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

Date: 12 January 2011

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **12 January 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION FOR ORDER TO OBTAIN WITNESS STATEMENTS AND TESTIMONY FROM NATIONAL COURTS

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 for Order to Obtain Witness Statements and Testimony from National Courts, filed on 19 November 2010 ("Motion"), and hereby issues this decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests that the Trial Chamber, pursuant to Rules 73 and 98 of the Tribunal's Rules of Procedure and Evidence ("Rules"), direct the Office of the Prosecutor ("Prosecution") to obtain and disclose any prior statements and/or testimony given by its witnesses in domestic proceedings from the relevant authorities in Bosnia and Herzegovina, Croatia, and Serbia.[1] He notes that the Prosecution is only obliged, under Rule 66(A)(ii), to disclose to him copies of prior statements given by its witnesses which are in its possession, but asserts that there appears to be no systematic effort made by the Prosecution to obtain such statements or testimony given in domestic criminal proceedings.[2]

2. The Accused argues that such prior statements and testimony are crucial for testing the credibility of the Prosecution's witnesses.[3] He then refers to International Criminal Tribunal for Rwanda ("ICTR") cases, stating that Trial Chambers there have frequently ordered the prosecution to obtain prior statements of its witnesses from Rwandan national courts and to disclose them to the defence.[4] He claims that the rationale behind such orders is that the prosecution has working relationships with and superior access to the relevant domestic courts, and that the same applies here. He thus argues that an order from the Chamber directing the Prosecution to obtain and disclose the requested material is the most efficient and expeditious means of obtaining it.[5]

3. The Accused further argues that if he were to request the prior statements or testimony of all the Prosecution witnesses from the relevant domestic authorities, there would be a greater risk of disclosure of confidential information pertaining to protected witnesses than there would be if the Prosecution were to make such requests itself.[6] Furthermore, in the course of interviews with its own witnesses, the Prosecution will more readily be able to identify to whom they have previously

[1] Motion, para. 10
[2] Motion, paras. 2, 4.
[3] Motion, para. 5.
[4] Motion, para. 6.
[5] Motion, para.7.
[6] Motion, para. 8.

given statements or testimony and then make the necessary requests to the appropriate domestic authorities.[7]

4. Finally, the Accused asserts that, should the Chamber not issue the requested order to the Prosecution, he will make written requests to all three states for any statements and recordings of the Prosecution's witnesses in their possession, and, absent their voluntary co-operation, seek binding orders against them.[8]

5. On 29 November 2010, the Prosecution filed its "Response to Karadžić's Motion for Order to Obtain Witness Statements and Testimony from National Courts" ("Response"), arguing that the broad scale and non-specific nature of the Motion amounts to a "fishing expedition", and the Accused's claim of reluctance on the part of state authorities to co-operate with him is premature and unsubstantiated.[9] The Prosecution notes that it is not obliged to obtain and disclose material such as that requested by the Accused, which is not in its possession. It further asserts that the Accused abuses Rule 98 of the Rules, which is not related to disclosure but has generally been used to obtain specific materials in circumstances where the moving party has undertaken reasonable efforts to obtain the material itself, which the Accused does not show.[10]

6. The Prosecution also contests the Accused's claim that the relevant state authorities will not co-operate voluntarily with requests made by the Accused for the material sought and observes that such claims are in any case premature when no such requests have yet been made.[11] The Prosecution further disputes that it is better situated to obtain the material sought from the state authorities and argues that the Accused can obtain the prior statements and/or testimony of witnesses with protective measures without revealing their identities as witnesses in this case in the same manner as the Prosecution.[12] It finally argues that the Accused cannot use the prospect of "lengthy" proceedings to obtain the material from the relevant domestic authorities, including potential motions for binding orders, as a basis for the relief sought, adding that any fault for delays in obtaining this material lies with the Accused, who has been in possession of the Prosecution witness list since May 2009.[13]

[7] Motion, para. 9.
[8] Motion, para. 11.
[9] Response, paras. 1, 13.
[10] Response, paras. 2, 14.
[11] Response, para. 15.
[12] Response, para. 16.
[13] Response, para. 17.

II. Applicable Law

7. Rule 66(A)(ii) of the Rules provides that the Prosecution shall disclose to the defence, within a time-limit prescribed by the Trial Chamber or by the pre-trial Judge, copies of the statements of all witnesses it intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*. Both the Accused and the Prosecution agree that this obligation extends only to material in the possession of the Prosecution. This Chamber has previously noted that Rule 66(A)(ii) covers not only statements taken by the Prosecution but also those taken by national authorities in the course of other judicial proceedings involving a witness.[14]

8. Rule 98 of the Rules provides that "[a] Trial Chamber may order either party to produce additional evidence" and that "[i]t may *proprio motu* summon witnesses and order their attendance."

