



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: 8 February 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: 8 February 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC WITH CONFIDENTIAL ANNEX

**DECISION ON MOTION TO COMPEL INSPECTION OF ITEMS
MATERIAL TO THE SARAJEVO DEFENCE CASE**

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 Items Material to the Sarajevo Defence Case” filed publicly with a confidential annex on 28 October 2011 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused moves, pursuant to Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), for an order compelling the Office of the Prosecutor (“Prosecution”) to allow inspection of the following items in its possession regarding any of 201 prospective defence witnesses (“Prospective Witnesses”), listed in Confidential Annex C of the Motion, pertaining to the Sarajevo component of the case.¹ The Accused requests the following categories of materials (collectively, “Requested Materials”) as they relate to each of the Prospective Witnesses:

- (a) “Any statement, interview, or testimony of the person related to the events in Bosnia during 1992–95” (“Category 1”),
- (b) “Any document authored by the person related to the events in Bosnia during 1992–95” (“Category 2”),
- (c) “Any judicial records pertaining to the investigation, arrest, or prosecution of the person” (“Category 3”), and
- (d) “Any statements made by the person to immigration authorities related to the events in Bosnia during 1992–95” (“Category 4”).²

2. The Accused states that he sought the Requested Materials from the Prosecution on 5 October 2011 (“5 October Letter”) and that the Prosecution refused the request in a letter on 11 October 2011.³ The Accused also argues that he seeks the Requested Materials because they may directly affect the credibility of the Prospective Witnesses and are therefore important for his ultimate assessment of whether to call these individuals as witnesses.⁴ The Accused also contends that he need not contact and interview the witnesses before the Prosecution makes the

¹ Motion, para. 1.

² Motion, para. 1.

³ Motion, para. 3.

⁴ Motion paras. 1, 11.

Requested Materials available for inspection, especially considering the purpose of the Motion is to screen and reduce his number of potential witnesses.⁵

3. In the “Prosecution Response to ‘Motion to Compel Inspection of Items Material to the Sarajevo Defence Case’”, filed publicly with confidential annexes on 10 November 2011 (“Response”), the Prosecution argues that the Motion should be dismissed.⁶ The Prosecution argues that, while it is willing to assist the Accused prepare for his defence case, the Motion “fails to identify the items sought with sufficient specificity, fails to show they are in the possession of the Prosecution, and fails to establish *prima facie* materiality of the Requested Materials to the preparation of his defence case”.⁷ The Prosecution notes that the Accused has not submitted sufficiently identifying information for the individuals on his list—such as date of birth, father’s name, or other biographical data.⁸ The Prosecution also argues generally that the four categories of items requested by the Accused are too broad, thus constituting a “fishing expedition”.⁹ The Prosecution further submits that the Accused has general access to relevant materials on the Electronic Disclosure Suite (“EDS”) but has not availed himself of it.

4. On 13 January 2012, the Chamber orally requested that the Accused clarify the basis on which he considers that he has demonstrated *prima facie* that the Requested Materials are in the custody or control of the Prosecution.¹⁰ The Accused thus filed his “Supplemental Submission: Motion to Compel Inspection of Items Material to the Sarajevo Defence Case” on 16 January 2012 (“Supplemental Submission”), arguing that the “vast majority” of persons for whom the Requested Materials are sought from the Prosecution were officers in the Sarajevo Romanija Corps (“SRK”) of the Bosnian Serb Army (“VRS”), and that the Prosecution’s introduction of hundreds of such documents at trial demonstrates *prima facie* that other documents relating to those Prospective Witnesses who were in the SRK are also in the custody and control of the Prosecution.¹¹ The Accused also notes that the Prosecution has produced a number of statements and transcripts of members of the SRK and other members of the VRS, and that numerous SRK members are likely to have been interviewed by the Prosecution.¹² The Accused also contends that immigration and judicial records may be in the custody and control of the Prosecution because it is the Prosecution’s practice to use such records to impeach defence

⁵ Motion, para. 13.

⁶ Response, para. 1.

⁷ Response, para. 1.

⁸ Response, para. 4.

⁹ Response, para. 5.

¹⁰ T. 22963–22964 (13 January 2012).

¹¹ Supplemental Submission, para. 4.

