



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: 11 July 2012

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:** 11 July 2012

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

***PUBLIC***

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**INTERIM DECISION ON PROSECUTION'S MOTION FOR PARTIAL  
RECONSIDERATION OR CLARIFICATION OF THE CHAMBER'S DECISION  
ON THE ACCUSED'S MOTION TO UNSEAL ICMP EXHIBITS**

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**Office of the Prosecutor**

Mr. Alan Tieger  
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**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 “Prosecution Motion for Partial Reconsideration or Clarification of the Chamber’s Decision on the Accused’s Motion to Unseal ICMP Exhibits”, filed on 16 May 2012, with confidential Appendices A to D, (“Motion”), and hereby issues this interim decision thereon.

### I. Background and Submissions

1. On 21 and 22 March 2012, the Chamber heard the evidence of Thomas Parsons, the director of forensic science of the International Commission on Missing Persons (“ICMP”), who testified about DNA identification—performed by the ICMP—of persons found in mass graves throughout Bosnia and Herzegovina (“BiH”). During Parsons’ testimony, the Office of the Prosecutor (“Prosecution”) tendered a number of documents and requested that some of them be admitted under seal. Following the Accused’s objection, and an extensive discussion between the parties and the Chamber,<sup>1</sup> the Chamber decided to provisionally place the following 11 documents under seal, namely P4639, P4640, P4641, P4642, P4650, P4651, P4656, P4662, P4663, P4672, and P4673, and invited the parties to file written submissions in relation thereto, in order to enable it to make an informed final decision.<sup>2</sup> In addition, the Prosecution tendered both a confidential and a public redacted version of the transcript of Parsons’ testimony from the *Popović et al.* case. These were admitted as P4636 and P4643 respectively.

2. On 25 April 2012, the Chamber issued its “Decision on the Accused’s Motion to Unseal ICMP Exhibits” (“Decision”) in which it ordered that exhibits P4650, P4651, P4656, P4662, P4663, P4672, and P4673, be reclassified as public exhibits.<sup>3</sup> The Chamber also instructed the Prosecution to upload a more legible copy of exhibit P4650.<sup>4</sup> In addition, the Chamber ordered the Prosecution to provide public redacted versions of P4639, P4640, P4641, and P4642.<sup>5</sup> In relation to the transcript of Parsons’ evidence from the *Popović et al.* case, the Chamber was unable to determine the basis on which it was redacted by the Prosecution and therefore ordered it to report back to the Chamber on this issue.<sup>6</sup> The Prosecution had argued that the above mentioned exhibits should remain confidential on the basis of Rule 75 of the Rules of Procedure

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<sup>1</sup> Hearing, T. 26568–26571, 26578–26583 (21 March 2012).

<sup>2</sup> Hearing, T. 26583 (21 March 2012). *See also* Registry’s Confidential Memorandum of 27 March 2012, which lists all the Prosecution exhibits admitted through Parsons.

<sup>3</sup> Decision, paras. 12, 15–17, 19(a).

<sup>4</sup> Decision, para. 16.

<sup>5</sup> Decision, paras. 13–14, 19(b)–(c).

<sup>6</sup> Decision, paras. 18, 19(d).

and Evidence (“Rules”).<sup>7</sup> Accordingly, the discussion in the Decision was based on that Rule, as well as Rule 54.<sup>8</sup>

3. On 2 May 2012, the Prosecution filed a motion requesting a temporary stay of the Decision, particularly of the order that exhibits P4650, P4651, P4656, P4662, P4663, and P4673 be reclassified as public exhibits, as well as an extension of time in relation to the redactions of P4639, P4640, P4641, P4642, P4636, and P4643.<sup>9</sup> The Prosecution claimed that it had received these exhibits from the ICMP pursuant to Rule 70 of the Rules and that it needed some time to consult with the ICMP before deciding whether to seek reconsideration of the Decision.<sup>10</sup> On 4 May 2012, the Chamber granted the request orally, staying the Decision until 18 May 2012, in which time the Prosecution was to consult with the ICMP and decide on the further course of action.<sup>11</sup> The Chamber notes that the Prosecution’s request for stay made no reference to P4672, which was also one of the exhibits the Chamber had ordered to be reclassified as public.<sup>12</sup>

