

IT-98-29/1-A
2014 - # 2010
07 September 2012

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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-98-29/1-A
Date: 7 September 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Guy Delvoie

Registrar: Mr John Hocking

Decision of: 7 September 2012

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

**DECISION ON MOTION SEEKING DISCLOSURE OF
RULE 68 MATERIAL**

Office of the Prosecutor
Mr Paul Rogers

Counsel of Record for
Dragomir Milošević
Mr Branislav Tapušković
Ms Branislava Isailović

Counsel for Dragomir Milošević
Mr Stéphane Bourgon

I. PROCEDURAL HISTORY

1. On 29 May 2012, Mr Stéphane Bourgon (“Counsel”) submitted a motion on behalf of Dragomir Milošević before the President, seeking disclosure of Rule 68 material (“Motion”).¹ The Prosecution responded to the Motion on 8 June 2012 (“Response”).² On 12 June 2012, Counsel sought leave to reply to the Response and replied (“Reply”).³ On 27 June 2012, the President assigned the Motion to Trial Chamber I.⁴

II. SUBMISSIONS OF THE PARTIES

2. Counsel seeks to obtain exculpatory material from the Prosecution in order to prepare a possible motion for review of the Appeals Judgment against Dragomir Milošević.⁵ He submits that since the Appeal Chamber’s Judgement of 12 November 2009, Dragomir Milošević’s counsel of record have not received any Rule 68 material from the Prosecution.⁶ Counsel submits that there is information suggesting that relevant disclosable Rule 68 material exists.⁷ In that respect, he refers to information arising from (i) Rule 115 motions in the appeal proceedings, (ii) media reports, and (iii) discussions with Defence members in the *Karadžić* and *Mladić* cases.⁸ In relation to the last category, Counsel states that he is unable to be more precise about the requested material as the respective Defence counsel have not shared or are not in a position to share any details.⁹ Counsel requests the Chamber to order the Prosecution to disclose any exculpatory material for Dragomir Milošević which has come into its possession since the Appeals Judgement.¹⁰

3. The Prosecution opposes the Motion.¹¹ It states that it is complying with its disclosure obligations but that with regard to Dragomir Milošević no new material has been identified “having regard to the stage of the Milošević proceedings”.¹² The Prosecution submits that Counsel is

¹ Motion on Behalf of Dragomir Milošević Seeking Disclosure of Rule 68 Material, 29 May 2012.

² Prosecution Response to Motion on Behalf of Dragomir Milošević Seeking Disclosure of Rule 68 Material, 8 June 2012 (Confidential).

³ Motion on Behalf of Dragomir Milošević Seeking Leave to Reply and Reply to Prosecution Response to Motion on Behalf of Dragomir Milošević Seeking Disclosure of Rule 68 Material, 12 June 2012.

⁴ Order Assigning a Trial Chamber to Consider Dragomir Milošević’s Motion Seeking Disclosure of Rule 68 Material, 27 June 2012 (“Assignment Order”). On 2 July 2012, the Prosecution moved the President to reconsider the Assignment Order, Motion for Reconsideration of Order Assigning a Trial Chamber to Consider Dragomir Milošević’s Motion Seeking Disclosure of Rule 68 Material, 2 July 2012 (“Reconsideration Motion”). On 12 July 2012, the President denied the Reconsideration Motion, Decision on Motion for Reconsideration, 12 July 2012.

⁵ Motion, paras 1, 15.

⁶ Motion, paras 2, 9, 14.

⁷ Motion, para. 12.

⁸ Motion, para. 12; Reply, para. 12.

⁹ Reply, para. 13.

¹⁰ Motion, ‘Relief Sought’.

¹¹ Response, paras 1, 4.

¹² Response, paras 1, 3.

engaged in a “fishing expedition” as he only provides assertions and does not show or identify any specific material which would need to be disclosed.¹³ The Prosecution adds that it offered to conduct further searches and invited Counsel to suggest additional search terms for any searches for exculpatory material.¹⁴

III. APPLICABLE LAW

4. Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) states as follows, in relevant parts:

Subject to the provisions of Rule 70,

(i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;

(v) notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (i) above.

5. The Prosecution has a positive and continuous obligation to disclose potentially exculpatory materials under Rule 68 (i) of the Rules.¹⁵ The responsibility for disclosing exculpatory material rests on the Prosecution alone.¹⁶ Determining what material meets Rule 68 disclosure requirements falls within the Prosecution’s discretion and its initial assessment of such exculpatory material must be done in good faith.¹⁷ The Prosecution must actively review the material in its possession for exculpatory material.¹⁸ However, Rule 68 (i) does not impose an obligation on the Prosecution to search for materials which it does not have knowledge of, nor does it entitle the Defence to embark on a fishing expedition to obtain exculpatory material.¹⁹

6. The Prosecution remains obligated *at all times* to disclose to the Defence any material in its possession and actual knowledge which might, wholly or in part, be exculpatory.²⁰ Furthermore, the

¹³ Response, paras 1, 3.