¹² Supplemental Submission, para. 6.

witnesses. Finally, the Accused submits that the Chamber may order the Prosecution to compel records not yet in its custody and control.¹³

5. In the “Prosecution Response to ‘Supplemental Submission: Motion to Compel Inspection of Items Material to the Sarajevo Defence Case’”, filed on 25 January 2012 (“Response to Supplemental Submission”), the Prosecution argues that the Supplemental Submission does not remedy the defects in the Motion regarding the specificity of the Requested Materials. In that respect, the Prosecution contends that the Requested Materials are described in “sweeping terms”, thus making it difficult for the Prosecution to locate them.¹⁴ It also contends that the Accused’s argument regarding the Prosecution’s previous use of SRK-related material demonstrates that the Accused already has access to such documents and that, if the Motion were granted, the Prosecution would be devoting time and resources to requests that are overly broad and duplicative.¹⁵ The Prosecution finally argues that there is no authority supporting the Accused’s contention that the Chamber could order, pursuant to Rule 66(B), the Prosecution to produce materials not yet in its possession.¹⁶

II. Applicable Law

6. Rule 66(B) of the Rules requires 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: (i) are material to the preparation of the defence, or (ii) are intended for use by the Prosecutor as evidence at trial, or (iii) were obtained from or belonged to the accused.

7. In accordance with the language of the Rule, the Accused should first direct any request for inspection to the Prosecution and only refer the matter to the Chamber when such request has failed.¹⁷ Even where the Accused may be able to search for the materials itself within Prosecution databases, to which it has access through the EDS, the Appeals Chamber has held that “[a] request under Rule 66(B) is one of the methods available to the Defence for carrying out investigations’ and the fact or possibility of other investigations does not prevent the use of inspection under this provision”.¹⁸

¹³ Supplemental Submission, para. 8.

¹⁴ Response to Supplemental Submission, paras. 1–3.

¹⁵ Response to Supplemental Submission, para. 4.

¹⁶ Response to Supplemental Submission, para. 5.

¹⁷ Decision on Accused Motion for Inspection and Disclosure, 9 October 2008, para. 4; *Delalić* Decision, para. 9.

¹⁸ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution’s Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 (“First *Karemera* Decision”), para. 15; *Prosecutor v. Bagosora*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence, 25 September 2006 (“*Bagosora* Decision”), para. 11.

8. Where the Defence is not satisfied with the outcome of its initial request, it may file a motion seeking an order from the Trial Chamber to permit inspection. To satisfy a motion pursuant to Rule 66(B) of the Rules, the Defence bears the burden to:

- (a) specifically identify the items sought;
- (b) demonstrate *prima facie* that the requested items are “material to the preparation of the defence”; and
- (c) demonstrate *prima facie* that the requested items are in the custody or control of the Prosecutor.¹⁹

Suitable parameters for specification of requested items may include (i) “a specific event or group of witnesses”, (ii) “a time period and/or geographic location” to which the material refers, (iii) “a category of documents defined by criteria which apply to a distinct group of individuals”, and (iv) “any other features defining the requested items with sufficient precision”.²⁰ An Accused should make a request “in as precise wording as is possible, rather than in sweeping ‘catch-all’ phrases”,²¹ and should not engage in mere “fishing expeditions”.²²

9. The Appeals Chamber in *Prosecutor v. Bagosora*, overturning a Trial Chamber decision declining to order inspection, held that “[i]n accord with the plain meaning of Rule 66(B) of the Rules, the test for materiality under the first category is the relevance of the documents to the preparation of the defence case. Preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence”.²³ It also commented that it “routinely construes the Prosecution’s disclosure obligations under the Rules broadly in accord with their plain meaning. Nothing in Rule 66(B) of the Rules limits an accused’s right to inspection only

See also Decision on Accused’s Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008 (“Immunity Decision”), paras. 8–11.

¹⁹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.18, Decision on Josph Nzirorera’s Appeal From Decision on Alleged Rule 66 Violation, 18 May 2010, para. 13 (“Second Karemera Decision”); *Bagosora* Decision, paras. 9–10; First *Karemera* Decision, para. 12; *see also* *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34, Decision on Joint Motions for Order Allowing Defence Counsel to Inspect Documents in the Possession of the Prosecution, 16 September 2002, p. 3; *Delalić* Decision, para. 9; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision of the President on the Prosecutor’s Motion for the Production of Notes Exchanged between Delalić and Mucić, 11 November 1996, para. 40.

²⁰ Second *Karemera* Decision, para. 32; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Written Reasons for the Chamber’s Oral Ruling of 9 June 2011 Denying in Part the Stanišić Motion to Compel the Prosecution to Comply with Rule 66(B), 21 June 2011, para. 24 (“*Stanišić* Reasons”).

²¹ Immunity Decision, para. 20.

²² Decision on Motion for Access to Confidential Materials in Completed Cases, 5 June 2009.

