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International Tribunal for the Prosecution  
of Persons Responsible for Serious  
Violations of International Humanitarian  
Law Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-95-14-T

Date: 29 April 1998

English  
Original: French

**IN THE TRIAL CHAMBER**

**Before:** Judge Claude Jorda, Presiding  
Judge Fouad Riad  
Judge Mohamed Shahabbudeen

**Registrar:** Mrs. Dorothee de Sampayo Garrido-Nijgh, Registrar

**Order of:** 29 April 1998

**THE PROSECUTOR**

**v.**

**TIHOMIR BLAŠKIĆ**

**DECISION ON THE DEFENCE MOTION FOR  
"SANCTIONS FOR PROSECUTOR'S REPEATED VIOLATIONS OF RULE 68  
OF THE RULES OF PROCEDURE AND EVIDENCE"**

**The Office of the Prosecutor:**

Mr. Mark Harmon  
Mr. Andrew Cayley  
Mr. Gregory Kehoe

**Defence Counsel:**

Mr. Anto Nobile  
Mr. Russell Hayman

Trial Chamber I 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 (hereinafter “the Tribunal”) received a motion for “Sanctions for the Prosecutor’s Repeated Violations of Rule 68 of the Rules of Procedure and Evidence” (hereinafter “the Motion”), filed by the Defence on 8 December 1997. The Prosecution responded to the Motion on 13 February 1998 and the Defence replied on 18 March 1998.

## I. Claims of the Parties

1. Following the testimony of Lieutenant-Colonel Bryan Watters on 10 and 11 November 1997, the Defence submitted that the Prosecutor had committed a serious violation of her obligations under Rule 68 of the Rules of Procedure and Evidence (hereinafter “the Rules”). According to the Defence, the violation was twofold: first, failing to disclose significant exculpatory information contained in a British Battalion Military Information Summary (hereinafter “Milinfosum No. 170”) of which it received only a heavily redacted version; second the Prosecution’s attempt to elicit from Colonel Watters testimony directly contradicting such exculpatory evidence.

2. The Defence states that it received from the Prosecution approximately 63 heavily redacted versions of the Milinfosums, including Milinfosum No. 170, the latter of which allegedly contained only one paragraph regarding a supposed meeting between the commanders of the British troops operating under the United Nations flag (BritBat) and HVO and BiH forces as well as a summary of a cease-fire order issued by the accused on 18 April 1993. In the non-disclosed portions of Milinfosum No. 170, on which the Defence bases its Motion, it appears that:

“A meeting between local commanders in Vitez school produced a cease-fire agreement. However, there are as yet little indications that this agreement has reduced activity on the ground. *CO 1 Chesire has agreed with 3 Corps BiH and Central Bosnia HVO that the national cease-fire signed by Boban and Izetbegovic should be effective from 2359B hrs tonight.*” (Emphasis in the Defence motion)

3. The Defence considers that this information contradicts the statements of Lieutenant-Colonel Watters who allegedly attempted to downplay the significance of the cease-fire agreement and to attack its legitimacy by stating *inter alia* that neither BritBat nor the European Community Monitoring Mission (ECMM) had been involved in negotiating such a cease-fire. The Defence argues that, on the contrary, this portion of the Milinfosum confirms both the fact

that local negotiations for a cease-fire - allegedly involving BritBat - occurred and that the agreement among the parties as to when the cease-fire would be implemented was reached.

4. In the opinion of the Defence, it was doubly wronged by the Prosecutor's conduct insofar as the Prosecutor not only failed to disclose the exculpatory information to it before the start of trial and then attempted to elicit contradictory testimony from Colonel Watters, but also failed to disclose the information after the said testimony, although the information in question, in addition to its exculpatory nature, bore directly on the credibility of a Prosecution witness, as stipulated in Rule 68.

