

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: 26 August 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION TO RECALL ELEVEN SARAJEVO WITNESSES

The Office of the Prosecutor:

Mr. Alan Tieger

Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves for an order directing that 11 prosecution witnesses who testified to events related to the Sarajevo component of the case be recalled for further cross examination. For each witness, the prosecution has been found to have violated its disclosure obligations by not disclosing exculpatory evidence before the witness testified. Dr. Karadzic now requests that the witnesses be recalled so that he can question the witnesses about the undisclosed documents, and so that he is in the same position as he would have been but for the prosecution's disclosure violation.

2. A list of the witnesses sought to be recalled, and the purpose of the evidence sought to be elicited from the witnesses, is attached in Annex "A".

3. This Trial Chamber has held that factors to be considered when a request to recall a witness is made are (1) the purpose of the evidence that the requesting party expects to elicit from the witness; and (2) the party's justification for not eliciting that evidence when the witness testified.¹ In each case, the justification for not eliciting the evidence when the witness testified is that Dr. Karadzic did not have the evidence in his possession because the prosecution had violated its disclosure obligations.

4. Recall of these witnesses is supported by the jurisprudence of this Tribunal.

5. In the *Delic* case, the Trial Chamber held that where the defence was deprived of the opportunity to put relevant questions to a prosecution witness as a result of Rule 68 violations, the defence would be entitled to have the witness recalled.²

6. In the *Brdjanin* case, the Trial Chamber held that where disclosure of exculpatory information is not made within sufficient time, the accused should be allowed to recall witnesses who have already testified, if he establishes to the satisfaction of the Trial Chamber that the lateness of the disclosure prejudiced the preparation or presentation of his defence³.

¹ *Decision on Accused's Motion to Recall Harry Konings for Further Cross Examination* (11 February 2011) at para. 8; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Requests in Relation to Notes Taken by Witness Adrianus Van Baal* (17 February 2011) at para. 7

² *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Urgent Defence Motion Concerning Rule 68 Compliance by The Prosecution*, (28 March 2008) at para.19

³ *Prosecutor v. Brdjanin*, No.IT-99-36-T, *Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68Bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved"*, (30 October 2002) at para.26

7. In the *Furundzija* case, the Trial Chamber ordered the recall of prosecution witnesses where the prosecution had violated its disclosure obligations and the material could have been put to its witnesses if the disclosure had been timely.⁴

8. In the *Oric* case, the Trial Chamber found multiple violations of Rule 68 and, as a remedy, invited the defence to indicate the names of the prosecution witnesses that the defence may wish to call for further cross examination.⁵

9. In the *Gotovina* case, a witness was recalled at the request of the prosecution where the defence only disclosed a new document after the witness had testified.⁶

10. In the *Stanisic & Simatovic* case, even where there was no disclosure violation, the Chamber ordered the recalling of a prosecution witness where subsequent information was obtained that was relevant to the witness' testimony.⁷

11. Trial Chambers of the ICTR have also ordered the recall of witnesses where the defence had been deprived of the right to put matters to them as a result of the prosecution's violations of its disclosure obligations.⁸

12. The Trial Chamber has frequently indicated that Dr. Karadzic should deal with late-disclosed material in his defence case. However, Dr. Karadzic is entitled to have the Trial Chamber consider these matters in connection with a Motion for Judgement of Acquittal pursuant to Rule 98 *bis* at the close of the prosecution's case. To require him to present these matters only in his defence case, when he could and would have presented them in the prosecution's case but for the prosecution's disclosure violations, is unfair.

