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International
Criminal Tribunal
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Tribunal Pénal
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l'ex-Yougoslavie

Section des
Services
d'administration et
d'appui judiciaire

CASE/AFFAIRE NO. IT-95-5/18-T (R. KARADŽIĆ) DATE 08 February 2011

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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: 8 February 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public w/Public and Confidential Annexes

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

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, an exculpatory documents which have been in its possession for years. The late disclosure also violated Rule 66(B). By delaying its disclosure, the prosecution prevented Dr. Karadzic from using the document in his cross examination of witness Momcilo Mandic:

2. The document in question was disclosed by the prosecution on 31 January 2011.¹

3. The document is a transcript of an intercepted conversation on 28 May 1992 between Mandic and Colonel Gagovic.² In the conversation, Mandic recounts how he has arranged for UNPROFOR to ship food into Sarajevo from Kislejak and provides information that the Muslims were shooting towards the airport.

4. The exculpatory nature of this document is that contradicts allegations that the Bosnian Serb leadership was unreasonably preventing humanitarian convoys from entering Sarajevo.³ Mandic is alleged to be a member of the joint criminal enterprise.⁴

5. The document is also exculpatory in that it confirms that the Muslims had initiated hostilities as of 28 May 1992 around the airport. Schedule G1 alleges that the city of Sarajevo was heavily shelled by the Bosnian Serbs beginning on 28 May 1992. The intercepted conversation tends to show that the shelling was in response to Muslim fire.

6. The document fits into Dr. Karadzic's case because it helps refute the above three allegations of the indictment

7. The exculpatory nature of this document is also demonstrated by the fact that it was disclosed by the prosecution pursuant to Rule 68.

8. The failure to disclose this document also violates Rule 66(B). On 26 October 2010, Dr. Karadzic made a specific request for inspection of all intercepted conversations.⁵ In the *Prosecution's Reply to Accused's Response for Motion for Judicial Notice of Intercepted Conversations Related to Sarajevo* (5 November 2010), the prosecution represented that all relevant intercepts had been disclosed.

¹ The disclosure letter is attached as Confidential Annex "C".

² A copy of the intercepted conversation and an English translation are attached as Annex "A".

³ See paragraph 14(j) of Third Amended Indictment

⁴ See paragraph 11 of Third Amended Indictment

⁵ A copy of Dr. Karadzic's letter is attached as Annex "B"

9. It is likely that this intercept, like the many other intercepts disclosed in May 2009, has been in the possession of the prosecution for several years. The failure to disclose this intercept prior to the testimony of Momcilo Mandic prejudiced Dr. Karadzic by preventing him from using it during his cross examination.

10. Dr. Karadzic has also been prejudiced by the late disclosure because he was unable to assess the document in preparing for trial as part of the development of his overall defence strategy.

11. The Trial Chamber has already held that the prosecution's policy of delaying disclosure of exculpatory material violates Rule 68.⁶ This latest example indicates that the violations are continuing.

12. Therefore, the Trial Chamber is requested to first make a finding that Rule 68 has been violated by the failure to disclose the transcript of the Mandic intercept as soon as practicable.

13. As a remedial measure, Dr. Karadzic renews his request for suspension of the trial for a three month period prior to the municipalities' component of the case so that the prosecution can complete its compliance with Rule 68 before Dr. Karadzic is expected to cross examine additional prosecution witnesses without the benefit of the disclosure to which he is entitled. The sheer magnitude of the disclosure violations which have continued since the winter recess requires a re-evaluation of the Trial Chamber's wishful thinking that the trial can go merrily on.

14. Dr. Karadzic wishes to point out that the document from this disclosure batch represents a tiny fraction of the Rule 68 violations represented by that disclosure. Dr. Karadzic is only able to include in these disclosure violation motion documents which are (1) in English and (2) relate to witnesses who have already been called. The vast majority of the disclosure is documents in Serbian and which relate to the municipalities component of the case.

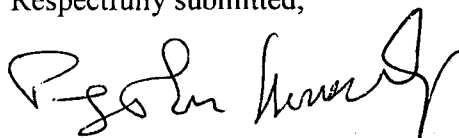
15. In addition to a suspension of the proceedings, Dr. Karadzic requests that the transcript of the intercepted conversation be marked for identification and admitted from

⁶ *Decision on Prosecution's Motion for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010) at para. 11; *Decision on Accused's Seventeenth bis and Twenty-Eighth Disclosure Violation Motions* (16 December 2010) at para. 23

the bar table if later authenticated, in order to ameliorate the prejudice he has suffered by its late disclosure.⁷

Word count: 884

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', written in a cursive style.

Radovan Karadzic

⁷ Dr. Karadzic is deferring his requests to recall prosecution witnesses until the end of the prosecution's case when the full extent of the disclosure violations is known.