5. When, having obtained an unredacted version of the same Milinfosum from a confidential source, it realised the above, the Defence asked that the Trial Chamber immediately order the following measures: (i) that the unredacted text of Milinfosum No. 170 (Exhibit B attached to the Motion and filed under seal) be admitted as Defence evidence; (ii) that Colonel Watters' testimony during re-direct examination and his testimony in response to questions from the Presiding Judge of the Trial Chamber regarding the non-disclosed exculpatory evidence be stricken or, in the alternative, that the witness again be called to appear as a Prosecution witness so that the Defence might resume its cross-examination limited to the points mentioned in the documents which, wrongfully, were not disclosed; and iii) that the Prosecution disclose to the Defence all the Milinfosums without redaction which have previously been produced in redacted form.

6. The Prosecutor submits that there was no violation on her part of the disclosure obligation under Rule 68 allegedly consisting of a wrongful withholding of exculpatory information. On the contrary, she states that she did disclose Milinfosum No. 170 on 10 March 1997 to which the cease-fire agreement in question was attached. Moreover, she specifies that she also provided the Defence with two other relevant documents: in August 1996, the diary of Lieutenant-Colonel Robert Stewart (Commander of the Cheshire Regiment), which contains the following entry about the day of 18 April:

"I spoke to Enver Hadzihasanovic [Commander of BiH 3rd Corps] and Timomir [sic] Blaskic on the telephone after this. Apparently Boban and President Izabegovic [sic] have agreed a cease-fire. I agreed with both of them that it should come into effect at midnight. We shall see.";

and on 9 May 1996, excerpts from Colonel Stewart's book, *Broken Lives*, which describes his experience in Bosnia and contains the following passage:

"I remained in the school and telephoned Enver Hadzihasanovic and Timomir [sic] Blaskic. Apparently Mate Boban and President Izetbegovic had agreed to a cease-fire, which both Enver and Timomir [sic] know about. The three of us agreed that all fighting should therefore stop at midnight. We knew that this would give time for appropriate orders to filter down to the lowest levels."

Although this specific passage from the book was not specifically disclosed to the Defence, the Prosecution submits that, the very fact of disclosing other excerpts from it in May 1996, means that the Defence was made aware of the book's existence and therefore had ready access to it for extracting information necessary for the preparation of the defence of the accused and for the cross-examination of the Colonel Watters, Colonel Stewart's second-in-command.

7. In any case, since the Prosecution is of the opinion that the willingness to enter into a cease-fire agreement, after the commission of crimes, cannot in and of itself absolve or mitigate the guilt of the accused, such willingness does not constitute exculpatory evidence within the meaning of Rule 68, which is why the Prosecutor did not envisage it as such.

8. The Prosecution consequently maintains the following viewpoints: i) it asserts that it did not wrongfully withhold exculpatory evidence covered in Rule 68, and argues, on the contrary, that it did disclose the information in question; ii) according to the Prosecution, mere willingness to enter into a cease-fire agreement is not exculpatory as such in respect of crimes already committed; iii) since the said agreement was not considered to be relevant to the charges in the indictment, the alleged omission was therefore not known to the Prosecution during and after the examination of Colonel Watters and; iv) rejecting the Defence allegation that the incident in question demonstrates "the fierce competitive environment of adversary litigation" while accusing it of being "overzealous" in order to gain a tactical advantage, the Prosecution maintains that the fact the Defence did not have a non-redacted version of the said Milinfosum during the cross-examination of Colonel Watters did not derive from a failure on the part of the Prosecution but rather from the risk inherent in the accused's tactical decision not to proceed with the pre-trial inspection provided under Sub-rule 66(B) of the Rules, in order to avoid the subsequent obligations in respect of reciprocal disclosure.

9. On the basis of this argument, the Prosecution requests that the Trial Chamber dismiss not only the motion to strike certain excerpts of Colonel Watters' testimony, but also the motion asking the Trial Chamber to order the disclosure to the Defence of complete Milinfosums from which the exculpatory evidence thus far provided was taken. However, it reaffirms its willingness, as expressed at trial already, to have Colonel Watters appear again in order to permit the Defence to conduct a new cross-examination focused on the contested excerpt of the Milinfosum. And it does not object to admitting Exhibit B attached to the Motion as a Defence exhibit.

