



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 May 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: 7 May 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO COMPEL INSPECTION OF
ITEMS MATERIAL TO THE MUNICIPALITIES 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 Municipalities Defence Case”, filed on 10 April 2012 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. The Chamber notes that this is the second motion to compel inspection of items material to the Accused’s defence case pursuant to Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”). In the “Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case”, issued on 8 February 2012 (“Sarajevo Decision”), the Chamber considered the Accused’s request for an order compelling the Office of the Prosecutor (“Prosecution”) to allow inspection of items in its possession regarding any of 201 prospective defence witnesses pertaining to the Sarajevo component of the case.¹ The Accused requested the following categories of materials as they related to each of the prospective witnesses:

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

2. The Chamber considered that the geographical and temporal limitations on the Accused’s request, as well as the manner in which the Prospective Witnesses were listed—by name and profession—were sufficiently detailed for purposes of specificity under Rule 66(B) of the Rules.³ The Chamber also considered that, for each category of items, the Accused had demonstrated *prima facie* that the items were material to the preparation of his defence because such material may assist

¹ Sarajevo Decision, para. 1.

² Sarajevo Decision, para. 1.

³ Sarajevo Decision, paras. 12–13.

the Accused in assessing witness credibility and determining which witnesses to call.⁴ Finally, with regard to prospective witnesses from the Sarajevo Romanija Corps (“SRK”) and UNPROFOR only, the Chamber considered that the Accused had met his burden of showing *prima facie* custody or control of the materials because the Prosecution had already used a large number of such documents in the case.⁵ The Chamber thus granted the Accused’s motion with respect to these witnesses.⁶ For the remaining witnesses, the Chamber denied the motion on the ground that the Accused had failed to make any showing that the documents were *prima facie* in the custody or control of the Prosecution.⁷

3. In the Motion, the Accused again moves, pursuant to Rule 66(B) of the Rules, for an order compelling the Prosecution to allow inspection of items in its possession pertaining to the municipalities component of his defence case, specifically regarding any of 118 prospective defence witnesses who were members of the Crisis Staffs of either the Autonomous Region of Krajina (“ARK”) or one of 18 municipalities listed in Confidential Annex C of the Motion (“Prospective Witnesses”).⁸ 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 1991–92”,
- (b) “Any document authored by the person related to the events in Bosnia during 1991–92”,
- (c) “Any judicial records pertaining to the investigation, arrest, or prosecution of the person”, and
- (d) “Any statements made by the person to immigration authorities related to the events in Bosnia during 1991–92”.⁹

4. The Accused states that he sought the Requested Materials from the Prosecution on 5 March 2012 and that the Prosecution responded by offering to provide requested material only for witnesses from the Zvornik, Ključ, and Sanski Most municipalities—municipalities “for which the Prosecution has substantial Crisis Staff documentation”.¹⁰ According to the Accused, the

⁴ Sarajevo Decision, paras. 14–17.

⁵ Sarajevo Decision, para. 18.

⁶ Sarajevo Decision, para. 20.

⁷ Sarajevo Decision, paras. 19–20.

⁸ Motion, para. 1, Confidential Annex C.

⁹ Motion, para. 1.

¹⁰ Motion, paras. 3, 7, Annex A, Confidential Annex B.

Prosecution only offered to provide interviews and testimony for some of the remaining witnesses.¹¹

5. The Accused states that the Requested Materials are material to the preparation of his defence case because they contain information necessary for him to select which witnesses to call.¹² He further contends that there is *prima facie* reason to believe that the Requested Materials are in the custody or control of the Prosecution because the Prosecution's Investigative Analyst, Dorothea Hanson, stated during her testimony before the Chamber that she had reviewed "tens of thousands" of pages of documents relevant to Crisis Staffs when preparing her report, entitled *Bosnian Serb Crisis Staffs, War Presidencies, and War Commissions 1991–1995* ("Report"), which was admitted into evidence during her testimony.¹³ The Accused notes that her report cites to Crisis Staff documents from "virtually all" of the municipalities charged in the Third Amended Indictment ("Indictment").¹⁴

6. In the "Prosecution Response to Motion to Compel Inspection of Items Material to the Municipalities Defence Case", filed on 24 April 2012 ("Response"), the Prosecution first clarifies that it had previously indicated to the Accused that it would provide him with access to the Requested Materials for: (a) the Prospective Witnesses from Zvornik, Ključ, and Sanski Most; as well as (b) those individuals who have either been interviewed or testified in a case before the Tribunal.¹⁵ In addition, the Prosecution concedes that it erroneously excluded Crisis Staff documentation for: (c) the Prospective Witnesses from Sokolac; (d) the Prospective Witnesses from Prijedor; (e) the fourth Prospective Witness listed under Vogošća municipality.¹⁶ The Prosecution also states that it has already provided the Accused with access to documentation for: (f) five Prospective Witnesses who were previously listed as Prosecution witnesses; and (g) two Prospective Witnesses previously prosecuted before the Tribunal.¹⁷ In sum, the Prosecution states that it has provided and is willing to provide the Accused access to materials relating to 56 Prospective Witnesses.¹⁸

7. For the remaining 62 witnesses—listed as members of Crisis Staffs from either the ARK or from 13 municipalities and "for which the Prosecution does not have substantial documentation

¹¹ Motion, para. 7.

