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 268.

<sup>32</sup> The Chamber has previously ordered the Prosecution to file similar reports to address specific concerns with respect to its disclosure practices. *See for example*: Decision on Accused's Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions, 11 March 2013, para. 23; Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011, para. 54.

already possessed or had access to substantially similar material to that contained in the Documents and/or conducted examination and cross-examination of witnesses with respect to the issues raised in the Documents.<sup>33</sup>

23. In the absence of prejudice to the Accused, there is no basis to grant the remedies sought with respect to the Documents. If the Accused is of the view that the First Document is important to his defence case he will have an opportunity to tender this document through a properly worded bar table motion. With respect to Aćimović, the Accused has failed to argue or demonstrate that there is a basis for reconsideration of the decision to admit his evidence pursuant to Rule 92 *bis* in light of the late disclosure of the Third Document and Fourth Document.

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<sup>33</sup> With respect to the First Document *see* for example Stanislav Galić, T. 37193–37195, 37198–37200 (15 April 2013); Dragomir Milošević, T. 32584–32585 (23 January 2013), T. 32699–32702 (28 January 2013); Yashushi Akashi, T. 37697 (24 April 2013); David Harland, T. 2103–2104 (7 May 2010). With respect to the Second Document the Chamber has received other evidence which shows that some Muslims were not killed but left Zvornik *see* for example Fadil Banjanović, P57 (Transcript from *Prosecutor v. S. Milošević*), T. 20621–20622, T. 20627–20630; Petko Panić, T.19166 (20 September 2011); P2749 (SerBiH MUP daily report, 25 April 1992), p. 4; D3886 (Witness statement of Svetozar Andrić dated 16 July 2013), para. 4. With respect to the Third Document and Fourth Document *see* the publicly available testimony referred to in the Response at para. 12 pertaining to the receipt by Aćimović of the telegram in question.

**IV. Disposition**

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

- a) **GRANTS**, by majority, Judge Kwon dissenting,<sup>34</sup> the Motion in part, and finds that the Prosecution violated Rule 68 of the Rules with respect to its late disclosure of the Documents;
- b) **INSTRUCTS**, the Prosecution in its next periodic disclosure report to address the Chamber's questions regarding its disclosure practices as outlined in paragraph 21 above; and
- c) **DENIES** the Motion in all other respects.

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



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Judge O-Gon Kwon  
Presiding

Dated this twenty-first day of January 2014  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

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<sup>34</sup> 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.