10. In its reply of 18 March 1998, the Defence refutes the Prosecution's arguments and confirms the terms of its motion.

## II. Analysis of the Claims of the Parties

11. The Trial Chamber notes that the parties agree on two points: the admission of Milinfosum No. 170 (Exhibit B attached to the Motion) as Defence evidence and the possibility of calling Mr. Watters again as a Prosecution witness. This further appearance would resolve the alternative issue of striking the excerpts of Colonel Watters' testimony which are viewed as hostile toward the accused.

12. The remaining point of contention relates to the scope of the Prosecution's obligation to disclose exculpatory evidence pursuant to Rule 68 of the Rules which states:

"The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence".

13. The Tribunal has previously been called upon to deal with the issue of disclosure. In particular, seised of a Defence *Motion to compel the production of discovery materials* filed on 26 November 1996, this Trial Chamber handed down a *Decision on the motion to compel the production of discovery materials* on 27 January 1997 (hereinafter "the Decision").

14. In that Decision, the Trial Chamber stated that the Prosecution bore sole responsibility for disclosing to the Defence the evidence which tends to suggest the innocence or mitigate the guilt of the accused and that it did so under its own responsibility and under the supervision of the Trial Chamber which, in case of an established failure to comply, would have to draw all the

consequences, particularly at trial (the Decision, paragraph 50). In respect of the scope of this obligation, the Trial Chamber added:

“If the Prosecution fulfills its above indicated obligations but the Defence considers that evidence other than that disclosed might prove exculpatory for the accused and was in the possession of the Office of the Prosecutor, it must submit to the Trial Chamber all *prima facie* proofs tending to make it likely that the evidence is exculpatory and was in the Prosecutor’s possession. Should it not present this *prima facie* proof to the Trial Chamber, the Defence will not be granted authorisation to have the evidence disclosed.”

15. The argument which is the subject of this motion touches on the same issue as the foregoing hypothesis, that is, the one which allegedly demonstrates a misunderstanding as to whether some of the evidence is of an exculpatory nature, after an initial disclosure by the Prosecutor pursuant to Rule 68 of the Rules. And, beyond determining whether the excerpt in question is exculpatory in nature, in the end the question amounts to the following: Is the Prosecutor, in addition to the general and positive obligation of Rule 68, obliged to disclose the entire documents from which exculpatory evidence is extracted, or may the Prosecutor extract only the said evidence for disclosure to the Defence?

16. The proceedings before the Tribunal are supported by the principles of an adversarial system and a balanced trial. According to the aforementioned Decision, it is, of course, the responsibility of the Prosecution to disclose all potentially exculpatory evidence. In this view, an established extraction of the said evidence from its context would not, in principle, be conducive to a full understanding of the text nor permit one to measure its full scope. However, in the case at hand, the evidence which the Defence accuses the Prosecution of having extracted from Milinfosum No. 170 constitutes a cohesive whole which is distinct from the remainder of the text. Its extraction does not hinder the understanding of the full message. The Prosecution moreover remains the master of its own strategy and it is under no obligation to question a witness on an entire document about which the witness allegedly had or might have had knowledge.

17. Having said this, the Defence motion makes it necessary for the Trial Chamber to assess the nature of the passages extracted by the Prosecutor from Milinfosum No. 170. In this regard, the Trial Chamber notes two outstanding aspects. First, the passages of Milinfosum No. 170 disclosed to the Defence (Exhibit A attached to the Motion) clearly indicate the existence of a cease-fire agreement signed by the accused on 18 April 1993. This necessarily implies that, for

such an agreement to have been signed, local level discussions had taken place. Second, in addition, according to the text, it also appears that the accused allegedly received “orders from the Chief of Staff of the HVO in Herceg-Bosna”.<sup>1</sup>

18. To be sure, the main passage in Milinfosum No. 170, which the Defence accuses the Prosecutor of not having disclosed, states somewhat the circumstances in which the cease-fire agreement was allegedly implemented at the local level. However, this precision seems to be of little significance because the details on the negotiation process of the agreement do not seem indispensable for the Defence to use a cease-fire agreement, whose existence was duly disclosed by the Prosecutor. In all, the Defence had sufficient evidence necessary for preparing the cross-examination of Colonel Watters and it cannot be maintained that the Prosecutor violated Rule 68 of the Rules.

