



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 May 2011

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:** 10 May 2011

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

***PUBLIC***

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**DECISION ON ACCUSED'S FORTY-SEVENTH MOTION FOR FINDING OF  
DISCLOSURE VIOLATION AND FOR FURTHER SUSPENSION OF PROCEEDINGS**

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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 seized of the Accused’s “Forty-Seventh Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings (March 2011 – Rule 68)”, filed publicly with public and confidential annexes on 19 April 2011 (“Motion”), and hereby issues its decision thereon.

### **I. Submissions**

1. In the Motion, the Accused submits that the Office of the Prosecutor (“Prosecution”) violated Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by failing to disclose to him, as soon as practicable, six documents.<sup>1</sup> The first of these documents is a news article dated 30 July 1993 (“Article”); the second is a letter from the Accused to the President of France dated 29 July 1993 (“First Letter”); the third is a letter from the Accused to the UN Secretary General dated 13 June 1992 (“Second Letter”); the fourth is a VRS message dated 21 April 1994 (“VRS Message”); the fifth is a report regarding a public statement made by the Accused on 29 December 1992 (“Report”); and the sixth is a UN situation report dated 7 October 1992 (“Situation Report”) (together “Documents”).<sup>2</sup> The Accused argues that the Documents appear to have been in the Prosecution’s possession for a “number of years” but were not disclosed until March 2011.<sup>3</sup>

2. The Accused submits that the Documents are exculpatory in nature given that: (1) the Article reports on the discovery of arms smuggled to the Bosnian Muslims in a UN Convoy in July 1993, which supports his case that a careful inspection of convoys was required and thus contradicts the allegation that he “hindered the flow of humanitarian assistance for unlawful reasons”; (2) the First Letter contradicts the allegation that the Accused failed to punish crimes committed by VRS soldiers; (3) the Second Letter, in which the Accused requests that UN monitors be posted at all Serb positions, contradicts the “allegations that he conducted a campaign of terror by shelling civilians and corroborates his claim that his *mens rea* was that no shelling of civilian targets should occur in Sarajevo”; (4) the VRS Message and Report suggest that the Accused did his best to allow the movement of humanitarian convoys and thus contradicts the allegation that he unlawfully hindered the flow of humanitarian assistance; and

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

<sup>2</sup> Motion, para. 1 and annexes A to F.

<sup>3</sup> Motion, para. 2.

(5) the Situation Report supports the contention that in 1992 “national authorities did not have control of local authorities in municipalities such as Ilidža”.<sup>4</sup>

3. The Accused argues that he was prejudiced by this late disclosure of the Documents as he could not assess them in preparing for trial and developing his overall defence strategy, and he could not use them during his cross-examination of a number of witnesses who have already testified about the issues raised in them.<sup>5</sup> He thus requests the Chamber to make a finding that the Prosecution has violated Rule 68 by failing to disclose the Documents as soon as practicable.<sup>6</sup>

4. As an additional remedy, the Accused requests an extension of the current suspension of proceedings for a further eight weeks to allow him to conduct a timely review of the “over 100,000 pages of new documents” which were disclosed to him in March 2011.<sup>7</sup> In support of this submission, the Accused observes that an additional 23,457 pages of Rule 68 material (“Rule 68 Material”), which includes the Documents, and 88,955 pages of Rule 66(B) material (“Rule 66(B) Material”) were disclosed to him in March 2011, and argues that an eight week suspension would be proportional to previous suspensions ordered by the Chamber when large volumes of material had been disclosed to the defence.<sup>8</sup> The Accused bases this request on his estimate of the time required by his team to review both the Rule 68 Material and the Rule 66(B) Material.<sup>9</sup>

5. On 27 April 2011, the Prosecution filed the “Prosecution’s Response to Karadžić’s Forty-Seventh Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings” (“Response”). It acknowledges that four of the Documents “contain material of marginal exculpatory value” but argues that the Accused has not been prejudiced as they are “duplicative of material he already possesses”.<sup>10</sup> The Prosecution’s arguments with respect to each document are discussed separately below.