4. In the Motion, the Prosecution asks the Chamber to reconsider its Decision with regard to (i) reclassifying P4650, P4656, P4662, and P4663 as public exhibits; and (ii) creating public redacted versions of P4639, P4640, P4641, and P4642.<sup>13</sup> The Prosecution also informs the Chamber that it no longer seeks a stay of the Decision in relation to P4651 and P4673 as these contain no information that needs to be kept confidential.<sup>14</sup> Once again, however, the Prosecution makes no reference to exhibit P4672 in the Motion, despite it being one of the exhibits reclassified as public in the Decision.<sup>15</sup> The Prosecution finally notes that the reasoning applied in the Decision in relation to the above mentioned exhibits should also apply to P5005, which is an ICMP document admitted subsequently through Ewa Tabeau and placed under seal provisionally, pending the decision on the Motion.<sup>16</sup>

5. In support of the reconsideration request, the Prosecution argues that in opposing the Accused’s application which gave rise to the Decision, it “failed to explicitly alert the Chamber that confidentiality was a condition asserted by the Rule 70 provider for the use of documents as

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<sup>7</sup> Prosecution Response to the Motion of the Accused to Unseal ICMP Exhibits, 10 April 2012, paras. 2, 7.

<sup>8</sup> Decision, paras. 3, 8–9.

<sup>9</sup> Prosecution Motion for Stay of the Chamber’s Decision on the Accused’s Motion to Unseal ICMP Exhibits and for Extension of Time, 2 May 2012, para. 1.

<sup>10</sup> Prosecution Motion for Stay of the Chamber’s Decision on the Accused’s Motion to Unseal ICMP Exhibits and for Extension of Time, 2 May 2012, para. 2.

<sup>11</sup> Hearing, T. 28507 (4 May 2012).

<sup>12</sup> See Decision, para. 19(a) *cf.* Prosecution Motion for Stay of the Chamber’s Decision on the Accused’s Motion to Unseal ICMP Exhibits and for Extension of Time, 2 May 2012, para. 1.

<sup>13</sup> Motion, para. 1.

<sup>14</sup> Motion, footnote 3, para. 4.

<sup>15</sup> Motion, paras. 1, 3, 14.

<sup>16</sup> Motion, footnote 5.

evidence.”<sup>17</sup> The Prosecution claims that it had received the documents from the ICMP on a “confidential basis pursuant to Rule 70”, that it had then “requested the ICMP’s consent to use the documents at trial, as required by Rule 70(C)”, and that the ICMP had agreed “on condition that the documents remain confidential.”<sup>18</sup> Therefore, according to the Prosecution, reclassifying the documents as public would cause an injustice to the ICMP.<sup>19</sup> In support, the Prosecution refers to its communication with the ICMP, as attached in confidential Appendices A and B. It further submits, relying on a decision from the *Gotovina et al.* case, that the Chamber is bound by the Rule 70 conditions imposed by the provider, and that any limitations to the Accused’s right to a public trial do not substantially outweigh the exhibits’ probative value.<sup>20</sup>

6. The Prosecution also asserts that the Decision should be reconsidered on the ground that there is a clear error of reasoning in the Chamber’s conclusion that it is “reasonable to assume that by now the family members of listed individuals have been informed” of the DNA matches made by the ICMP and thus of the deaths of their relatives.<sup>21</sup> The Prosecution explains that such assumption is incorrect and that the Chamber made it “without the benefit of full submissions on the matter”.<sup>22</sup> The Prosecution further explains that it is the BiH authorities, not the ICMP, that inform the families of those missing of the matches made by the ICMP, and that this procedure is marred by practical difficulties which slow the process down.<sup>23</sup>

7. In case its request for reconsideration is unsuccessful, the Prosecution finally asks the Chamber to provide clarification of the Decision regarding the scope of the redactions to be made to exhibits P4639 and P4641.<sup>24</sup> It submits that these two exhibits contain personal contact information of the relatives of victims which is of highly sensitive and personal nature and therefore should also be redacted. Accordingly, the Prosecution asks the Chamber to “clarify that the scope of the redactions ordered includes redacting this information.”<sup>25</sup>

8. Finally, regarding P4650, the Prosecution informs the Chamber that it was unable to upload a more legible copy of that exhibit but notes that it was used as a “demonstrative aid”

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<sup>17</sup> Motion, para. 1.

