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UNITED  
NATIONS



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: IT-00-39-T

Date: 2 June 2006

Original: English

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**IN TRIAL CHAMBER I**

**Before:** Judge Alphons Orie, presiding  
Judge Joaquín Martín Canivell  
Judge Claude Hanoteau

**Registrar:** Mr Hans Holthuis

**Decision of:** 2 June 2006

**PROSECUTOR**

v.

**MOMČILO KRAJIŠNIK**

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**DECISION ON DEFENCE MOTION ON RULE 68 OF THE RULES OF  
PROCEDURE AND EVIDENCE  
WITH CONFIDENTIAL ANNEX**

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**Office of the Prosecutor**

Mr Mark Harmon  
Mr Alan Tieger

**Counsel for the Defence**

Mr Nicholas Stewart, QC  
Mr David Josse

1. On 10 April 2006, Witness D24 testified to have given a statement to a Prosecution investigator in 1997.<sup>1</sup> The Prosecution subsequently offered to provide the Defence with a passage from this statement.<sup>2</sup> On 20 April 2006, the Defence filed a motion seeking an order and guidance by the Chamber on the Prosecution's obligation to disclose material under Rule 68.<sup>3</sup>

2. In its motion, the Defence states that "In subsequent correspondence the Prosecution asserted that the relevant passage was not disclosable under Rule 68, and that it had been supplied in part to end any mystery as to what was in the statement and in part as a courtesy."<sup>4</sup> The Defence asserts that "The Prosecution stance in so far as it relates to Rule 68 suggests a serious misapplication of the said Rule" because the passage in question "falls for disclosure under all of the grounds in Rule 68 (i)."<sup>5</sup> The Defence does not explain why it considers this passage to fall under Rule 68 (i).

3. The Defence seeks the following:

a) A Ruling from the Chamber as to whether Rule 68 was applied correctly in relation to the statement of D24.

b) Directions from the Chamber as to how the Prosecution should apply Rule 68 in relation to both statements and interview transcripts in their possession.

c) An Order that the Prosecution thoroughly review material in their possession, in particular but not exclusively relating to statements and interviews, in the light of the Chamber's ruling and directions in relation to a) and b) above, in regard to all witnesses who have given evidence in the case, and make disclosure accordingly.

d) An Order that the Prosecution disclose the names as well as the relevant statements and/or interviews of all individuals who have not given evidence in the trial of Mr. Krajišnik whose statements or interviews may in some way no matter how small fall for disclosure under Rule 68.<sup>6</sup>

4. On 5 May 2006, the Prosecution filed its response.<sup>7</sup> The Prosecution asserts that the Defence failed to present a prima facie case regarding the exculpatory nature of the passage

<sup>1</sup> T. 22759-60.

<sup>2</sup> T. 22784. The passage is contained in a Confidential annex to this Decision.

<sup>3</sup> Defence Motion on Rule 68 of the Rules of Procedure and Evidence, 20 April 2006.

<sup>4</sup> *Ibid.*, para 5.

<sup>5</sup> *Ibid.*, para 6.

<sup>6</sup> *Ibid.*, para. 9.

<sup>7</sup> Prosecution's Response to Defence Motion on Rule 68 of the Rules of Procedure and Evidence, 5 May 2006.

disclosed to the Defence.<sup>8</sup> The Prosecution also asserts that its determination that the passage did not fall within the scope of Rule 68 was both reasonable and made in good faith, since the passage does not “on its face appear to fall within any of the three grounds set out in Rule 68 (i)”, both because it does not expressly mention acts of the Accused, and because an interpretation of the passage disfavouring the Defence case is supported by other evidence;<sup>9</sup> that, even if the Prosecution were in error, this did not result in prejudice to the Defence;<sup>10</sup> that the Defence failed to present a prima facie case regarding any systematic failure by the Prosecution to discharge its obligations under Rule 68;<sup>11</sup> and that the relief sought is excessive, disproportionate, and unwarranted.<sup>12</sup>

5. The Defence filed a reply on 11 May 2006<sup>13</sup> stating that even if the passage could give rise to an inference against the Accused, it also raises an inference in the Accused’s favour, and therefore should have been disclosed.<sup>14</sup> The Defence withdrew its request for relief under (c), namely its request for a thorough review of material in the possession of the Prosecution.<sup>15</sup>

6. Rule 68 provides, in relevant part:

Subject to the provisions of Rule 70,

(i) the Prosecutor shall, as soon as practicable, 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.

7. If the Defence believes that the Prosecution has not complied with Rule 68, it must first establish that the undisclosed material that the Defence considers to be exculpatory is in the possession of the Prosecution. Then, the Defence must present a prima facie case demonstrating that this material is of a probable exculpatory nature.<sup>16</sup>

8. In its request for relief under (a), the Defence requests the Chamber to rule on whether the law was applied correctly by the Prosecution in relation to the passage from the statement

<sup>8</sup> Ibid., para. 10.

<sup>9</sup> Ibid., para. 13.

<sup>10</sup> Ibid., paras 14-17.

<sup>11</sup> Ibid., paras 20-22.

<sup>12</sup> Ibid., para. 23.

<sup>13</sup> Defence reply to the Prosecutor’s response to Defence Motion on Rule 68 of the Rules of Procedure and Evidence, 11 May 2006. The Chamber granted the Defence leave to reply on 9 May 2006, T. 23711.

<sup>14</sup> Ibid., para. 6.

