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CASE/AFFAIRE NO. IT-95-5/18-T (R. KARADŽIĆ) **DATE** 10 December 2010 D43576

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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-95-5/18-T

Date: 10 December 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

Decision of: 10 December 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION'S REQUEST FOR RECONSIDERATION OF TRIAL
CHAMBER'S 11 NOVEMBER 2010 DECISION**

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 “Prosecution Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision”, filed on 1 December 2010, (“Request”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 11 November 2010, the Chamber issued the “Decision on Accused’s Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Violation Motions”, (“Decision”), wherein it found that the Office of the Prosecutor (“Prosecution”) had violated its disclosure obligations under Rules 66(A)(ii) and 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and ordered *inter alia* that “with the exception of new materials or material recently received by the Prosecution, the search for and disclosure of potentially exculpatory materials pursuant to Rule 68 be completed by 17 December 2010”.¹

2. In the Request, the Prosecution requests that the Chamber reconsider the Decision with respect to the 17 December 2010 deadline set for the search for and disclosure of potentially exculpatory materials pursuant to Rule 68.² The Prosecution emphasises the measures it has undertaken to accelerate its identification and disclosure of Rule 68 material but submits that it will be unable to meet that deadline.³ It argues that retaining the deadline would be “unfair to the Prosecution and contrary to the interests of justice”.⁴ In support of this submission, the Prosecution argues that the “imposition of the deadline was an unexpected departure from the established practice of the Tribunal” and emphasises the time consuming nature of the necessary electronic searches, the failure of the Accused to adequately identify his defences, and the Prosecution’s good faith attempts to comply with the Accused’s multiple Rule 66(B) requests.⁵

3. The Prosecution argues that the continuing obligation to disclose Rule 68 material is not subject to a specific deadline and depends on an assessment of what is “practicable” in the specific circumstances of the material in question.⁶ It cites the Appeals Chamber which has held that the Prosecution “cannot be expected to disclose material which, despite its best efforts, it has not been able to review and assess” and that this principle “applies not only to materials

¹ Decision, para. 44.

² Request, para. 1.

³ Request, para. 2.

⁴ Request, para. 2.

⁵ Request, para. 2.

⁶ Request, para. 5.

newly-arrived in the OTP's possession but also to materials in its possession that must be assessed in the context of each case".⁷

4. The Prosecution submits that it had been proceeding in this case on an understanding that the "Prosecution's universal practice in trials at this Tribunal has been to carry out its Rule 68 disclosure on a rolling basis" and that it "did not anticipate that the Chamber would impose a single disclosure deadline for Rule 68 material".⁸ It suggests that it pursued the "customary practice within the Tribunal of searching the Prosecution's evidence collections on witness names to locate potential Rule 68 materials associated with a witness based on the witness calling order in a given case".⁹ Further, the Prosecution argues that the Chamber's order to accelerate the searches represents a departure from past practices.¹⁰

5. The Prosecution also outlines the time, resources and "technological challenges" involved in searching its "enormous evidence holdings" and identifying relevant and potentially exculpatory material for disclosure to the Accused in this case.¹¹ It suggests that, given these challenges, and the fact that this is a "complex leadership case" with a "large number and wide variety of live issues," it cannot "guarantee that these searches will capture every piece of potentially exculpatory material, particularly in relation to issues of marginal importance, and documents with marginal exculpatory value".¹²

6. The Prosecution requests that the Chamber reconsiders its Decision and set new deadlines for the completion of its search and disclosure of potentially exculpatory materials pursuant to Rule 68.¹³

7. On 7 December 2010, the Accused filed a "Response to Prosecution Motion for Extension of Rule 68 Deadline", ("Response"), stating that he is not opposed to the Prosecution's request for an extension of the deadline for disclosing all remaining Rule 68 material and that he prefers to receive all the Rule 68 material he is entitled to, rather than have the Prosecution conduct searches which are not sufficiently thorough.¹⁴ He emphasises that the

⁷ Request, para. 5, citing *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 197.

⁸ Request, para. 6.

⁹ Request, para. 7.

¹⁰ Request, para. 7.

¹¹ Request, paras. 7-10.

¹² Request, para. 10.

¹³ The Prosecution asks for an extension until 31 January 2011 for the Rule 68 materials found in searches that have been completed but the search results are still being reviewed; until 28 February 2011 for searches that are currently being conducted; until 18 April 2011 for the witness searches for witnesses who will be testifying in the near future; and until 23 December 2010 for Rule 68 material identified from ongoing and related completed cases. Request, paras. 20-23.

¹⁴ Response, paras. 1-2.

Prosecution should have disclosed all Rule 68 material in its possession prior to the commencement of the trial, and the claim that it in fact searches for Rule 68 material on a rolling basis is an admission of a systemic violation of Rule 68.¹⁵ He notes that the Chamber has repeatedly stated that all Rule 68 material that is in the possession of the Prosecution should already have been disclosed.¹⁶ While acknowledging that, as a practical matter, an extension of the deadline appears necessary, the Accused also states that in order to ameliorate the prejudice he has suffered as a result of the late disclosure of Rule 68 material, the trial proceedings should be adjourned following the completion of the Sarajevo phase of the case, until 1 June 2011.¹⁷ He also submits that he laid out his defence with specificity in his opening statement in March 2010, and that his Rule 66(B) requests should not interfere with the disclosure of Rule 68 material, particularly given that the bulk of Rule 68 disclosure should have taken place prior to the commencement of the trial.¹⁸

II. Applicable Law

8. The standard for reconsideration of a decision set forth by the Appeals Chamber is that “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice’”.¹⁹ Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.²⁰

III. Discussion

9. In the Request, the Prosecution does not assert that the Chamber has committed a clear error of reasoning in setting a deadline for the completion of the identification and disclosure of Rule 68 material in its possession, as a basis for the reconsideration. Rather, the Prosecution focuses its arguments on the second limb of the test for reconsideration, namely, that

¹⁵ Response, para. 3.

