



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: 7 July 2011

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: 7 July 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO COMPEL INSPECTION OF WITNESS
MATERIAL (CHRISTIAN NIELSEN) AND PROSECUTION'S MOTION TO
RECLASSIFY PUBLIC MOTION**

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 Compel Inspection of Material Affecting the Credibility of Expert Witness Christian Nielsen”, filed publicly on 30 June 2011 (“Motion”) and the “Prosecution’s Motion to Reclassify Document Status and Response to Karadžić’s Motion to Compel Inspection of Material Affecting the Credibility of Expert Witness Christian Nielsen”, filed confidentially on 1 July 2011 (“Reclassification Motion and Response”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to order the Office of the Prosecutor (“Prosecution”) pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), to allow him to inspect “all memoranda of communications, or the communication themselves, with Ari Kerkannen concerning the reports he authored that were attributed to Christian Nielsen”.¹ He submits this information is material to the preparation of his defence because he may use it to challenge the credibility of proposed expert for the Prosecution, Christian Nielsen.² The Accused submits that he had requested this information from the Prosecution on 28 June 2011 but the Prosecution declined to voluntarily disclose it to him.³ The Accused claims that this information shows that Nielsen was “involved in a ‘plagiarism’ [sic] incident in connection with reports he has written in related cases at the ICTY”.⁴

2. The Motion was filed publicly and immediately followed by the Reclassification Motion and Response in which the Prosecution requests the Chamber to reclassify the Motion as confidential⁵ and also to deny the Motion in its entirety.⁶ On the issue of reclassification, the Prosecution submits that the Accused is attempting “to publish information which is grossly misleading, to the point of being defamatory”.⁷ The Prosecution argues that the Accused makes “unsubstantiated and irresponsible” allegations about Nielsen’s expert report⁸ and the “inflammatory and inappropriate language” used in the Motion might lead to “unwarranted

¹ Motion, para. 1.

² Motion, para. 4.

³ Motion, para. 2.

⁴ Motion, para. 4.

⁵ Reclassification Motion and Response, para. 1.

⁶ Reclassification Motion and Response, para. 2. On 30 June 2011, upon request by the Prosecution, the Registry temporarily halted the dissemination of the Motion from the public domain, pending a decision by the Chamber on the Prosecution’s reclassification request.

⁷ Reclassification Motion and Response, para. 1.

damage” to his professional reputation.⁹ On the substance, the Prosecution submits that the Motion should be denied because the Accused “has failed to identify the material sought with the requisite specificity, failed to make a *prima facie* showing of its ‘materiality for the preparation of the Defence’, and the request is untimely”.¹⁰

3. As procedural background to the Motion, the Prosecution submits that on 30 July 2004 Nielsen prepared on his own an “Addendum to Expert Report (Research Report prepared for the case of Stanišić and Simatović (IT-03-69))” (“2004 Report”). Subsequently, Nena Tromp became involved in expanding upon areas covered in the 2004 Report, which resulted in the filing of a report entitled “The Organisation of Internal Affairs Within the Serbian Entities in the Former Yugoslavia (1990-1995), authored by Nielsen and Tromp and dated 18 March 2008 (“March 2008 Report”) in the *Stanišić and Simatović* case. The Prosecution indicates that while Tromp was the primary author of chapters one to three of the March 2008 Report, these chapters were actually a composite of the work of Tromp, together with Budimir Babović and Ari Kerkänen.¹¹ The Prosecution notes that Nielsen was the primary author of chapter four of the March 2008 Report dealing with issues related to the Ministry of Interior of Republika Srpska.¹² The Prosecution in the *Stanišić and Simatović* case ultimately decided not to call Nielsen as a witness in that case since chapter four had the least relevance to those proceedings.¹³

4. In the present proceedings, the Prosecution notified the Accused on 19 March 2009 that it intended to seek the admission of two reports authored by Nielsen: i) the 2004 Report; and ii) “The Bosnian Serb ministry of Internal Affairs: Genesis, Performance and Command and Control 1990-1992 (Research Report prepared for the case of Krajišnik (IT-00-39), Updated for Mićo Stanišić (IT-04-79))” dated 29 February 2008 (“February 2008 Report”).¹⁴ The Prosecution indicates that chapter four of the March 2008 Report largely draws on the February 2008 Report. On 29 March 2011, in the Withdrawal Notice, the Prosecution notified the Accused that it was withdrawing the 2004 Report given that the information therein was largely contained in the February 2008 Report.

5. On 24 June 2011, the Prosecution notified the Accused that during Nielsen’s testimony, it would tender the report entitled “The Bosnian Serb Ministry of Internal Affairs: Genesis,

⁸ Reclassification Motion and Response, paras. 3–4.