²³ *Bagosora* Decision, para. 9.

of material related to the Prosecution's case-in-chief. Rather, this Rule uses much broader language: 'material to the preparation of the defence case' and 'intended for use [...] at trial'.²⁴

III. Discussion

10. The Chamber recalls the Appeals Chamber's ruling that the determination of whether the required level of specificity has been met for purposes of a request under Rule 66(B) of the Rules is considered in light of the specific framework of the case.²⁵ The Chamber notes that various Trial Chambers both at the Tribunal and the International Criminal Tribunal for Rwanda ("ICTR") have come to distinct determinations regarding the level of specificity required for an order to compel inspection pursuant to Rule 66(B) of the Rules.²⁶

11. The Chamber also recalls the Immunity Decision, in which it ruled that the requested material satisfied the specificity requirement for a motion to compel inspection pursuant to Rule 66(B) of the Rules when it consisted of "all information in the possession of the Prosecution concerning the agreement made with Radovan Karadžić on or about 18–19 July 1996 by Richard Holbrooke", including any contemporaneous notes or recordings "reflecting what took place during the meeting".²⁷ By contrast, the Chamber considered that the remaining categories—"memoranda or correspondence" relating to the meeting as well as other categories of items—were "overly broad in scope" and "framed in language too vague for the Prosecution to be able to determine in every case whether a particular document falls into a particular category".²⁸

²⁴ *Bagosora* Decision, para. 8.

²⁵ Second *Karemera* Decision, para. 32.

²⁶ For example, an ICTR Trial Chamber in *Prosecutor v. Zigiranyirazo* considered that a request was sufficiently specific when it included (i) "statements made by Defence witnesses to any person whatsoever which are in the possession of the Prosecutor", (ii) "documents relative to the immigration status of any Defence witness which are in the possession of the Prosecution", and (iii) "*Gacaca* materials about Defence witnesses in the possession of the Prosecution". It also ruled, by contrast, that a request for "other impeachment material in the possession of the Prosecution" was insufficiently specific. *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules, 21 February, 2007 ("*Zigiranyirazo* Decision"). In the *Prosecutor v. Stanišić & Župljanin* case, the Trial Chamber initially denied in part a Mićo Stanišić Defence motion to compel inspection pursuant to Rule 66(B) for overly broad categories such as "[a]ny and all reports, dispatches, letters or any other documents prepared or received by any witness on the Stanišić witness list relevant to the indictment or their credibility generally". Subsequently, however, in light of the "limitations" placed by the Župljanin Defence, including the year 1992 and the indictment municipalities, the Trial Chamber granted a similar motion from the Stojan Župljanin Defence which, *inter alia*, included the category of "[a]ny and all reports, dispatches, letters or any other documents prepared or received by any witness on the Župljanin witness list in 1992 which relates to events in the indictment municipalities with which Stojan Župljanin is charged" (emphasis added). *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-T, 19 August 2011 ("*Župljanin* Decision"), paras. 3, 12 (emphasis added).

²⁷ Immunity Decision, paras. 4, 20.

²⁸ Immunity Decision, paras. 4, 20.

12. The Chamber first notes that the Motion, and the four categories identified therein, pertain to the Prospective Witnesses and are all related to the Sarajevo component of the case. As noted above, suitable parameters for specification of requested items may include a specific group of witnesses,²⁹ and by the Prosecution's own admission it is capable of identifying "several" of these individuals based on their name and occupation.³⁰ The Chamber also considers that any ambiguities regarding the identities of individuals could be resolved with minimal clarification from the Accused, if and when necessary. The Chamber thus considers that the manner in which the Prospective Witnesses are listed—by name and profession—is sufficiently detailed for purposes of specificity under Rule 66(B) of the Rules.

13. The Chamber also recalls that suitable parameters for specification of requested items may include a specific time period and/or geographical location.³¹ The Chamber notes that while Categories 1, 2, and 4 refer to "events in Bosnia during 1992–95", the Motion is clearly titled as relating to the Sarajevo component of the case. In addition, the positions of the Prospective Witnesses also indicate that the purpose of the Motion is to inspect material related to the Sarajevo component of the case. The Chamber thus considers that the Accused has adequately limited his request in geographical and temporal terms for purposes of specificity of Rule 66(B).

14. Turning now to each category individually, regarding the types of documents sought under Category 1—statements, interviews, and testimony—the Chamber reiterates that "the request is not required to be so specific as to identify exactly which documents are sought to be disclosed, and may refer to a category of documents".³² The Chamber thus finds that, in this manner, the Accused has adequately limited his request for purposes of the specificity prong of Rule 66(B). Regarding the materiality of the documents in Category 1, the Chamber recalls that "preparation is a broad concept" and that the requirement of *prima facie* materiality may be satisfied when inspection is for the purposes of assessing witness credibility.³³ In the present case, the Chamber considers that such a request—for Sarajevo-related statements, interviews, or

²⁹ Second *Karemera* Decision, para. 32; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Written Reasons for the Chamber's Oral Ruling of 9 June 2011 Denying in Part the Stanišić Motion to Compel the Prosecution to Comply with Rule 66(B), 21 June 2011, para. 24 ("*Stanišić* Reasons").