⁴ *Prosecutor v. Furundzija*, No.: IT-95-17/1-T, *Decision*, (16 July 1998) at para.21

⁵ *Prosecutor v. Oric*, No. IT-03-68-T, *Decision on Urgent Defence Motion Regarding Prosecutorial Non Compliance with Rule 68* (27 October 2005)

⁶ *Prosecutor v. Gotovina et al*, No. IT-06-90-T,, *Decision on Prosecution Motion to Recall Marko Rajcic* (24 April 2009)

⁷ *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Reasons For Decision to Recall Witness JF-047* (31 March 2011)

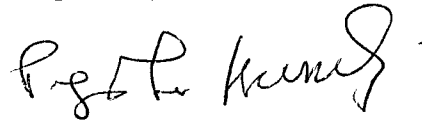
⁸ *Prosecutor v. Ndindilyimana et al*, No. ICTR-00-56-T, *Decision on Defence Motions Alleging Violations of the Prosecutor's Disclosure Obligations Pursuant to Rule 68*, (22 September 2008) at para. 63;

Prosecutor v Karemera et al, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness HH* (26 March 2009) at para. 4; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Prosecution Witnesses ALG, AWD, G, and T* (16 April 2009) at para. 8-9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness* (4 March 2008) at para. 30

13. Therefore, it is respectfully requested that the Trial Chamber order that the 11 witnesses listed in Annex A be recalled during the prosecution's case.

Word count: 993

Respectfully submitted,

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

Radovan Karadzic⁹

⁹ The assistance of Legal Interns Agathe Grenouillet (France) and Kejia Guo (China/Netherlands) in the research for this motion is gratefully acknowledged.

ANNEX "A"

| Witness | Disclosure Viol. # | Description of Material Withheld | Reason for Recalling Witness |
|----------------|---------------------------|---|---|
| Herbert Okun | 4 | Lord Owen memorandum of 10 September 1992 meeting with Karadzic | To confront witness with differences between his testimony and the memorandum and to elicit favorable information ¹⁰ |

Dr. Karadzic said he would do all he could to support the work of the conference.¹¹ He gave an assurance that detainees being evacuated from Manjaca and Trnoplje camps would not be shelled and promised full cooperation. He stated it was in the Serb's interests to see these camps closed.¹² He suggested that ICRC or UNHCR personnel should manage all detention camps to which they already had full access.¹³ He proposed the UN should take over the management of water and electricity supplies and promised full cooperation in organizing this.¹⁴ He claimed that all Serb heavy weapons had now been concentrated in 11 positions around Sarajevo and 3-5 positions around the other four towns. Observers had already gone to 10 of the positions around Sarajevo and the others were ready to accept observers.¹⁵ Contrary to Ambassador Okun's testimony that Dr. Karadzic frequently acknowledged that ethnic cleansing occurred, there is no reference to any such acknowledgement in the memorandum of this meeting. Nor is there reference to Dr. Karadzic's apartment as testified to by Ambassador Okun.

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| 32 | Memorandum of Lord Owen of meetings in November 1992 | To confront witness with differences between his testimony and the memorandum and to elicit favorable information ¹⁶ |
| | Memorandum of Lord Owen for foreign ministers in November | |

¹⁰ No violation of Rule 68 was found, but the document was found to be within the scope of a Rule 66(B) request and the Trial Chamber observed it should have been disclosed earlier. *Decision on Accused's Third, Fourth, Fifth and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures* (20 July 2010) at para. 37. Note that David Owen has been dropped from the prosecution's witness list.

¹¹ para. 19

¹² para. 19

¹³ para. 19

¹⁴ para. 19

¹⁵ para. 20

¹⁶ Although no Rule 68 violation was found as to these documents, *Decision on Accused's Thirty-Second, Thirty-Third, Thirty-Fifth, and Thirty-Sixth Disclosure Violation Motions* (24 February 2011) at para. 18,

1992

The memoranda contains Lord Owen's assessment that Dr. Karadzic was reasonable with respect to making concessions about Sarajevo, so long as they are the final concessions and lead to an agreement, as well as the fact that Dr. Karadzic agreed to accept the approach to the maps suggested by President Izetbegovic, which he described as appropriate. This contradicts the allegations of the indictment that Dr. Karadzic had the objective to terrorize the civilian population of Sarajevo.