#### *Article*

6. With respect to the Article, the Prosecution submits that it contains information about the discovery by the HVO of possible weapons smuggling to the Bosnian Muslims in a geographic

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<sup>4</sup> Motion, paras. 1, 4.

<sup>5</sup> Motion, paras. 6–7.

<sup>6</sup> Motion, para. 9.

<sup>7</sup> Motion, paras. 3, 10.

<sup>8</sup> Motion, paras. 3, 9.

<sup>9</sup> Motion, para. 10.

<sup>10</sup> Response, para. 1.

area unrelated to this case.<sup>11</sup> The Prosecution submits that even if the Article is considered to have some exculpatory value, its disclosure did not prejudice the Accused given that he “already possesses evidence of weapons smuggling directly relevant to the circumstances of this case” and that he has used that evidence during his cross-examination of Prosecution witnesses.<sup>12</sup> On this basis, it concludes that the Accused’s claim that the late disclosure of the Article prejudiced his cross-examination of Prosecution witnesses or the development of his overall defence strategy is unfounded.<sup>13</sup>

*First Letter*

7. The Prosecution submits that the First Letter is not exculpatory as it does not undermine its allegation that “the Accused failed to punish the crimes with which he is charged”.<sup>14</sup> It also contests whether the First Letter demonstrates that VRS soldiers were actually punished for the incident referred to.<sup>15</sup> The Prosecution submits that even if the First Letter is considered to have some exculpatory value, its disclosure did not prejudice the Accused given that he “already possesses similar evidence relating far more directly to the crimes in Sarajevo with which he is charged”.<sup>16</sup> On this basis, it concludes that the Accused’s claim that he was prejudiced because the late disclosure prevented him from using the First Letter in his cross-examination of Prosecution witnesses or in the development of his overall defence strategy is unfounded.<sup>17</sup>

*Second Letter, VRS Message, Report, and Situation Report*

8. The Prosecution acknowledges that the Second Letter, VRS Message, Report, and Situation Report have some exculpatory value and should have been disclosed to the Accused earlier.<sup>18</sup> However, it submits that the Accused has long been in possession of similar, if not identical, information to that contained in these documents and that, therefore, there is no merit to his claim that he has been prejudiced by their late disclosure.<sup>19</sup>

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<sup>11</sup> Response, para. 4.

<sup>12</sup> Response, para. 5, refers to exhibits D143, D190, D1030, D1031, D1032, D1126, and the Accused’s cross-examination of David Harland, Anthony Banbury, Rupert Smith, and KDZ182.

<sup>13</sup> Response, para. 6.

<sup>14</sup> Response, para. 7.

<sup>15</sup> Response, para. 8.

<sup>16</sup> Response, para. 9, refers to exhibits P799, P917, P2289, D101, D683, and D825.

<sup>17</sup> Response, para. 6.

<sup>18</sup> Response, paras. 11, 14, 16, 18.

<sup>19</sup> Response, paras. 11–13, 15, 17, 18–19.

### *Requested Suspension of Proceedings*

9. The Prosecution submits that the Accused's request for a further eight-week suspension of proceedings is unwarranted and that he improperly bases this request, in large part, on the recent disclosure of Rule 66(B) material.<sup>20</sup> It contends that approximately 80 percent of the over 100,000 pages of material disclosed in March 2011 was provided in response to a Rule 66(B) request by the Accused, and that this material "cannot properly form part of the justification" for any additional adjournment.<sup>21</sup> It submits that, based on the Accused's calculations, the remaining 20 percent of the material disclosed as either exculpatory or relevant to the defence case could be reviewed in approximately one-and-a-half weeks.<sup>22</sup> In addition, the Prosecution observes that virtually all of the Rule 68 Material was identified through its witness-related searches and the way in which it was disclosed to the Accused would allow him to identify which documents are relevant to a particular witness.<sup>23</sup> It argues that this should allow the Accused to easily prioritise his review of the documents "in accordance with the witness schedule" without the need for a further eight-week adjournment of proceedings.<sup>24</sup>

## **II. Applicable Law**

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".<sup>25</sup> 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>26</sup>

11. The Chamber reiterates that regardless of the Prosecution's internal practices, there is a clear obligation to disclose potentially exculpatory material "as soon as practicable" and that the "ongoing nature of the obligation relates only to the fact that as new material comes into the possession of the Prosecution it should be assessed as to its potentially exculpatory nature and

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<sup>20</sup> Response, para. 2.

