

UNITED
NATIONS

IT-95-5/18-T
D35761 - D35758
17 May 2010

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

Date: 17 May 2010

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 17 May 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S MOTION TO EXCLUDE TESTIMONY OF
AERNOUT VAN LYNDEN**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER 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 (“Tribunal”) is seised of the Accused’s Motion to Exclude Testimony of Aernout Van Lynden”, filed on 14 May 2010 (“Motion”), and hereby issues its decision thereon.

1. On 18 May 2009, shortly after the Office of the Prosecutor (“Prosecution”) filed its Rule 65 *ter* witness list, the Accused filed his “Motion to Exclude Testimony of War Correspondents” (“Motion on War Correspondents”) arguing that all war correspondents on that list should be disallowed from giving evidence because they should not have the right to give evidence voluntarily and waive the privilege established in the *Brđanin* case,¹ as doing so would render this privilege meaningless for other war correspondents. The Chamber dismissed the Motion, without hearing from the Prosecution, on the following basis:

The Trial Chamber considers this Motion to be both frivolous and vexatious. It is wholly lacking in merit and is a wasteful use of resources. It seeks to exclude from giving evidence potential witnesses who are plainly competent to do so on the basis of a decision in *Brđanin* which has no relevance to this Motion, other than establishing clearly that the privilege enjoyed by war correspondents is a matter which is for them personally to choose to exercise or not. It contains no tenable argument in support of the relief sought. Whether or not any witness should give evidence is a matter to be determined by a Trial Chamber on a case by case basis depending on the particular circumstances that apply to each individual witness.²

2. In the present Motion, the Accused moves to exclude the testimony of witness Aernout Van Lynden, who is scheduled to begin testifying in this case on 19 May 2010, relying on the *Brđanin* decision again, which, as already stated by the Chamber, clearly establishes the opposite.³ The Accused then states that the issue raised by his Motion is whether the relevant war correspondent alone can waive the qualified privilege established by the *Brđanin* decision, or whether that should be done by his or her employer. He argues that it should be the latter, in line with this Tribunal’s jurisprudence which gives such a privilege to the International Committee for Red Cross (“ICRC”). Since no such waiver has been given by Mr. Van Lynden’s employer at the time of his reporting from Bosnia and Herzegovina, he should be precluded from testifying in this case.⁴

¹ *Prosecutor v. Brđanin*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.

² Decision on Motion to Exclude Testimony of War Correspondents, 20 May 2010, para. 3.

³ Motion, paras. 1–6.

⁴ Motion, paras. 7–8, 11–14.

3. The Prosecution filed the “Prosecution’s Response to Accused’s Motion to Exclude Testimony of Aernout Van Lynden” on 17 May 2010 (“Response”). It opposes the Motion on the basis that (i) the Accused essentially repeats the same argument he made in his Motion on War Correspondents, which was dismissed by the Chamber, and (ii) makes a “self-serving and inapposite attempt to analogise war correspondents to the situation of ICRC delegates.”⁵

4. The Chamber agrees with the Prosecution that the Accused is essentially repeating the same merit-less arguments he made in his Motion on War Correspondents. Even the Accused acknowledges this, but then refers to the Chamber’s prior finding to the effect that “whether or not any witness should give evidence is a matter to be determined by a Trial Chamber on a case by case basis” and implies that it somehow left the door open for him to file essentially the same motion, this time with a reference to a specific witness.⁶ However, in light of the Chamber’s clear reference to the settled jurisprudence of this Tribunal—which allows war correspondents to waive their privilege, if they choose to do so—this reasoning is untenable. This is why the present Motion is also frivolous and vexatious, perhaps even more so than the Motion on War Correspondents.

5. In addition, the Accused’s attempt to make an analogy between war correspondents and ICRC employees is misguided and goes against the settled practice of this Tribunal to hear regularly from war correspondents who are willing to give evidence. Indeed, other than stating that this analogy makes “intrinsic sense”,⁷ the Accused points to no authority that would support his position. Accordingly, the Chamber is of the view that the Motion should be dismissed.

6. Once again, the Chamber expresses its concern about the manner in which the Accused is employing his resources, while continuing to mention resource-limitations as an obstacle to his ongoing trial preparation. Filing the present Motion, in light of the settled jurisprudence and practice of this Tribunal, as well as the already expressed view of this Chamber on the issue of war correspondents, was a complete waste of the resources available to the Accused, and the Chamber advises him to manage his team in a more productive manner as the trial progresses.

⁵ Response, paras. 1–4.

⁶ Motion, paras. 9–10.

⁷ Motion, para. 14.

7. For the reasons outlined above, the Trial Chamber, pursuant to Rule 54 of the Tribunal's Rules of Procedure and Evidence, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this seventeenth day of May 2010
At The Hague
The Netherlands

[Seal of the Tribunal]