



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: 23 March 2010

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

Order of: 23 March 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

ORDER ON SUBMISSIONS MADE BY APPOINTED COUNSEL

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed 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 “Supplemental Confidential *Ex Parte* Submission of Standby Counsel *Inter Partes* to the Office of the Prosecutor”, filed on 25 February 2010 (“Supplemental Submission”), and hereby issues this order in relation thereto.

1. On 5 November 2009, the Chamber instructed the Registrar to appoint counsel, who would begin immediately to prepare him or herself to represent the interests of the Accused when the trial resumes, if that should be required.¹ It also ordered *inter alia* the Prosecution “to take all necessary measures to ensure that the appointed counsel is enabled to prepare him or herself fully, including through the provision of relevant documents.” Mr. Richard Harvey (“appointed counsel”) was appointed by the Registrar on 19 November 2009.

2. Following the Status Conference held on 28 January 2010, during which the presiding Judge informed the appointed counsel to bring to the Chamber’s attention any difficulties he was experiencing in his preparations, on 9 February 2010, he filed, confidentially and *ex parte*, the “Submission of Standby Counsel” (“Submission”), in which he informed the Chamber of a number of his concerns relating, primarily, to how the manner of disclosure by the Prosecution was impacting on his ability to prepare to represent the interests of the Accused.²

3. In the Supplemental Submission, the appointed counsel indicated that he had chosen to file it, and the Submission, *inter partes* the Prosecution “in order that the [Prosecution] shall have an opportunity to address any of the issues raised” in the submissions.³ The Submission was subsequently filed *inter partes* the Prosecution in an Addendum.⁴ In the Supplemental Submission, the appointed counsel elaborated further on the issues concerning the manner in which he had received disclosure material, and the difficulties he was experiencing, which he had outlined in the Submission.

4. On 3 March 2010, in an Order, the Chamber invited the Prosecution to respond to any of the issues raised by the appointed counsel, but noted that it was particularly concerned to hear from the Prosecution on a number of specific matters pertaining to electronic indexes and

¹ Decision on the Appointment of Counsel and Order on Further Trial Proceedings, 5 November 2009.

² Hearing, T. 710 (28 January 2010).

³ Supplemental Submission, para. 2.

⁴ On 26 February 2010, the Submission was filed *ex parte* the Accused but *inter partes* the Prosecution, see Addendum to the Supplemental Confidential *Ex Parte* Submission of Standby Counsel *Inter Partes* the Prosecution” (“Addendum”).

disclosure on CD or external hard drive as well as through the Electronic Disclosure Suite (“EDS”).⁵

5. On 4 March 2010, the Prosecution filed its “Prosecution Response to Supplemental Submission of Stand-By Counsel” (“Response”), confidentially and *ex parte* the Accused, in which it addressed the issues raised by the appointed counsel and specified in the Order on Supplemental Submission. The Prosecution also noted that it had filed the Response *ex parte* the Accused as the Submission and Supplemental Submission were filed *ex parte* the Accused, but it did not otherwise see a need to keep it *ex parte*.⁶

6. On 8 March 2010, the appointed counsel filed the “Confidential and *Ex Parte* Reply of Standby Counsel *Inter Partes* to the Response of the Office of the Prosecutor” (“Reply”). While he did not seek leave to file the Reply, which is the normally required procedure when motions are submitted by parties, the Chamber considers that the further clarification of the issues that were raised in the Submission and the Supplemental Submission are of assistance to the Chamber.

7. The Chamber does not consider it necessary for the purposes of this Order to set out the submissions of the appointed counsel and the Prosecution in detail. It notes that, in the course of his filings, the appointed counsel has narrowed his concerns to (i) the lack of provision of electronic indexes for all of the material disclosed and (ii) the difficulties arising from the disclosure of some Rule 68 material solely through the EDS, such that this material should be additionally provided on CD or external hard drive.

8. In relation to electronic indexes, the Chamber understands that, while individual electronic indexes were not provided for every batch of disclosed material, the Prosecution has now provided to the appointed counsel and the Accused a “master disclosure log” in electronic form, which lists all material disclosed to date, and that this will be continuously updated and provided to them as additional material is disclosed. It would therefore appear that the provision and updating of this master disclosure log now dispenses with the need for individual electronic indexes for each batch of disclosed material.

9. In relation to the Rule 68 material that has only been disclosed through the EDS, the Chamber is aware of some of the technical limitations of the EDS system and is sympathetic to the appointed counsel’s complaints concerning the time-consuming manner in which individual

⁵ Order in relation to Supplemental Submission of Standby Counsel, filed confidentially and *ex parte* the Accused on 3 March 2010 (“Order on Supplemental Submission”).

⁶ Response, fn. 1.

files must be downloaded from the system, in light of the late stage in the proceedings at which he was appointed and required to familiarise himself with the case. However, it notes that not all Rule 68 material has been disclosed only through the EDS. Rather, the Prosecution has disclosed some batches of Rule 68 material on CD or external hard drive as well, and, as the amount of Rule 68 material disclosed recently has been relatively small, it has provided the latest batches on CDs before also placing it on the EDS.⁷ As such, the appointed counsel's concerns must be relate to a number of earlier Rule 68 disclosure batches, some of which are large.

10. The Chamber understands that, were it to require the Prosecution to also provide these batches to the appointed counsel on CD or external hard drive, the process that would need to be undertaken by the Prosecution would be the same as that performed by the appointed counsel and his team in terms of downloading, renaming and copying the material. This remains an onerous task, some of which may well have already been completed by the appointed counsel. The Chamber notes that it cannot be expected that the appointed counsel will have reviewed *all* disclosure material before the presentation of evidence at trial begins. This is particularly so when it comes to Rule 68 material, in respect of which the Prosecution has an ongoing disclosure obligation. Therefore, despite the fact that the appointed counsel will continue to have to devote time and resources to downloading and renaming files from the EDS in order to be able to make appropriate use of them, the Chamber is of the view that it would not be reasonable in the circumstances to require the Prosecution to provide on CD or external hard drive the batches of Rule 68 material that it has not already provided in this way. However, the Chamber considers that all future Rule 68 disclosure should be made by CD or external hard drive as well as through the EDS.

11. The Chamber reiterates that the Prosecution should promptly and diligently respond to any reasonable requests for assistance made by the appointed counsel in his further preparations for trial, which may mean in some circumstances going beyond what is strictly required by the relevant Rules on disclosure. However, the Chamber will not, in the present circumstances, order the Prosecution to take any particular course of action, as it has concluded that the appointed counsel's request concerning electronic indexes is moot and that there is nothing specific and reasonable that the Chamber can do at this stage which will effectively address the problems he is encountering with the EDS.

⁷ Response, paras. 20-21.

12. Finally, the Chamber considers that this Order and the related filings from the Prosecution and appointed counsel should be made public. Therefore, it will request the Registry to change the status of the earlier filings.

13. For the abovementioned reasons, the Trial Chamber, pursuant to Rule 54 of the Tribunal's Rules of Procedure and Evidence, hereby:

- a) **DENIES** the relief requested in the Supplemental Submission; and
- b) **REQUESTS** the Registry to change the status of the Supplemental Submission, Addendum, including Annex A, Order on Supplemental Submission, Response, and Reply from confidential and *ex parte* the Accused to public.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-third day of March 2010
At The Hague
The Netherlands

[Seal of the Tribunal]