III. Discussion

9. While the disclosure of material falling within the terms of Rule 66(A)(ii) is required in order to permit the defence to prepare properly for trial, such material may or may not, ultimately, become part of the body of evidence in the case in question. Rule 98, on the other hand, is concerned with the production of "additional" evidence at the instigation of the Chamber, either through an order to the parties to produce that evidence, or through its own summoning of witnesses. At this Tribunal, Rule 98 is generally, although not always, used towards the end of the trial proceedings, when the Chamber is in a position to assess whether or not it is in the interests of justice to order the production of such evidence or witness testimony. The Chamber's decision to make use of Rule 98 is a discretionary one, depending on all the relevant circumstances.[15]

10. In the Motion, the Accused seeks to use Rule 98 as a tool to obtain material for his review and use during his ongoing preparation for the trial, rather than for the submission of specific items

[14] *See* Decision on Accused's Eighteenth to Twenty first Disclosure Violation Motions, 2 November 2010, para. 40, citing *Prosecutor v. Gatete*, Case No. ICTR-2000-61-PT, Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial, 13 October 2009, para. 19. *See also Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukic's Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B, 3 November 2008, para 12 and *Prosecutor v. Milutinović et. al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 29 September 2006, para. 14 citing the Appeals Chamber in *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and additional filings, 26 September 2000, para. 15.

[15] *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on *Nicolić*'s Motion Requesting the Trial Chamber to Exercise its Discretion Pursuant to Rule 98, 15 June 2009, p. 3; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović Defence Motion for Trial Chamber to Summon Christopher Hill and Boris Mayorski, 3 July 2008, para. 3.

of evidence into the record. He relies, in large part, upon certain ICTR cases wherein Rule 98 has been used to direct the prosecution to obtain judicial records or other material relating to specific witnesses for the purposes of disclosure to the defence.[16] However, in none of these cited cases did the Chambers grant a request similar to the one made by the Accused to order the Prosecution to obtain and disclose such material relating to all of its witnesses. Moreover, in some of these cases, the Chambers have expressly required the defence to have first made its own efforts to obtain the requested material before ordering the prosecution to assist.[17] Indeed, in *Karemera*, the Trial Chamber emphasised that the use of Rule 98 to facilitate the provision of material to the defence in no way obviates the defence's obligations to prepare its case and conduct its own investigations.[18]

11. The Accused is essentially asking the Prosecution to conduct his own investigations, rather than seeking its assistance on a case by case basis to obtain specific material should he encounter difficulties in doing so himself. While the Chamber will not entertain such broad requests, it certainly encourages all forms of co-operation between the parties, and, should the Prosecution be aware of the existence of the kind of material sought by the Accused, it would be of assistance were it to communicate that to him and direct him to the relevant authorities. Only if the Accused is unable to obtain specific material relating to specific witnesses from the authorities of a particular state, he may seek the intervention of the Chamber. However, the Accused's suggestion that broadly framed requests for any material relating to all Prosecution witnesses would be directed to the authorities in Bosnia and Herzegovina, Croatia, and Serbia and that, absent the provision of such material by those states, motions for binding orders would be filed and litigated in a protracted manner, is misplaced. As the Accused is well aware, the Chamber carefully scrutinises all requests for binding orders, which must satisfy a strict test of necessity and not be formulated in a manner which places too onerous a burden upon the state in question. The Accused is advised to devote his efforts and resources in a more focused manner, to make requests which are reasonable and for material which is genuinely necessary for his defence. Indeed, it is not in his interests to add to the already voluminous quantity of documents in his possession which must be reviewed and analysed with material that is likely to be of marginal utility. In addition, in making any requests to state

[16] *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on *Joseph Nzirorera*'s Motion to Exclude Testimony of Witness AXA, 11 July 2007, para. 6; *Prosecutor v. Karemera*, Case No. ICTR-98-44-PT, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005, para. 11; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier, 1 November 2004, para. 11; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001, paras. 20-22 .

[17] *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Defence Motion for Subpoenas to Prosecution Witnesses, 10 May 2007, paras. 16-17; *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, 27 November 2006 ("*Karemera* November 2006 Decision"), para. 13.

[18] *Karemera* November 2006 Decision, para. 13.

authorities for documentation, the Accused, as would any counsel, and his defence team must be careful to comply with the protective measures for witnesses in this case, as must the Prosecution.

12. The Chamber trusts that the parties communicate and co-operate on an ongoing basis and that, should the Prosecution become aware of prior statements or testimony given by any of its witnesses to specific domestic bodies, it will alert the Accused thereto. Furthermore, should the Accused encounter difficulties in obtaining such material from national courts or authorities, and the Prosecution be in a position to assist, this is also a matter for the parties to work out between themselves. However, the Chamber considers that at this stage it would not be an appropriate exercise of its discretion to order the production of evidence, pursuant to Rule 98, to broadly require the Prosecution to request all the material sought by the Accused from the domestic authorities of the states which may or may not be in possession of such material.

IV. Disposition

13. For these reasons, the Chamber, pursuant to Rule 98 of the Rules, hereby **DENIES** the Motion

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

Judge O-Gon Kwon
Presiding

Dated this twelfth day of January 2011
At The Hague
The Netherlands

[Seal of the Tribunal]