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

<sup>16</sup> *Blaškić* Appeal Judgement, 29 July 2004, para. 268; *Kordić and Čerkez* Appeal Judgement, 17 December 2004, para. 179; *Kajelijeli* Appeal Judgement, 23 May 2005, para. 262.

of Witness D24.<sup>17</sup> The statement, due to its very nature, was in the possession of the Prosecution. The passage may be interpreted either in favour or against the accused. A favourable interpretation would be that the effort to prevent mobilisation of the Muslims is the expression of a sincere wish to seek a peaceful solution. An unfavourable one would be that the Serb side sought to gain military advantage by preventing the Muslims from mobilising.

9. Material which in any way may suggest the innocence or mitigate the guilt of an accused or affect the credibility of Prosecution evidence, shall be disclosed to the Defence.<sup>18</sup> This disclosure obligation is not limited to material that is exculpatory “on its face”.<sup>19</sup> For material to fall within the ambit of Rule 68 (i), it is thus not required that it in fact suggests the innocence of an accused; it is sufficient that it *may* so suggest.

10. The passage from the statement should therefore have been disclosed to the Defence, and the Prosecution breached its obligation under Rule 68 by not doing so as soon as practicable. In the application of Rule 68, it is in the first instance the Prosecution’s responsibility to determine what material may be exculpatory and to disclose it accordingly.<sup>20</sup> A presumption of good faith attaches to this obligation.<sup>21</sup> With regard to the passage from the statement of Witness D24, the fact that this material is susceptible to multiple interpretations, makes it understandable that the Prosecution paid insufficient attention to its exculpatory nature. Therefore, the Chamber’s presumption of good faith has not been rebutted by the Prosecution’s misapplication of Rule 68 in this instance.

11. As to the Defence’s request for relief under (b),<sup>22</sup> the Chamber deems its considerations above to be sufficient guidance on how the Prosecution should apply Rule 68.

12. Where the Defence, in its request for relief under (d), seeks an order for disclosure,<sup>23</sup> the Chamber notes that no probable exculpatory character of any specific statement or interview record has been demonstrated in support of the request. The Defence, in effect, insists on the loyal discharge by the Prosecution of its disclosure obligations under Rule 68 (i). The Chamber does not consider there to be any bad faith or systematic failure to comply on the part of the Prosecution, thus there is no need to issue an order as requested. The Chamber

<sup>17</sup> Defence Motion, para 9 (a).

<sup>18</sup> *Krstić* Appeal Judgement, 19 April 2004, para. 178.

<sup>19</sup> *Ibid.*, para. 179.

<sup>20</sup> *Brđanin and Talić*, Decision on “Motion for relief from Rule 68 violations by the Prosecutor and for sanctions to be imposed pursuant to Rule 68 bis and Motion for adjournment while matters affecting justice and a fair trial can be resolved”, 30 October 2002, para. 30.

<sup>21</sup> *Ibid.*

<sup>22</sup> Defence motion, para 9 (b).

<sup>23</sup> *Ibid.*, para 9 (d).

expects the Prosecution to pay due attention to its ongoing disclosure obligations, which may entail a review of material it has already in its possession in light of the present decision.

13. In this respect, the Chamber draws the attention of the parties to Rule 67 (C), which provides:

If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

If material may suggest the innocence or mitigate the guilt of the accused, or may affect the credibility of Prosecution evidence, but could also be understood as supporting the Prosecution's case, the Prosecution should consult the Defence before disclosing the material to the Chamber. Rule 67 (C) is intended to protect an accused and inform the Chamber of any late disclosure of exculpatory material. This Rule should not have the counterproductive effect of making available to the Chamber material that is considered by the Defence to be of an incriminatory rather than of an exculpatory character.

14. The failure to disclose the passage of the statement given by Witness D24 has caused no prejudice to the Defence that would require any further remedy. The information contained in the passage was in its essence already discovered by the Defence, and appears in its 65 ter statement filed on 4 October 2005,<sup>24</sup> well before the Defence spotted materially the same information in the disclosed passage of the statement of Witness D 24.

15. The Chamber does not see how the provision in the procedure on calling and examining Chamber witnesses<sup>25</sup> cited by the Defence,<sup>26</sup> which states that the Chamber *may* order the Prosecution to produce material with regard to prospective Chamber witnesses, is an argument in favour of granting the Defence motion. The power of the Chamber to order the parties to disclose records of interviews with persons whom the Chamber is considering to call as Chamber witnesses flows from its discretion in relation to the proper application of Rule 98, and is unrelated to Rule 68.

<sup>24</sup> Defence filing pursuant to Rule 65 *ter* (G)(i) of the Rules of procedure and evidence, 4 October 2005.

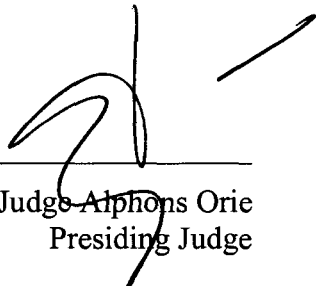
<sup>25</sup> Finalized Procedure on calling and examining Chamber witnesses, Annex to Finalized Procedure on Chamber witnesses; decisions and orders on several evidentiary and procedural matters, 24 April 2006.

**FOR THE FOREGOING REASONS THE CHAMBER HEREBY,**

**FINDS** that with regard to the passage from Witness D24's statement, the Prosecution has breached its obligation under Rule 68, and

**DENIES** the motion in all other respects.

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



Judge Alphons Orié  
Presiding Judge

Dated this 2nd day of June 2006  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

<sup>26</sup> Defence Motion, para. 8.