<sup>18</sup> Motion, para. 4.

<sup>19</sup> Motion, paras. 1, 5, 11.

<sup>20</sup> Motion, paras. 7–8.

<sup>21</sup> Motion, para. 1.

<sup>22</sup> Motion, para. 12.

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

<sup>24</sup> Motion, para. 2.

<sup>25</sup> Motion, para. 13.

alone and is legible for that purpose as the column labels and dates and places of disappearances are discernible.<sup>26</sup>

9. On 18 May 2012, the Prosecution informed the Chamber and the Accused, via email, that it had uploaded public redacted versions of exhibits P4639, P4641, P4642, while P4640 needed no redactions. The Prosecution also noted that it had not redacted the personal contact details from P4639 and P4641 and requested that none of these exhibits be communicated to the public until the Chamber rules on the Motion.

10. On 18 May 2012, the Accused filed his “Response to the Motion for Reconsideration of Decision Making ICMP Documents Public” (“Response”) opposing the Motion.<sup>27</sup> The Accused submits that any claim of privilege under Rule 70 has been waived by the Prosecution’s failure to assert it prior to the Decision.<sup>28</sup> The Accused also disputes the existence of a Rule 70 agreement between the Prosecution and the ICMP and requests an evidentiary hearing at which representatives of the Prosecution and the ICMP can testify and can be cross-examined on the existence of the agreement.<sup>29</sup> In support, the Accused notes that the exhibits at issue here do not appear to have been entered into the Prosecution’s evidence database as Rule 70 documents because they do not bear Evidence Registration Number (“ERN”) that begins with “R”. In addition, he notes that in the various disclosure letters accompanying the ICMP material, no reference was made to any Rule 70 agreement.<sup>30</sup> The Accused also submits that the families have the right to know if their members have been identified by the ICMP sooner rather than later and that the Tribunal would be doing a public service by disclosing the names of individuals whose remains were matched by the ICMP.<sup>31</sup> Finally, he submits that he is in fact prejudiced by the confidentiality of the exhibits at issue here as it prevents people from coming forward and contradicting the ICMP’s identifications. Accordingly, should the Chamber find that the material is governed by Rule 70 conditions, it should then exclude the evidence of Thomas Parsons and any other evidence relying on ICMP identifications under Rule 70(G).<sup>32</sup> Finally, the Accused notes that he does not oppose the redaction of personal contact details of relatives who provided their DNA samples to the ICMP.<sup>33</sup>

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<sup>26</sup> Motion, para. 14.

<sup>27</sup> Response, para. 1.

<sup>28</sup> Response, para. 2.

<sup>29</sup> Response, paras. 3–5.

<sup>30</sup> Response, para. 4.

<sup>31</sup> Response, para. 6.

<sup>32</sup> Response, para. 8.

<sup>33</sup> Response, para. 9.

11. Having been granted leave to reply,<sup>34</sup> the Prosecution filed, on 25 May 2012, the “Prosecution’s Reply to Accused’s Response to Motion for Reconsideration of Decision Making ICMP Documents Public” (“Reply”). In the Reply the Prosecution contends that, contrary to the Accused’s submission, it cannot waive the ICMP’s assertion of confidentiality because ICMP, as a Rule 70 provider, maintains control over the confidentiality of the material it provides.<sup>35</sup> The Prosecution also argues that its failure to assert a Rule 70 privilege does not prevent it from seeking reconsideration of the Decision since the Tribunal case-law recognises that parties can seek reconsideration of decisions in light of new facts or new arguments.<sup>36</sup> With respect to the Accused’s argument that there was no Rule 70 agreement between the Prosecution and the ICMP, the Prosecution submits that his claim about the lack of the letter “R” in ERN numbers is factually wrong as the letter “R” was used for some of the exhibits tendered through Parsons, including P4663 and P4673.<sup>37</sup> In addition, the Prosecution explains that the identification of documents with specific ERN numbers is an internal method of distinguishing certain collections or categories of documents for practical reasons and not on the basis of their status.<sup>38</sup> Finally, the Prosecution contends that it is not its general practice to include Rule 70 language in its disclosure letters and argues that the ICMP’s most recent representation of the conditions attaching to its documents, illustrated by confidential Appendix A of the Motion, as well as the “longstanding practice” of admitting ICMP documents under seal, is sufficient to enable the Chamber to assess whether the information was provided on a confidential basis.<sup>39</sup> Finally, the Prosecution argues that the Accused’s request for an evidentiary hearing should be dismissed as he has failed to provide “any substantiation of his allegations to justify” such a hearing since:

Both the ICMP and the Prosecution have asserted that the documents were provided on condition of confidentiality under Rule 70 and—*save for the Prosecution’s failure to expressly alert the Chamber to this fact*—no evidence exists to the contrary.<sup>40</sup>

## **II. Applicable Law**

12. The Chamber recalls that there is no provision in the Tribunal’s Rules of Procedure and Evidence (“Rules”) for requests for reconsideration, which are a product of the Tribunal’s

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<sup>34</sup> See Prosecution Request for Leave to Reply to Accused’s Response to Motion for Reconsideration of Decision Making ICMP Documents Public, 23 May 2012. On the same day, the parties were informed by the Chamber’s legal officer, over email, that the Chamber had decided to grant the Prosecution leave to reply to the Response.

<sup>35</sup> Reply, para. 2.

<sup>36</sup> Reply, para. 3.

<sup>37</sup> Reply, para. 5.

<sup>38</sup> Reply, para. 5.

<sup>39</sup> Reply, paras. 6–7.

<sup>40</sup> Reply, para. 8 [emphasis added].

jurisprudence, and are permissible only under certain conditions.<sup>41</sup> The Chamber has “inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.’”<sup>42</sup> Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.<sup>43</sup>

13. Rule 70 deals with matters not subject to disclosure and states, in relevant parts, the following:

- (A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.
- (B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.
- (C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.
- (D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.

[...]

<sup>41</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 (“*Prlić* Decision on Reconsideration”), p. 2.

<sup>42</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, 6 April 2006, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); see also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d’une Erreur Matérielle”, 14 June 2006, para. 2.

<sup>43</sup> *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2; see also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić’s Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, pp. 2–3.

- (G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

14. As stated by the Appeals Chamber, the purpose of Rule 70 (B) to (G) is to encourage states, organisations, and individuals to share sensitive information with the Tribunal by permitting the sharing of such information on a confidential basis and by guaranteeing the providers of that information that the information and its sources would be protected.<sup>44</sup> In addition, all that Rule 70 requires, according to the Appeals Chamber, is that the information was provided on a confidential basis.<sup>45</sup> The Chambers of the Tribunal have the authority to assess whether information has been provided in accordance with Rule 70 but such inquiries must be of limited nature and must extend only to an examination of whether the information was provided on a confidential basis.<sup>46</sup> Where there is any doubt that the protections of Rule 70 are sought, the Chambers should invite the party which provided the information and the party to which the information was provided to supply evidence upon these issues before ruling on the application of Rule 70.<sup>47</sup> In addition to this safeguard against the abuse of the Rule, the Chambers also have the power, pursuant to Rules 70(G) and 89(D), to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.<sup>48</sup>

### **III. Discussion**

15. As can be seen from the above, the Prosecution's main argument is that the Chamber should reconsider its Decision in order to avoid an injustice being caused to the ICMP as Rule 70 conditions of confidentiality were in place for the above mentioned exhibits but were not considered by the Chamber at the time of the Decision due to the Prosecution's failure to mention them at that time. The Prosecution also argues that the Chamber is bound by the said Rule 70 conditions and thus has to reconsider its Decision and revert the status of the above mentioned exhibits back to under seal.

16. Accordingly, before the Chamber can embark on the analysis of whether the reconsideration test has been satisfied, it has to determine whether Rule 70 conditions were indeed in place at the time it issued its Decision. The Chamber recalls that while the inquiries as to whether information has been provided in accordance with Rule 70 must be of limited nature

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<sup>44</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("*Milošević* Decision"), para. 19; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, paras. 17–18.