³⁰ Response, para. 5, notes 6–7. The Chamber also notes that the request in the Motion alters the categories from those in the 5 October Letter, where the Accused had requested access to broader categories of items than those now requested. Motion, Appendix A, requesting (1) "Information obtained from the person, whether in the form of a statement, interview, testimony or correspondence in the possession of the prosecution," (2) "Any document authored by the person in the possession of the prosecution related to the events in Bosnia during 1992–1995", (3) "Any judicial records pertaining to the investigation, arrest, or prosecution of the person in the possession of the prosecution", and (4) "Any statements made by the person to immigration authorities".

³¹ Second *Karemera* Decision, para. 32; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Written Reasons for the Chamber's Oral Ruling of 9 June 2011 Denying in Part the Stanišić Motion to Compel the Prosecution to Comply with Rule 66(B), 21 June 2011, para. 24 ("*Stanišić* Reasons").

³² Immunity Decision, para. 20.

³³ First *Karemera* Decision, para. 14.

testimony from the Prospective Witnesses—is *prima facie* material because such material may assist the Accused in assessing witness credibility and determining which witnesses to call. In relation to this category, the Chamber notes that the Accused has access to public testimonies, exhibits, and filings in other proceedings before this Tribunal and that it is for him to locate such materials.³⁴

15. With regard to Category 2, the Chamber considers that it is sufficiently specific given that it relates to documents authored by the specifically-identified Prospective Witnesses. The Chamber also considers that the requirement of *prima facie* materiality is satisfied because such documents may be inspected for the purposes of assessing witness credibility and determining which witnesses to call.³⁵

16. With regard to Category 3, the Chamber notes that the time and geographic location are not identified but considers that the category of judicial records pertaining to the investigation, arrest, or prosecution of the person are sufficiently specific because they identify materials that relate to the specifically-identified Prospective Witnesses on the list. Furthermore, the Chamber considers that the relevance of these judicial records to the credibility of the Prospective Witnesses is not necessarily limited to events in BiH between 1992 and 1995. The Chamber also considers that judicial records satisfy the requirement of *prima facie* materiality because they will assist the Accused in assessing witness credibility and determining which witnesses to call.³⁶

17. With regard to Category 4, the Chamber considers that it is sufficiently specific given that it relates to statements made to immigration authorities by the specifically-identified Prospective Witnesses. The Chamber also considers that, pursuant to Appeals Chamber jurisprudence, immigration records satisfy the requirement of *prima facie* materiality for purposes of Rule 66(B).³⁷

18. Turning now to the requirement that the material be in the possession of the Prosecution, the Chamber again recalls that it is the Accused's burden to demonstrate *prima facie* that the Requested Materials are in the custody or control of the Prosecution.³⁸ With regard to those Prospective Witnesses who were in the SRK, the Chamber notes the Accused's argument that the Prosecution has already used a large number of SRK documents during the trial and

³⁴ Decision on Accused's Motion for Access to Exhibits in *Orić* Case, 18 November 2011, para. 11; *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Form of Disclosure, 4 July 2006, para. 20.

³⁵ First *Karemera* Decision, para. 14.

³⁶ First *Karemera* Decision, para. 14.

³⁷ *Bagosora* Decision, para. 9.

³⁸ Second *Karemera* Decision, para. 13; see also Immunity Decision, para. 27.

considers that such a showing demonstrates *prima facie* that the Prosecution has other such documents relating to the Prospective Witnesses who were in the SRK in its custody or control. The Chamber notes that, notwithstanding the fact that it was not raised by the Accused, the same reasoning may be applied to documents pertaining to Prospective Witnesses from the UNPROFOR, thus demonstrating *prima facie* custody or control of such documents

19. With regard to the remaining Prospective Witnesses, the Chamber considers that the Accused fails to make any showing in either the Motion—which states only that the Accused requests items “in the possession of the prosecution” without providing any foundation for this claim—or the Supplemental Submission. The Chamber thus considers that the Accused has failed to meet its burden to demonstrate *prima facie* that the Requested Materials relating to these Prospective Witnesses are in the custody or control of the Prosecution. In that respect, the Motion constitutes a fishing expedition which is impermissible under Rule 66(B).

IV. Disposition

20. Accordingly, the Trial Chamber, pursuant to Rules 54 and 66(B) of the Rules, hereby:

(A) **GRANTS** the Motion **IN PART** and **ORDERS** the Prosecution to allow the Accused, and/or members of his defence team, to inspect the Requested Materials in its custody relating to those Prospective Witnesses listed in the Confidential Annex appended to this Decision, excluding public testimonies, public exhibits, and public filings in other proceedings before this Tribunal, within a month of this Decision.; and

(B) **DENIES** the remainder of the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this eighth day of February 2012
At The Hague
The Netherlands

[Seal of the Tribunal]