

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

IN TRIAL CHAMBER No. 3

Before: Judge O-Gon Kwon, Presiding  
Judge Howard Morrison  
Judge Melville Baird  
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 29 November 2010

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public w/Confidential Annexes*

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TWENTY-EIGHTH MOTION FOR FINDING OF DISCLOSURE  
VIOLATION AND FOR REMEDIAL MEASURES

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The Office of the Prosecutor:

Mr. Alan Tieger

Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves for a finding that the prosecution has once again violated Rule 68 by failing to disclose, as soon as practicable, three exculpatory documents. He further contends that as to two of the documents, the prosecution and the United States government abused the process of the Tribunal by agreeing to receive the documents under the provisions of Rule 70.

2. The documents in question were disclosed by the prosecution on 22 November 2010 after General Michael Rose and Minister of Justice Momcilo Mandic had completed their testimony.<sup>1</sup>

3. The first document is an Associated Press report provided to the prosecution by the United States government. The exculpatory nature of the document was recognized by the prosecution, which furnished it pursuant to Rule 68, and is apparent on its face. Had it been disclosed to Dr. Karadzic, he could have used it during cross examination of General Michael Rose to advance his case that factories in Sarajevo were legitimate military targets and that General Rose had warned the Bosnian Muslim Army about offensive actions.<sup>2</sup>

4. The second document is another Associated Press report provided to the prosecution by the United States government. The exculpatory nature of the document was recognized by the prosecution, which furnished it pursuant to Rule 68, and is apparent on its face. Had it been disclosed to Dr. Karadzic, he could have used it during his cross examination of General Rose to advance his case that General Rose had protested to the Bosnian Muslim Army concerning offensive actions.<sup>3</sup>

5. The third document is a compilation of orders and decrees issued by Dr. Karadzic and an explanation of how these decrees demonstrated Dr. Karadzic's efforts to comply with international humanitarian law, to outlaw paramilitaries, and to prosecute wrongdoers. The prosecution has indicated that the document came into its possession in May 2008 and was obtained during a search of the residence of former Republika Srpska Minister of Information Miroslav Toholj. The exculpatory nature of the document was

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<sup>1</sup> The disclosure letter is attached as Confidential Annex "A". The prosecution has advised that the content of the documents cannot be made public because of an agreement it made with the provider under Rule 70.

<sup>2</sup> This document is attached as Annex "B". Because the prosecution has agreed on conditions of non-disclosure with the United States, Dr. Karadzic is precluded from disclosing the contents of the document in a public filing.

<sup>3</sup> This document is attached as Annex "C".

recognized by the prosecution, which furnished it pursuant to Rule 68, and is apparent from its content. Dr. Karadzic would have used this document and the underlying documents to which it refers, in his cross-examination of former Minister of Justice Momcilo Mandic had the document been timely disclosed.<sup>4</sup>

6. The failure to disclose these documents “as soon as practicable” constitutes a violation of Rule 68. The Trial Chamber is requested to make a specific finding that the prosecution has violated Rule 68 with respect to these three documents.

7. Dr. Karadzic has been prejudiced by the late disclosure because he was unable to assess the documents in preparing for trial as part of the development of his overall defence strategy and was unable to use the documents with General Rose and Minister Mandic. As a remedy, Dr. Karadzic requests that the Trial Chamber direct the prosecution to postpone calling any future witness for whom Rule 68 disclosure has not been completed and to look favorably upon a motion to recall General Rose and Minister Mandic when and if such a motion is made.<sup>5</sup>

8. The prosecution has claimed that the late disclosure of documents 1 and 2 was due to the need to obtain the consent of the United States government, which had provided the documents pursuant to Rule 70. This argument must fail for two reasons.

9. First, the prosecution has known that it will call General Rose as a witness since at least May 2009 when it filed its witness list. It could and should have sought consent earlier so that the documents could have been disclosed before General Rose testified.

10. As far back as December 2008, when responding to Dr. Karadzic’s *Motion for Disclosure of Rule 68 Material Obtained Under Rule 70(B)*, the prosecution undertook to obtain the timely consent of the Rule 70 providers to disclose exculpatory material.<sup>6</sup> The

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<sup>4</sup> This document is attached as Annex “D”.

<sup>5</sup> As previously indicated, Dr. Karadzic intends to make a motion to recall numerous prosecution witnesses at the close of the prosecution’s case. Because the disclosure violations in his case are continuous, he has deemed it more efficient to wait until he has received all of the withheld disclosure before making such motions rather than make individual motions upon the discovery of every individual disclosure violation. In addition, Dr. Karadzic may be able to introduce some of the improperly withheld documents through other prosecution witnesses, which would obviate the need to recall some witnesses.

<sup>6</sup> *Prosecution Response to Motion for Disclosure of Rule 68 Material Obtained Under Rule 70* (10 December 2008) at para. 7

Trial Chamber relied upon those assurances when denying Dr. Karadzic's motion,<sup>7</sup> and when denying his application for certification to appeal.<sup>8</sup>

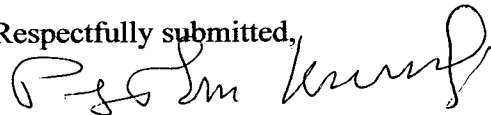
11. Second, the prosecution and United States have abused the provisions of Rule 70. The two documents in question are news reports of the Associated Press disseminated to more than a thousand news outlets throughout the world and read by millions of people. To classify these documents as confidential, and preclude their disclosure to the accused or use in a public trial, is contrary to the interests of justice.

12. The United States should not be providing material in the public domain under the provisions of Rule 70, and the prosecution should not accept such materials under those conditions. This practice is an abuse of the Tribunal's accommodation to States to protect their legitimate needs of confidentiality and violates the right of an accused to a fair and expeditious trial. This kind of mindless classification of publicly disseminated material as "confidential" undermines the confidentiality process at a time when the United States is seeking international support for violations of its confidentiality by WikiLeaks and other outlets. Therefore, what has occurred here is detrimental to the United States' own interests, as well as Dr. Karadzic's interest in a fair trial.

13. Abuse of confidentiality provisions similar to those of Rule 70 led a Trial Chamber of the International Criminal Court to issue an order staying the proceedings for abuse of process.<sup>9</sup> This Trial Chamber should also not countenance such abuses. It is respectfully requested that the Trial Chamber direct the prosecution to immediately seek the consent of all Rule 70 providers to disclose materials which are already in the public domain and to cease and desist from entering into Rule 70 agreements with respect to such material.

Word count: 1317

Respectfully submitted,



Radovan Karadzic

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<sup>7</sup> *Decision on Accused's Motion for Disclosure of Rule 68 Material Obtained Under Rule 70(B) and Order on Prosecution Disclosure Report* (15 January 2009)

<sup>8</sup> *Decision on Accused's Application for Certification to Appeal Decision on Rule 70(B)* (12 February 2009)

<sup>9</sup> *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, *Decision on the Consequences of Non-Disclosure of Exculpatory Materials...* (13 June 2008) at para. 73 aff'd *Judgement on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials..."* (20 October 2008)