<sup>45</sup> *Milošević* Decision, para. 25.

<sup>46</sup> *Milošević* Decision, para. 29.

<sup>47</sup> *Milošević* Decision, para. 31.

<sup>48</sup> *Milošević* Decision, para. 26.



and must extend only to an examination of whether the information was in fact provided on a confidential basis, the Chamber can also, where there is any doubt that Rule 70 conditions were sought, invite the party which provided the information and the party to which the information was provided to supply evidence upon these issues before ruling on the application of Rule 70.<sup>49</sup> This, according to the Appeals Chamber, is one of the two safeguards that exist to “ensure that any misuse [of Rule 70] does not deprive accused persons of their rights to challenge the evidence against them and to receive a fair trial.”<sup>50</sup> While this ruling by the Appeals Chamber was made in relation to litigation on a fresh Rule 70 application by a state provider, the Chamber considers that it is equally applicable, if not more applicable, in the circumstances here, where the Prosecution is claiming that the Chamber should reconsider its earlier Decision because Rule 70 conditions existed at the time that Decision was made. Indeed, given that the parties went through an extensive litigation on the confidential status of the above mentioned exhibits—throughout which the Prosecution never mentioned any Rule 70 conditions and instead chose to rely on Rule 75—the Chamber considers it even more important to make inquiries as to the existence of Rule 70 conditions at the time the Decision was issued. Contrary to the Prosecution’s submission referred to above, the Chamber considers the Prosecution’s failure to raise Rule 70 in a timely manner to be of such significance as to throw into doubt the claim that the documents were provided “on condition of confidentiality *under Rule 70*”.<sup>51</sup>

17. In that respect, the Chamber notes that the *Gotovina* decision relied upon by the Prosecution is distinguishable from the current circumstances. It concerned a motion by the Prosecution seeking reclassification of Rule 70 documents from public to confidential, on the basis that the Prosecution had misunderstood the Rule 70 provider’s intent as to the public use of these documents at trial. This was a misunderstanding as to the confidential status of the documents arising as a result of the ambiguity in the communications between the Rule 70 provider and the Prosecution, rather than a question as to whether the documents were in fact provided under Rule 70.<sup>52</sup> In addition, the Chamber observes that the Prosecution in the *Gotovina* case explained in detail the circumstances behind its mistaken use of the Rule 70 information publicly at the *Gotovina* trial.<sup>53</sup> In contrast, in the current Motion, the Prosecution mentions its failure to refer to Rule 70 prior to the Decision only briefly, without explaining why

<sup>49</sup> See above, para. 14.

<sup>50</sup> *Milošević* Decision, para. 26. The other safeguard, according to the Appeals Chamber can be found in Rule 70(G).

<sup>51</sup> See above para. 11 [emphasis added].

<sup>52</sup> See *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Prosecution’s Motion to Change the Status of ECMM Documents Pursuant to Rule 70, 14 March 2011; Decision on Prosecution’s Motion to Change the Status of ECMM Documents Pursuant to Rule 70, 14 March 2011.

<sup>53</sup> *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Prosecution’s Motion to Change the Status of ECMM Documents Pursuant to Rule 70, 14 March 2011, paras. 5–8.

and how such a failure occurred, particularly given that the very issue in the litigation over these exhibits was their confidentiality.<sup>54</sup>

18. The Chamber further notes that the Prosecution, in support of its argument that Rule 70 conditions were in place at the time the Decision was made, provides two emails the ICMP had sent to the Prosecution on this issue.<sup>55</sup> However, both emails were sent to the Prosecution *after* the Decision was issued, expressing the ICMP's discontent with the reclassification of the exhibits. The first email, in which the ICMP notes that its documents were provided on the basis of confidentiality and asks that it be informed of the "recourse that may be available to [it] to request the Chamber to revisit its decision," is dated 1 May 2012.<sup>56</sup> The other email is dated 12 May 2012, and in it the ICMP explains the reasons behind its insistence on the confidentiality of the exhibits in question.<sup>57</sup> Accordingly, contrary to the Prosecution's claims, the two emails are not sufficient for the Chamber to determine that Rule 70 conditions were in fact in place *before or at the time* it issued its Decision.