19. In addition, although the Trial Chamber appreciates the concern of the Defence in respect of the legitimate interests of the accused, it is nonetheless of the opinion that a full disclosure of all the Milinfosums - until now disclosed in excerpt form - would be unjustified and excessive. First, as shown above, one cannot speak of “repeated violations” of Rule 68 of the Rules. The reservations allowed in respect of this disclosure would be limited to the form of the said disclosure insofar as if it were to be taken out of context, the exculpatory evidence could not be used effectively by the Defence. Therefore the Trial Chamber, using its powers of supervision over disclosure, asks the Prosecutor to verify the Milinfosums in its possession and, possibly, to disclose to the Defence sufficiently cohesive, understandable and usable versions of exculpatory evidence contained in the 63 Milinfosums identified by the Defence.

20. Furthermore, by expressly restricting itself to Rule 68 of the Rules, the Defence, while requesting such broad access to Prosecution documentation, is avoiding the reciprocal obligation which it would have pursuant to Rules 66 and 67 of the Rules. Acceding to its request without limitations would consequently disturb the balance of the trial, particularly since such a disclosure would manifestly occur beyond the strict requirements of Rule 68 which requires the disclosure of exculpatory “evidence” and not all or an entire section of the Prosecutor’s documentation. Furthermore, the Prosecution must be able to redact from the documents it discloses the passages which are confidential and constitute neither incriminating nor exculpatory evidence within the meaning of Rule 68.

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<sup>1</sup> See Exhibit A attached to the Motion

21. All these considerations lead the Trial Chamber to deem that the Prosecutor's obligation is, in part and of necessity, tinged with subjectivity, which also leads the Judges to presume that the Office of the Prosecutor has acted in good faith. As in the present case, and as acknowledged in principle in its aforementioned decision of 27 January 1997, the Trial Chamber alone shall determine any established violations, possible sanctions and, lastly, the consequences to be drawn at the time of trial as regards the probative value of the evidence.

### III. DISPOSITION

For the foregoing reasons,

Ruling *inter partes* and in public,

**THE TRIAL CHAMBER** having considered the motion filed by the Defence and,

**PURSUANT TO RULE 54** of the Rules of Procedure and Evidence of the Tribunal,

**NOTES** the agreement of the parties to the admission of Exhibit B attached to the Motion and filed under seal,

**NOTES** also the agreement of the parties to the possibility of calling Colonel Brian Watters back to the witness stand, so that the Defence may resume its cross-examination on the passage omitted from Milinfosum No. 170,

**REQUESTS** the Registrar to include Exhibit B attached to the Motion among the exhibits,

**ORDERS** the Prosecution to have Colonel Watters appear again within a relatively short period of time and within the time it has been allotted by the Trial Chamber for the presentation of its evidence,

**ORDERS** the Prosecution to examine the Milinfosums previously produced in redacted form in order to be certain that it did not fail to disclose to the Defence exculpatory evidence falling within the framework of Rule 68,

**STATES** that, in cases where there is additional evidence to disclose, such disclosure should be conducted in sufficiently cohesive versions; that, furthermore, the Prosecutor shall especially avoid taking the said evidence completely out of context so as to facilitate their use by the Defence of the accused; and that a report on this examination and the possible disclosure shall be submitted to the Trial Chamber and to the Defence no later than 30 June 1998.

**DISMISSES** the Defence request relating to the full disclosure of all British Battalion Military Information Summaries ( "the Milinfosums").

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

(signed)

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Claude Jorda  
Presiding Judge of the Trial Chamber

Done this twenty-ninth day of April 1998  
At The Hague,  
The Netherlands

**(Seal of the Tribunal)**