¹² Motion, para. 2.

¹³ Motion, para. 8; P2589 (Dorothea Hanson's expert report entitled "Bosnian Serb Crisis Staffs, War Presidencies and War Commissions 1991–1995", 10 September 2009).

¹⁴ Motion, para. 8.

¹⁵ Response, para. 3.

¹⁶ Response, paras. 4–5.

¹⁷ Response, para. 6.

¹⁸ Response, para. 7.

relevant to the Request”—the Prosecution contends that the Accused has not demonstrated that these materials (“Remaining Materials”) are *prima facie* in the Prosecution’s custody or control.¹⁹ The Prosecution argues that while, in the Sarajevo Decision, the Chamber found that the Accused had satisfied his *prima facie* showing that the Prosecution had custody or control of SRK documents because the Prosecution had already used a large number of SRK documents during the trial, the Prosecution contends that the Accused now only attempts to meet his burden by citing to the Report.²⁰ The Prosecution clarifies that, in the Report, Dorothea Hanson stated that, while tens of thousands of pages were reviewed, extensive records were available for only some municipalities, while for others few or no documents were available.²¹ The Prosecution also notes that the Accused does not specifically identify whether the Report cites to Crisis Staff documents for all the municipalities for which he seeks materials.²² Finally, the Prosecution contends that the Accused has not provided a sufficient basis on which to compel the Prosecution to conduct “extensive and time-consuming searches” on an “individual-by-individual basis” for the Remaining Materials, for which the Prosecution “has hardly any Crisis Staff documentation in its possession”.²³

II. Applicable Law

8. 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. The Chamber has outlined before the law applicable to a request to compel inspection pursuant to Rule 66(B) of the Rules, and will not repeat it in this Decision, but refers to the relevant paragraphs of the Sarajevo Decision.²⁴

III. Discussion

9. With regard to the first two prongs of the test to compel inspection pursuant to Rule 66(B), the Chamber notes that the categories of Requested Materials are identical to those requested in the Sarajevo Decision, with the exception of the narrower time period to account for the alleged temporal scope of the municipalities component of the case. The Chamber also notes that the

¹⁹ Response, paras. 8–15, 17. The Chamber notes that the Prosecution erroneously lists 14 remaining municipalities.

²⁰ Response, paras. 9–10.

²¹ Response, para. 11; Report, paras. 8, 142.

²² Response, para. 12.

²³ Response, paras. 14–15.

²⁴ Sarajevo Decision, paras. 6–9.

Prospective Witnesses are specifically identified and listed as Crisis Staff officials from either the ARK or from one of the municipalities listed in Confidential Annex C to the Motion and which are covered by the Indictment. For the same reasons as stated in the Sarajevo Decision,²⁵ the Chamber considers that the Accused has satisfied his burden of showing that the Requested Materials are specifically identified and *prima facie* material to the preparation of the defence.²⁶

10. With regard to the third prong, the Chamber notes that, in the Motion, the Accused relies exclusively on the Report and statements of Dorothea Hanson for his *prima facie* showing that the Remaining Materials are in the custody or control of the Prosecution. Though the Prosecution is correct that the Accused does not identify whether the Report cites Crisis Staff documents for all the municipalities in the Accused's request, and instead states that the Report cites documents from "virtually all" of them, the Chamber notes that the Report does in fact refer to all of the municipalities in Confidential Annex C to the Motion, and refers to documents either authored by or relating to the majority of Crisis Staffs listed in the Accused's request.²⁷ Furthermore, by the Prosecution's own admission, it has "few documents available" relating to Crisis Staffs from the remaining municipalities, thus providing the Chamber with further showing that such documents are in the Prosecution's custody or control.²⁸

11. Finally, the Chamber considers that the Prosecution's pragmatic argument—that it will not make available materials related to municipalities for which it lacks a sufficient quantity of documentation—borders on self-defeating. In essence, the Prosecution argues that it lacks a substantial number of documents to make available to the Accused, and yet also argues that a review of materials relating to these municipalities would be unduly burdensome and time-consuming.

12. The Chamber thus considers that the Accused—in conjunction with the Prosecution's own admission—has made a *prima facie* case that the Remaining Materials are in the custody or control of the Prosecution. The Chamber therefore considers that the Accused has met the necessary burden for an order to compel inspection pursuant to Rule 66(B) of the Rules.

²⁵ Sarajevo Decision, paras. 12–17.

²⁶ As stated in the Sarajevo Decision, the Chamber again 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.

²⁷ *See, e.g.*, Report, fn. 8 (referring to P2632, related to Bosanski Novi), 79 (referring to Rule 65 *ter* number 17211, related to Ilidža), 87 (referring to P888, related to Novo Sarajevo).

²⁸ Response, para. 12.

IV. Disposition

13. Accordingly, the Chamber, pursuant to Rules 54 and 66(B) of the Rules, hereby **GRANTS** the Motion 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 C of the Motion, excluding public testimonies, public exhibits, and public filings in other proceedings before this Tribunal, within a month of this Decision.

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



Judge O-Gon Kwon
Presiding

Dated this seventh day of May 2012
At The Hague
The Netherlands

[Seal of the Tribunal]