19. In addition, the Chamber is not satisfied at this point with the Prosecution's arguments relating to its practices as regard disclosure of Rule 70 materials. For example, in contradicting the Accused's submission that the letter "R" was not part of the ERN number of the exhibits in question, the Prosecution observes that it was in fact used for some of those exhibits, such as P4633 and P4673. However, having then explained what certain other letters mean when used as part of the ERN number, the Prosecution failed to explain what the letter "R" stands for. Furthermore, the Prosecution explains that absent special circumstances, it generally does not inform the Accused in its disclosure letters whether certain material is indeed Rule 70 material or not.<sup>58</sup> However, at the same time, the Prosecution does not explain how it communicates to the Accused or other defence teams the existence of Rule 70 conditions in relation to Rule 70 documents it discloses to them.<sup>59</sup>

20. Finally, while referring to the "longstanding practice" of admission of ICMP documents under seal in other cases,<sup>60</sup> the Prosecution provides no further details as to the basis on which these documents, including the exhibits at issue here, were admitted under seal in those cases, and therefore makes no reference to the Rules under which they were classified as confidential.

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<sup>54</sup> See Motion, paras. 1, 3; Reply, para. 8.

<sup>55</sup> See confidential Appendices A and B.

<sup>56</sup> See confidential Appendix A.

<sup>57</sup> See confidential Appendix B.

<sup>58</sup> Reply, para. 5.

<sup>59</sup> Reply, para. 6.

<sup>60</sup> Reply, para. 7.

21. Accordingly, before deciding on the Motion, and in particular the issue of whether Rule 70 conditions were in place when the Chamber issued its Decision, the Chamber requires more detailed submissions from the Prosecution addressing all of the above questions, as well as further communication it had with the ICMP during the time when the exhibits at issue here were first handed over to the Prosecution, together with any subsequent communication where Rule 70 may have been mentioned. However, instead of holding an evidentiary hearing, as requested by the Accused, the Chamber considers it preferable to receive these submissions and any accompanying communication in writing. The Chamber does not consider it necessary to involve the ICMP at this stage.

22. The Chamber also notes that the Prosecution has failed to report back to it on the issue of the wholesale redactions made to P4636 and will once again instruct it to do so. As noted above, the Prosecution has also omitted to make any reference to P4672 in its Motion, and should therefore clarify its position in relation thereto. As for the Prosecution's submission in relation to P5005 and its alternative request in the Motion in relation to P4639 and P4641, the Chamber shall postpone its decision on these exhibits until it receives the above mentioned information.

#### **IV. Disposition**

23. Accordingly, the Trial Chamber, pursuant to Rule 54 of the Rules, hereby **POSTPONES** its decision on the Motion and **ORDERS** the Prosecution to provide, by 23 July 2012, the following information to the Chamber:

- (i) any communication it had with the ICMP relating to the above mentioned exhibits, generated at or around the time when these exhibits were first handed over to the Prosecution;
- (ii) any subsequent communication it had with the ICMP in which Rule 70 was mentioned explicitly in relation to these exhibits, or in relation to any other ICMP documents in the Prosecution's possession;
- (iii) further clarification as to how and why it failed to mention Rule 70 prior to the Decision being issued;
- (iv) further clarification on what the letter "R" stands for when used as part of the ERN number;

- (v) further explanation on the Prosecution's practices in relation to disclosure of Rule 70 documents, in particular the way in which the Prosecution informs the defence in general, and this Accused in particular, as to whether or not certain documents are subject to Rule 70 conditions;
- (vi) detailed submissions as to the legal basis on which these exhibits and other ICMP documents have been admitted under seal in other cases before the Tribunal;
- (vii) further clarification as to P4672 and whether its status should also be reconsidered by the Chamber; and
- (viii) further information on the appropriate redactions to be made to P4636.

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



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Judge O-Gon Kwon  
Presiding

Dated this eleventh day of July 2012  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**