<sup>21</sup> Response, paras. 21–22.

<sup>22</sup> Response, para. 24. The Prosecution also notes that approximately 2,000 pages of the Rule 68 Material are duplicates given that they were disclosed in both English and BCS.

<sup>23</sup> Response, para. 24.

<sup>24</sup> Response, paras. 24–25.

<sup>25</sup> Decision on the Accused's Motion to Set Deadlines for Disclosure, 1 October 2009, para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgement, 29 July 2004 ("*Blaškić* Appeals Judgement"), para. 267.

<sup>26</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeals Judgement"), para. 179.

disclosed accordingly”.<sup>27</sup> The continuing nature of this obligation does not permit the Prosecution to delay the disclosure of potentially exculpatory material which was already in its possession or to adopt a practice of identifying and disclosing such material on a “rolling basis”.<sup>28</sup> The approach previously taken by the Prosecution in identifying and disclosing witness-related Rule 68 material on a “rolling basis” demonstrates a failure to comply with the Chamber’s repeated instructions to disclose, as soon as practicable, all Rule 68 materials in its possession.<sup>29</sup>

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.<sup>30</sup>

13. Articles 20(1) and 21(4)(c) of the Statute of the Tribunal (“Statute”) protect the rights of an accused person to be tried expeditiously, with full respect for his rights, and without undue delay. In addition, Article 21(4)(b) of the Statute provides that an accused person should have “adequate time and facilities for the preparation of his defence”. The Chamber recalls that an adjournment of the proceedings is an exceptional measure, which it will only order if convinced that it is in the interests of justice to do so.<sup>31</sup>

### **III. Discussion**

14. The Article reports on a complaint made by the HVO leadership to UNPROFOR in July 1993 about an incident where weapons were found to have been smuggled in a UN convoy escorted by Canadian UNPROFOR soldiers.<sup>32</sup> While this incident does not appear to relate to events connected to the charges against the Accused, the Chamber finds that the Article does contain potentially exculpatory material insofar as it could be used to support his contention that UN convoys were being used to smuggle arms to the Bosnian Muslims, and that, therefore, he did not obstruct these convoys for unlawful reasons. The Chamber therefore finds that the Prosecution has violated Rule 68 of the Rules by failing to disclose the Article to the Accused as soon as practicable.

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<sup>27</sup> Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010 (“Reconsideration Decision”), para. 11.

<sup>28</sup> Reconsideration Decision, para. 13.

<sup>29</sup> Reconsideration Decision, paras. 10, 12.

<sup>30</sup> *Kordić and Čerkez* Appeals Judgement, para. 179; *Blaškić* Appeals Judgement, para. 268.

<sup>31</sup> Decision on Accused’s Motion for Fifth Suspension of Proceedings, 17 March 2011 (“Decision on Fifth Suspension”), para. 6; Decision on Accused’s Motion for Suspension of Proceedings, 18 August 2010 (“Decision on Suspension of Proceedings”), para. 5.

<sup>32</sup> Motion, Annex A.

15. The First Letter contains a statement by the Accused that the Bosnian Serb authorities had “launched an immediate investigation” into an attack on an UNPROFOR base and an assurance from him that those who were suspected of involvement had been arrested and would be punished in accordance with the law if their responsibility was proved.<sup>33</sup> While the First Letter does not prove what measures were actually taken to punish those responsible, it does tend to contradict the allegation that the Accused failed to take measures to punish crimes committed by those under his command. The Chamber therefore finds that the First Letter is potentially exculpatory and that the Prosecution has violated Rule 68 of the Rules by failing to disclose it to the Accused as soon as practicable.

16. The Prosecution has acknowledged that the Second Letter, VRS Message, Report, and Situation Report have some exculpatory value. On this basis, and having conducted its own review of these documents, the Chamber concludes that they are potentially exculpatory, and that the Prosecution has violated its obligation under Rule 68 of the Rules to disclose these four documents to the Accused as soon as practicable.