Ambassador Okun's diary for November 1992 contains notes of Lord Owen's briefings, but makes no mention of these favorable assessments of Dr. Karadzic's position.

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| 24 | Cyrus Vance memorandum of 10 September 1992 meeting with Karadzic of 5 March 1992 meeting with Karadzic | To confront witness with differences between his testimony and the memorandum and to elicit favorable information: |
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Dr. Karadzic had "denied any involvement with the erection of the barricades which completely paralyzed Sarajevo last Monday."

Ambassador Okun's diary records only that "'Karadzic more disheveled and melodramatic but did not use word 'genocide' until about three minutes into conversation. CRV pressed him to continue participation in tripartite conference under Cutileiro's chair. K said that he would. Launched into defence, personal, of Serb position!"¹⁷ This entry was elicited from Ambassador Okun during his direct examination as an example of Dr. Karadzic's alleged unreasonableness.¹⁸

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| Colm Doyle | 24 | Same Vance memo as above | To confront the witness with information which contradicts his testimony |
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The memorandum indicates that Dr. Karadzic had "denied any involvement with the erection of the barricades which completely

given the need to recall Ambassador Okun for other issues, Dr. Karadzic would like to question him about these late-disclosed documents as well.

¹⁷ Exhibit P1418 at p. 43 (marked as pg 104 in the diary)

¹⁸ Transcript of 22 April 2010, pp. 1490-91

paralyzed Sarajevo last Monday.”¹⁹ Colonel Doyle testified that during the time when the barriers were in place on 2 March 1992, a person manning one of the barricades had told Mr. Doyle that he would only dismantle the barricade upon orders of Dr. Karadzic.²⁰

| | | | |
|---------------|----|--|--|
| David Harland | 18 | Karadzic letter dated 24 July 1993 to Owen and Stoltenberg | To confront the witness with information which contradicts his testimony and to elicit favorable information |
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In the letter, a copy of which was received by UN Civil Affairs, Dr. Karadzic provided a guarantee for gas re-supply to the city of Sarajevo. Mr. Harland, a Civil Affairs officer, testified that the Bosnian Serbs deprived the citizens of Sarajevo of utilities when it suited their political purposes and testified that the Bosnian Serbs would allow the flow of utilities when they were threatened by international intervention.²¹ No particular intervention was threatened in late July 1993.

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| 47 | Karadzic order of 21 April 1994 | To confront the witness with information which contradicts his testimony and to elicit favorable information |
| | Karadzic statement of 29 December 1992 | To confront the witness with information which contradicts his testimony and to elicit favorable information |

In a VRS message dated 21 April 1994, they transmitted President Karadzic’s order that unhindered passage for convoys should be provided.

In a report of a public statement of 29 December 1992 by President Karadzic, he indicated that humanitarian convoys should not be obstructed and urged the public not to cause problems with the passage of the convoys.

This contradicts the testimony of David Harland that President Karadzic hindered the passage of convoys during that period.²²

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| KDZ185 | 43 | ICFY memorandum of | To elicit favorable |
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¹⁹ Para. 3.

²⁰ Transcript of 21 May 2010, p. 2659

²¹ Transcript of 6 May 2010 at p.2019

²² Exhibit #P820; Witness Statement of 4 September 2009, para. 88

20 July 1993

information

The memorandum indicates that "UNPROFOR assesses that Sarajevo was without electricity and therefore without water until 13 July as a result of a deliberate political choice made by the Bosnian Government" and that the Bosnian government had requested the government of Hungary to stop the delivery of natural gas. This supports the defence that the Muslims were responsible for much of the suffering of the people in Sarajevo, and the crimes alleged in the indictment, as a result of their tactics to force international intervention. The witness was a UNPROFOR official in Sarajevo during this time.