ANNEX "A"

Internal number: CD-9-10-1/02/017

Subject: talk, held on 28 May 1992 between Mandić Momčilo and Colonel Gagović

Phone control:

Code mark:

Gagović	Yes?
Unknown female:	Hello
Gagović	Good afternoon
Unknown female:	Just a sec, Ministry of Justice, I would like to speak to Mr. Gagović.
Gagović.	Yes, please
Unknown female:	It is you, just a sec, Mr. Gagović wants to speak to you
Gagović	Yes, halo, halo
Mandić Momčilo:	Colonel
Gagović	Yes
Momčilo Mandić	Is that guy Čadžo over there?
Gagović	No
MM	Well, try to contact him so that he can contact UNPROFOR that I arranged with Ilidža regarding the food transport from Kiseljak
Gagović	Who is this?
MM	Momo Mandić
Gagović	Oh, it is you, Momo
MM	Yes.
Gagović	Uhhm
MM	Yes, to contact them and say that I arranged it with the municipality and Ilidža
Gagović	Ok
MM	To accept it, that this patrol would await them and accept them so that they can transport the food from Kiseljak towards the town
Gagović	Ok
MM	And that Čadžo must inform them that the Muslims are shooting towards the airport
Gagović	Ok
Mm	So that they can intervene, in order to...
Gagović	Ok, ok
MM	Cease it.
Gagović	I have just asked for Abdić down there
MM	One another thing, I should go to Ilidža, to the Crisis staff to arrange things regarding the airport
Gagović	Ok

MM	Have you got this armoured vehicle, or something to pass through the airport, they open fire, and I have to go
Gagović	...
MM	I have got nothing
Gagović,	Ok then
MM	If you have got some, send it here to KP station/headquarters, to the left
Gagović	Ok, I shall see
MM	Please do because people have been waiting for me down there for two hours
Gagović
MM	Our obligation is to establish those criteria and try to let it pass tomorrow or day after tomorrow..
Gagović	Ok, Momo
MM	Agreed. Thank you and cheers
Gagović	Good bye

0322-0055

nterni broj: CD-9-10-1/02/017

PREDMET: Razgovor vođen dana 28.05.1992. godine
između Mandić Momčila i pukovnika Gagovića

Kontrola telefona:

Kodna oznaka:

Gagović:	Ja.
NN ženska osoba:	Halo.
Gagović:	Dobar dan.
NN ženska osoba:	Samo malo, Ministarstvo pravde, gospodina Gagovića bi trebala.
Gagović:	Izvolite.
NN ženska osoba:	Vi ste, samo momenat Mandić vas treba.
Gagović:	Molim, halo, halo, da.
Mandić Momčilo:	Pukovniče.
Gagović:	Molim.
Mandić Momčilo:	Je li tu negde onaj Čadžo?
Gagović:	Nije.
Mandić Momčilo:	'Ajde molim te nekako da stupiš s njim u kontakt pa da javi UNPROFOR-u da sam ja dogovorio s lližom za prelaz hrane iz Kiseljaka.
Gagović:	A ko je to?
Mandić Momčilo:	Momo Mandić.
Gagović:	A ti si Momo?
Mandić Momčilo:	Jesam.
Gagović:	Aha.
Mandić Momčilo:	Da, da im javi da sam ja dogovorio sa opštinom I..., lližna.
Gagović:	Dobro.
Mandić Momčilo:	Da prihvati, da će ova patrola ih dočekat', prihvatit' i da oni provedu tu hranu iz Kiseljaka prema gradu.
Gagović:	Dobro.
Mandić Momčilo:	Te da ih Čadžo obavijesti da se puca na aerodrom od strane Muslimana.

0322-0056

Gagović:	Dobro.
Mandić Momčilo:	Pa da to oni intervenišu, da se to ...
Gagović:	Dobro, dobro.
Mandić Momčilo:	Prekine.
Gagović:	Sad sam tražio dolje ovaj Abdića
Mandić Momčilo:	Eh molim te još nešto, ja trebam da idem na Ilidžu ovaj u Krizni štab da se dogovorim oko ovog aerodroma.
Gagović:	Dobro.
Mandić Momčilo:	Da li imaš kakvo oklopno vozilo il' nešto da prođem kroz aerodrom, pucaju ovi, a moram ić' ...
Gagović:
Mandić Momčilo:	A nemam ništa.
Gagović:	Dobro ovaj ...
Mandić Momčilo:	A..., ako imaš nek' dođe ovde u KP dom lijevo.
Gagović:	Aha, dobro, videću sad
Mandić Momčilo:	'Ajde molim te onaj, jer dole me ljudi već čekaju dva sata
Gagović:
Mandić Momčilo:	A ob..., obaveza nam je da danas te kriterije utvrdimo i da pokušamo to sutra, preksutra pustit'.
Gagović:	Dobro Momo.
Mandić Momčilo:	Dogovoreno, hvala ti, živio.
Gagović:	Zdravo.

ANNEX "B"

Dr. Radovan Karadzic

26 October 2010

Mr. Alan Tieger
Office of the Prosecutor
ICTY

Dear Mr. Tieger,

In preparing to respond to your Motion for Judicial Notice of Intercepts, I asked our team what was involved in our reviewing all of the intercepts and also choosing those intercepts relating to Sarajevo which we would like to have admitted.

They told me that (1) we are not sure that the transcripts of all intercepted conversations in the possession of OTP have been disclosed, or whether disclosure has been limited to those OTP wants to use (65 ter) or which OTP has identified as possibly exculpatory (Rule 68); and (2) the disclosure of transcripts of intercepted conversations has been piecemeal, is scattered in a number of batches, and would be very time consuming to collect.

Therefore, I am requesting that OTP disclose and re-disclose on one DVD, the transcripts of all intercepted conversations in its possession. In addition, if there are recordings which have not been transcribed, can you please disclose those to us as well?

We might be able to agree on admission of a collection of intercepts, much like the collection of Assembly session transcripts, if we feel that we are on equal footing with OTP in being able to identify and admit intercepts which help our case. (We would reserve our Rule 95 objection for pre-war intercepts and may object to some intercepts if we have particular information that calls their reliability into question.)

Thank you for your cooperation.

Yours truly,

Dr. Radovan Karadzic