#### *Assessment of Prejudice*

17. While the Prosecution is in violation of its disclosure obligations under Rule 68 through its late disclosure of the Documents referred to in the Motion, the Chamber finds that the Accused has suffered no prejudice as a result of these violations. In reaching this conclusion, the Chamber reviewed the examples identified by the Prosecution and is satisfied that the Accused already possessed and used a number of documents, which suggested that (1) convoys were being used to smuggle goods and weapons,<sup>34</sup> (2) investigations were promised or being conducted by Bosnian Serb authorities into specific incidents,<sup>35</sup> (3) the Accused ordered the VRS to provide free movement for humanitarian convoys,<sup>36</sup> and (4) the Bosnian Serb leadership in Pale had difficulties in controlling local authorities.<sup>37</sup>

18. In addition, the Prosecution states that in August 2009 it had disclosed a document which contained identical information to that in the Second Letter regarding a cease-fire declared by the Accused in June 1992 and his request that UN monitors be posted to Bosnian Serb

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<sup>33</sup> Motion, Annex B.

<sup>34</sup> Response to Motion, para. 5, refers to exhibits D143, D190, D1030, D1031, D1032, D1126, and the Accused’s cross-examination of David Harland (10 May 2010, T. 2169–2172; 11 May 2010, T. 2352–2353 (private session)), Anthony Banbury (16 March 2011, T. 13452–13456), Rupert Smith (11 February 2011, T. 11642–11648), and KDZ182 (10 March 2011, T. 13116–13118).

<sup>35</sup> Response to Motion, para. 9, refers to exhibits P799, P917, P2289, D101, D683, D825, and the Accused’s cross-examination of Michael Rose (6 October 2010, T. 7344–7346, 7364–7368), Rupert Smith (10 February 2011, T. 11528–11531), and Adrianus van Baal (27 October 2010, T. 8454–8455).

<sup>36</sup> Response to Motion, paras. 16–17.

positions.<sup>38</sup> Similarly, the information contained in the VRS Message about an order issued by the Accused in April 1994 allowing the free movement of humanitarian convoys was apparently disclosed in a different format to the Accused in October 2009.<sup>39</sup> Given that the Accused already possessed material which was consistent with, and in some cases more relevant to, the potentially exculpatory issues contained in the Documents, the Chamber finds that the Accused was not prejudiced by their late disclosure. As the Chamber has previously decided, if a newly disclosed document adds nothing new to the material already available to the Accused, even if that document is potentially exculpatory, it is hard to conclude that his cross-examination of witnesses or the development of his overall defence strategy has been negatively affected or that this has resulted in prejudice.<sup>40</sup>

*Requested Suspension of Proceedings*

19. In the 10 December 2010 “Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision” (“Reconsideration Decision”), the Prosecution was ordered by the Chamber to identify and disclose Rule 68 material to the Accused as follows:

(i) Rule 68 material from ongoing and related completed cases relating to the period before the Decision, by 23 December 2010, (ii) Rule 68 materials found in searches that have been completed but the search results are still subject to review, by 31 January 2011, (iii) Rule 68 materials identified from searches that are “currently being conducted”, by 28 February 2011, and (iv) Rule 68 material identified during witness-related searches for all Prosecution witnesses, by 18 April 2011.<sup>41</sup>

20. These deadlines were set by the Chamber because the Prosecution claimed that it could not meet the previous 17 December 2010 deadline for the search for and disclosure of all potentially exculpatory materials in its possession.<sup>42</sup> The final deadline for disclosure of Rule 68 “material identified during witness-related searches” was subsequently brought forward by the Chamber to 31 March 2011.<sup>43</sup> It is this final deadline which prompted the disclosure of the Rule 68 Material referred to in the Motion.

21. The Chamber has specifically observed that the defence does not have the right “to have reviewed all Rule 66(B) material provided to it prior to hearing evidence in the case” and that the timing of Rule 66(B) requests and the subsequent provision of that material should not be

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<sup>37</sup> Response to Motion, paras. 18–19, refers to exhibits D541, D540 and, D92.