49 Morillon Memorandum of To elicit favorable
15 February 1993 information

Morillon Memorandum of
January 1993

The memorandum of General Morillon dated 15 February 1993 states that (1) the Bosnian Army broke the ceasefire; (2) the Bosnian Army admitted attacking the headquarters of the French Battalion; and (3) President Izetbegovic had refused the delivery of humanitarian aid.

The memorandum of General Morillon dated 6 January 1993 explains that the Muslims are responsible for the "siege of Sarajevo" by virtue of their refusal to honor the agreement on the freedom of movement of civilians and their use of the airport to move military troops, thus endangering civilians.

This supports the defence that the Muslims were responsible for much of the suffering of the people in Sarajevo, and the crimes alleged in the indictment, as a result of their tactics to force international intervention. The witness was a UNPROFOR official in Sarajevo during this time.

Michael Rose 31 Andreev memorandum of To elicit favorable
11 May 1994 information

The memorandum from UN Civil Affairs Officer Victor Andreev dated 11 May 1994 recounts how the Bosnian Muslim government had sought to provoke international military intervention, including by "their gamble in Goradze." This supports Dr. Karadzic's position that the Muslim Army initiated the hostilities in Goradze, then collapsed into the town to create the false impression that the Serbs were attacking the safe area and obtain international intervention on their behalf.

General Rose testified that on 16 April 1994, he ordered air strikes against Serb tanks which were attacking Bosnian forces east of Goradze. He testified that Dr. Karadzic's representations about what had occurred in Goradze were not true.²³ The defence would have put the Andreev memorandum to him, and sought its admission, had it been disclosed on time.

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| 49 | de laPrestle memorandum of 13 September 1994 | To elicit favorable information |
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In the memorandum, General de la Prestle stated that (1) the Bosnian Army broke the ceasefire; (2) the Bosnian Army admitted attacking the headquarters of the French Battalion; and (3) President Izetbegovic had refused the delivery of humanitarian aid.

General de laPrestle noted that "the recent tightening of BSA grip upon Sarajevo has resulted directly from a number of BiH offensives." He also cited examples of shellings blamed on the Bosnian Serbs which were in fact initiated by the Bosnian Muslims, such as the 18 August shelling of Sarajevo airport and the 1 September shelling of UNPROFOR positions.

This corroborates Dr. Karadzic's defence that the Serbs have been falsely blamed for shelling incidents, including those enumerated in Schedule G of the Indictment, for which the Muslims were responsible.

Had this document been timely disclosed, Dr. Karadzic could he have jogged General Rose's memory as to who was responsible for those incidents, and as to specific instances of Muslim shellings being blamed on the Serbs, and he could have gotten the document admitted into evidence through General Rose.

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| KDZ450 | 37 | UN memorandum dated 21 March 1994 | To elicit favorable information |
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The memorandum reported that Mr. Krajisnik had appointed a special team to facilitate the implementation of an agreement that convoys would be checked only once and then allowed to travel unimpeded and that humanitarian convoys should be allowed to move at any time. The memorandum observed that it seemed like the Serb leadership are trying to use the agreement to strengthen its control over the military.

The memorandum contradicts the allegations of the indictment, and the testimony of several prosecution witnesses, that the Bosnian Serb leadership were unreasonably obstructing the movement of convoys. This memorandum shows an occasion where the Bosnian Serb

²³ Exhibit P1638; Amalgamated Statement, para. 93

leadership was facilitating in a positive way the freedom of movement. It corroborates the defence position that the restrictions on convoys were not intended to be, nor were they, unreasonable.

Had this memorandum been disclosed at the time Witness KDZ450 testified, he would have been able to confirm the accuracy of its contents.