¹⁴ Response, para. 3.

¹⁵ *Prosecutor v. Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 (“Bralo Decision”), para. 29.

¹⁶ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 (“Karemera Decision”), para. 9.

¹⁷ Bralo Decision, para 30.

¹⁸ Karemera Decision, para. 10.

¹⁹ Bralo Decision, para. 30.

²⁰ *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Opinion Further to the Decision of the Trial Chamber Seized of the Case The Prosecutor v. Dario Kordić and Mario Čerkez dated 12 November 1998, 22 December 1998, p. 5 (Emphasis added); see also *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Prosecution’s Application to Seek Guidance From the Appeals Chamber Regarding Redaction of the Statement of “Witness Two” for the purpose of Disclosure to Paško Ljubičić under Rule 68, 30 March 2004 (Confidential), para. 32, footnote 43.

Appeals Chamber has previously found that the Prosecution violated its Rule 68 disclosure obligations at a time after the pronouncement of a final judgement.²¹ This continuity of the Prosecution's disclosure obligations is in line with the *rationale* of disclosure in general, namely to participate in the process of administering justice and to assist the Tribunal to arrive at the truth and to do justice for the international community, victims, and the accused.²²

7. If an accused or convicted person wishes to show that the Prosecution is in breach of its obligations, he/she must identify specifically the materials sought, present a *prima facie* showing of their probable exculpatory nature, and prove the Prosecutor's custody or control of the materials requested.²³

IV. DISCUSSION

8. The Chamber will analyse at the outset whether Counsel has standing to bring the instant motion. The Chamber notes that Counsel is not one of the counsel of record for Dragomir Milošević, but has been assigned to him by the Registry in a limited capacity in relation to analysing the viability of a motion for review of Judgement.²⁴ The Chamber notes that recently a Specially Appointed Chamber in this case considered whether Counsel had standing to bring a motion requesting a variation of protective measures, related to the preparation for possible review proceedings.²⁵ The Chamber subscribes to that Chamber's analysis in this matter and concludes that Counsel has standing to bring the instant motion.

9. The Reply touches upon issues raised for the first time in the Response. As such, the Chamber is satisfied that the Reply can assist the Chamber when deciding on the Motion. Leave to reply is therefore granted.

10. Counsel requests an order to the Prosecution to disclose exculpatory material. The Rules and the case-law hold that the Prosecution's disclosure obligations do not end with the final judgement. The Prosecution also accepts this. Since a disclosure obligation already exists in the Rules, the requested order is not necessary.

11. The real issue touched upon in the Motion is whether or not the Prosecution is complying with its disclosure obligations. The fact that no material has been disclosed since the final

²¹ *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, paras 5, 8, 45-47.

²² Karemera Decision, para. 9.

²³ Bralo Decision, para. 31.

²⁴ See Motion, paras 2, 5-9, Enclosures 1-4.

²⁵ Decision on Motion Seeking Variation of Protective Measures Pursuant to Rule 75 (G), 16 July 2012, paras 11-13.

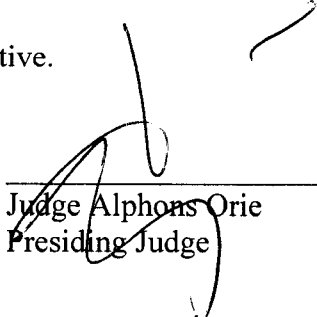
judgement is not enough to conclude that the Prosecution has violated its disclosure obligations. Further, Counsel does not elaborate on the information from media reports suggesting that exculpatory material is in the Prosecution's possession, thus failing to provide the required specificity. Moreover, the Motion is unclear how Rule 115 motions during Dragomir Milošević's appeals proceedings can provide information about Prosecution disclosure violations after the Appeals Judgement. Lastly, the mere fact that the Prosecution disclosed a lot of Rule 68 material in other cases before this Tribunal is insufficient to demonstrate a disclosure violation vis-à-vis Dragomir Milošević. In sum, Counsel has failed to demonstrate specifically what materials are sought.

12. Notwithstanding the above, the Chamber is concerned about some of the statements in the Response. The Prosecution seems to suggest that the stage of proceedings is a factor to be taken into account when discharging its disclosure obligations. Rule 68 (v) and the case-law do not support this. Furthermore, in relation to the Prosecution's offers to engage in further searches or have Counsel suggest specific search terms, the Chamber reminds the Prosecution of its independent disclosure responsibility and its obligation to actively review documents in its possession.

V. DISPOSITION

13. For the foregoing reasons, pursuant to Rules 68 (v) and 126 *bis* of the Rules, the Chamber **GRANTS** Counsel's request for leave to reply to the Response; and **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this Seventh day of September 2012
At The Hague
The Netherlands

[Seal of the Tribunal]