<sup>38</sup> Response to Motion, paras. 11–13.

<sup>39</sup> Response to Motion, paras. 14–15.

<sup>40</sup> Decision on Accused’s Forty-Third to Forty-Fifth Disclosure Violation Motions, 8 April 2011, para. 29.

<sup>41</sup> Reconsideration Decision, para. 17.

<sup>42</sup> Reconsideration Decision, para. 15.

<sup>43</sup> Decision on Accused’s Motion for Fourth Suspension of Proceedings, 16 February 2011 (“Decision on Fourth Suspension”), paras. 13–14.



used as a basis for an adjournment of the trial.<sup>44</sup> It follows that in assessing whether a further suspension of proceedings is warranted, the Chamber will only consider the 23,457 pages of Rule 68 Material and not the 88,955 pages of Rule 66(B) Material which were disclosed to the Accused in March 2011.

22. While the Chamber has held that “it is not necessary for the trial to be suspended whenever new Rule 68 material” is disclosed, it has suspended proceedings when it considered that the large volume of material disclosed pursuant to Rule 68 warranted a suspension to allow the Accused “sufficient time to review and incorporate that material if necessary into his ongoing preparations for trial”.<sup>45</sup>

23. When assessing previous batches of material disclosed late to the Accused pursuant to Rule 68, the Chamber has found that the accompanying indexes provided by the Prosecution, while helpful “cannot substitute for his own detailed review of all the material... so that the Accused can be satisfied as to the nature of its content and whether it contains anything exculpatory or otherwise important for his defence”.<sup>46</sup> In the present instance, however, the Rule 68 Material is described as “witness-related” and, according to the Prosecution, has been disclosed in a way which would allow the Accused to identify which documents pertain to upcoming witnesses and to prioritise his review of those documents accordingly. While the Prosecution’s classification of the Rule 68 Material does not substitute for the Accused’s own detailed review of each of the documents disclosed, it does allow his team to focus their attention on first reviewing material which is identified as being most relevant to upcoming witnesses.

24. In addition, in determining whether or not a further suspension of the proceedings is warranted, and the length of that suspension, the Chamber has considered the Prosecution’s submission that approximately 2,000 pages of the Rule 68 Material are duplicates given that they were disclosed in both English and BCS, and the fact that, using the Accused’s calculations, his team would require approximately one-and-a-half weeks to review all of the Rule 68 Material. Having considered these factors, the Chamber finds that it is in the interests of justice for the current period of suspension to be extended by a further week to allow the Accused and his team to review the Rule 68 Material and incorporate it, if necessary, into his ongoing preparations for trial.

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<sup>44</sup> Decision on Accused’s Motion for Additional Time to Prepare Cross-Examination of Momčilo Mandić, 2 July 2010, para. 9.

25. This further suspension and disruption to proceedings underscores the fact that the Prosecution should have disclosed all of the Rule 68 material in its possession, including “witness-related” material, as soon as practicable, and adds to the Chamber’s concerns with the way in which the Prosecution has approached its disclosure obligations in this case.

#### IV. Disposition

26. For the foregoing reasons, the Chamber, pursuant to Rules 54, 68, and 68 *bis* of the Rules, hereby **GRANTS** the Motion in part, and:

- a) **FINDS**, by Majority, Judge Kwon dissenting,<sup>47</sup> that the Prosecution has violated Rule 68 of the Rules with respect to the disclosure of the Documents referred to in the Motion;
- b) **ORDERS** that following the completion of the current suspension, the proceedings shall be suspended for a further week and will therefore resume on Monday, 30 May 2011; 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 tenth day of May 2011  
At The Hague  
The Netherlands

[Seal of the Tribunal]

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<sup>45</sup> Decision on Accused’s Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Violation Motions, 11 November 2010, para. 40; Decision on Accused’s Thirtieth and Thirty-First Disclosure Violation Motions, 3 February 2011, para. 13; Decision on Fourth Suspension, para. 12; Decision on Fifth Suspension, para. 9.

<sup>46</sup> Decision on Suspension of Proceedings, para. 6; Decision on Fourth Suspension, para. 11.

<sup>47</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.