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| Martin Bell | 42 | Diary entries of prominent individual who visited Sarajevo | To elicit favorable information |
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The diary indicates that this individual was told on his visit by the UNPROFOR Commander that the Serbs informed them before they fired their heavy weapons. The UNPROFOR Commander also confirmed Dr. Karadzic's statement that the Serbs refrained from firing their heavy weapons even in the face of Muslim attacks. The diary also indicates that the writer found Dr. Karadzic refreshingly honest and that Dr. Karadzic had indicated that those atrocities which had been committed by Serbs had been committed by persons who were out of control of the authorities.

Martin Bell was present in Sarajevo during this visit and was in contact with the individual who authored the diary. Had the diary been disclosed at the time of Mr. Bell's testimony, Dr. Karadzic could have elicited these facts from Mr. Bell and confirmed that the events described in the diary took place and that the author of the diary indeed held those opinions.

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| Hussein Ali Abdel-Razek | 49 | Memoranda of General Morillon | To elicit favorable information |
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In a memorandum written by General Morillon dated 6 January 1993 he explains that the Muslims are responsible for the "siege of Sarajevo" by virtue of their refusal to honor the agreement on the freedom of movement of civilians and their use of the airport to move military troops, thus endangering civilians.

In a memorandum written by General Morillon dated 15 February 1993 he states that (1) the Bosnian Army broke the ceasefire; (2) the Bosnian Army admitted attacking the headquarters of the French Battalion; and (3) President Izetbegovic had refused the delivery of humanitarian aid.

General Ali Abdel-Razek was stationed in Sarajevo during this time and he was the immediate subordinate of General Morillon. Had these documents been disclosed to Dr. Karadzic at the time of General Abdel-Razek's testimony, he could have put them to General Abdel-Razek to

shed a completely different light on the General's testimony and conclusion that the firing by the Serbs was indiscriminate.²⁴

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| Richard Phillips | 49 | Transcript of interview of General Vlado Lizdek on 7 April 2001 | To elicit favorable information |
| | | Transcript of interview of General Svetozar Guzina on 28-30 October 2003 | |

In his interview, General Lizdek indicated that an investigation of the mortars positioned to the north of Sarajevo was undertaken by the SRK and that it was determined that those mortars had not been fired at the time of the Markale I incident. He denied that any members of his brigade shot at civilians at Spicasta Stijena. He indicated that his orders were to engage only those persons believed to be soldiers. He indicated that he had no knowledge of any war crimes committed within his area of responsibility.

In his interview, General Guzina stated that the School of the Blind and School of Theology were in his area of responsibility when he became commander of 1st Battalion in 1993. With respect to the School of Theology, General Guzina indicated that it served only as a viewing point and weapons were used there only when they were under attack by Muslim forces. General Guzina further indicated that no one ever issued an order to shoot at civilians.

Richard Phillips was present at both interviews. Had the transcripts been disclosed at the time he testified, Dr. Karadzic could have elicited this information from him. This is particularly important since General Lizdek has since died.

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| General Rupert Smith | 49 | Notes of interview of a UN Official on 29 Sept. 2003 | To elicit favorable information |
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The UN official stated that in 1995, General Mladic had indicated that he could care less about decisions taken by Karadzic. Given General Smith's relationship with the UN official, it is likely that the UN official would have informed General Smith about this statement in 1995,

This evidence demonstrates the lack of control of Dr. Karadzic as alleged for Article 7(3) liability and for the "ordering" form of liability under Article 7(1). Had the interview been disclosed prior to the testimony of General Smith, Dr. Karadzic could have elicited this information from him.

²⁴ Exhibit P1258; statement at p. 15

Witness KDZ088

47 Karadzic letter dated
13 June 1992

To elicit favorable
information

In this letter, Dr. Karadzic declares a cease-fire and requests that UN monitors be posted at all Serb positions. This supports his contention that he believed that the VRS was not targeting civilians by shelling and sniping, and was willing to allow the UN to be on the spot to verify this.

Had this letter been disclosed before the testimony of Witness KDZ088, Dr. Karadzic could have elicited this information from him and could have introduced this document through his testimony.