⁹ Reclassification Motion and Response, para. 8.

¹⁰ Reclassification Motion and Response, para. 2.

¹¹ Prosecution Notice of Withdrawal of Expert Report of Christian Nielsen, 29 March 2011 (“Withdrawal Notice”), paras. 1–5.

¹² Withdrawal Notice, para. 3.

¹³ Withdrawal Notice, para. 4.

Performance and Command and Control 1990-1992, Report prepared for the case of Krajišnik (IT-00-39), Updated for Mićo Stanišić (IT-04-79)), 29 February 2008, Corrected Version prepared for Radovan Karadžić (IT-95-5/18) 19 May 2011” (“Corrected February 2008 Report”).¹⁵ The Corrected February 2008 Report bears 65 *ter* number 23141.

II. Applicable Law

6. Rule 66(B) of the Rules provides that the Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused. The material requested pursuant to Rule 66(B) must: (i) be relevant or possibly relevant to an issue in the case; (ii) raise or possibly raise a new issue, the existence of which is not apparent from the evidence the Prosecution proposes to use; and (iii) hold out a real, as opposed to a fanciful, prospect of providing a lead on evidence which goes to (i) or (ii).¹⁶

III. Discussion

7. The Chamber acknowledges that the right of the Accused to a fair trial includes the right to a public trial and accompanying public filings. The Prosecution’s argument that the professional reputation of Nielsen will be damaged by the Motion is without merit as much of the litigation on this issue in previous cases was conducted in public. Save for the use of obscene or otherwise offensive language,¹⁷ the Accused is free to challenge the credibility of witnesses in his case as he sees fit, and with respect to Nielsen, the Accused is simply raising arguments about the legitimate authorship of certain reports. Furthermore, were the Motion to be reclassified as confidential, the Chamber would also have to order that the cross-examination on this issue be conducted in private session. However, the Chamber does not consider that this is warranted and that it would be a necessary restriction on the Accused’s right to a public trial. Accordingly, the Chamber will not reclassify the Motion as confidential.

8. Turning next to the substance of the Motion, the Chamber recalls that in the present proceedings, the Prosecution intends to only tender one report, that is the Corrected February

¹⁴ Prosecution’s Notice of Disclosure of Expert Reports by Christian Nielsen and his Curriculum Vitae, 12 March 2009.

¹⁵ Prosecution Notification in Respect of Expert Report by Dr Christian Nielsen, 24 June 2011.

¹⁶ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Stanišić Request for Order of Disclosure of Materials Related to the Admissibility of Expert Report of Reynaud Theunens, 11 March 2011, para. 12, citing *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 27 September 1996, paras. 6–8.

2008 Report, which the Prosecution submits was solely authored by Nielsen.¹⁸ The Chamber further notes that the Accused has access to all the public litigation in the *Stanišić and Simatović* case on the issue of the authorship of the March 2008 Report. The Prosecution has also provided the Accused with correspondence relating to the preparation and history leading up to the various reports authored and co-authored by Nielsen for the purposes of Tribunal's proceedings.¹⁹ In that sense, the Chamber finds that the Accused has sufficient information at his disposal to challenge Nielsen's credibility on this issue and to pose questions about the authorship of the Corrected February 2008 Report during the course of Nielsen's cross-examination. The Chamber is therefore not convinced that it is necessary for the Accused to have "all memoranda of communications, or the communication themselves, with Ari Kerkannen concerning the reports he authored that were attributed to Christian Nielsen".

9. Finally, the Chamber notes that the Accused has been in possession of most of this information since March 2011.²⁰ Nevertheless, he has filed this Motion the week that Nielsen was scheduled to testify, which was three months after the disclosure of the documents. The Chamber is of the view that the Accused should have filed the Motion earlier than the day before Nielsen was scheduled to testify and stresses the importance of timely requests to ensure the smooth conduct of proceedings.

¹⁷ Practice Direction on the Procedure for the Review of Written Submissions which Contain Obscene or Otherwise Offensive Language, 14 November 2005 (IT/240).

¹⁸ See para. 5 *supra*.

¹⁹ Reclassification Motion and Response, para. 11.

²⁰ Reclassification Motion and Response, para. 11.

IV. Disposition

10. For the foregoing reasons, the Trial Chamber, pursuant to Rules 66(B) and 68 of the Rules, hereby:

- a) **DENIES** the Motion;
- b) **DENIES** the Reclassification Motion and Response; and
- c) **INSTRUCTS** the Registry to activate the public dissemination of the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this seventh day of July 2011
At The Hague
The Netherlands

[Seal of the Tribunal]