¹⁶ Response, para. 5.

¹⁷ Response, paras. 8–9.

¹⁸ Response, para. 14.

¹⁹ Decision on Accused’s Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010, para. 12, citing *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, 6 April 2006, para. 25, fn. 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); see also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d’une Erreur Matérielle”, 14 June 2006, para. 2.

²⁰ *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2; see also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić’s Motion for Reconsideration

reconsideration is necessary to prevent injustice. It does not, however, clarify what injustice would be caused by the Chamber's original decision, absent its reconsideration, and confines its request to an extension of the deadline set by the Chamber. For this reason, the Chamber does not consider the Request to be a proper request for reconsideration, but rather a simple request for extension of time to meet a deadline imposed by the Chamber. As such, it will consider whether the Prosecution has shown good cause for the extension sought.

10. Disclosure of Rule 68 material is an ongoing obligation and is as important as the obligation to prosecute.²¹ This duty to disclose requires the Prosecution to continually make assessments as to whether any materials in its possession are exculpatory of the accused, and if so, to expeditiously disclose any such materials.²² Since October 2009, the Chamber has repeatedly instructed the Prosecution to disclose, as soon as practicable, all Rule 68 materials currently in its possession, and to expedite its search for additional potentially exculpatory material which may be contained in its collections of evidence.²³ The Decision simply provided an end-date for the completion of that process, as it has become clear that the Prosecution has not acted in accordance with the Chamber's previous urging. This was, in part, an effort to ensure that no more time would be taken up dealing with motions filed by the Accused for findings of violations of Rule 68 by the Prosecution.

11. Regardless of the Office of the Prosecutor's internal practices, Rule 68 clearly requires the Prosecution to disclose potentially exculpatory material as "soon as practicable".²⁴ The ongoing nature of the obligation relates only to the fact that as new material comes into the possession of the Prosecution it should be assessed as to its potentially exculpatory nature and disclosed accordingly. This duty is a continuous obligation, as it remains even after a trial judgement has been rendered, and throughout the appeals proceedings.²⁵ It does not suggest that the Prosecution can delay the disclosure of such material already in its possession, or identify

and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, pp. 2-3.

²¹ Decision on Accused's Motion to Set Deadlines for Disclosure, 1 October 2009, ("Decision on Deadlines for Disclosure"), para. 19, citing *Prosecutor v. Lukić et al.*, Case No. I-98-32/1-T, Decision on Milan Lukić's Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B, 3 November 2008, para. 16; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 264; *Prosecutor v. Kordić and Čerkez*, Case No. IT-65-14/2-A, Appeal Judgement, 17 December 2004, para. 183; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3

²² Decision on Deadlines for Disclosure, para. 19.

²³ Decision on Deadlines for Disclosure, para. 20; Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures, 20 July 2010, ("Decision on Third to Sixth Motions"), para. 25.

²⁴ Decision on Accused's Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 29 September 2010, paras. 14-17.

²⁵ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 267.

and disclose potentially exculpatory material on a “rolling basis”. In determining whether there has been a violation of the Rule, a Chamber will assess whether the Prosecution has indeed made sufficient efforts to ensure the identification of such material and its provision to the Accused within a reasonable time-frame, taking into account all relevant circumstances.

12. The Prosecution argues that its enormous evidence holdings make it time-consuming and resource-intensive to identify and disclose Rule 68 material.²⁶ Yet, it also argues that the size of its case has no bearing on its failure to comply with disclosure obligations.²⁷ The Chamber reiterates that this process should have started in earnest as soon as the Accused was transferred to the custody of the Tribunal and made his initial appearance. More than a year after that date, in October 2009, the Prosecution was directed by the Chamber to expedite the search for and disclosure of Rule 68 material. The Chamber has already stressed the importance of the Prosecution maintaining an organized, efficient, and thorough system for the review of documentary evidence to ensure that all material falling within the disclosure-related Rules are provided to the Accused in a prompt manner.²⁸ The Chamber again expresses its deep concern at the lack of organisation and the unsystematic manner in which the Rule 68 searches are being conducted in this case.

13. The Prosecution also cites the failure of the Accused to identify his defences pursuant to Rule 65 *ter*(F) as contributing to the Prosecution’s inability to comply with the 17 December 2010 deadline. However, Rule 68 envisages the Prosecution making its own assessment of what material is potentially exculpatory of an accused person and this assessment should be made as early as the initial appearance, and on an ongoing basis, regardless of what the accused’s ultimate defence strategy proves to be. Thus, the fact that the Accused has failed to clearly set out his defences in his Pre-Trial Brief should not have a significant impact on the Prosecution’s ability to identify and disclose Rule 68 material.

14. Lastly, the Chamber has previously stated that it recognises the burden placed on the Prosecution by the Accused’s multiple Rule 66(B) requests.²⁹ However, the obligation to disclose potentially exculpatory material pursuant to Rule 68 is wholly independent of that burden.³⁰ The Chamber does not accept that compliance with the Accused’s Rule 66(B) requests relieves the obligation on the Prosecution to fully comply with the terms of Rule 68.

²⁶ Request, para. 8.

²⁷ Request, para. 15.

²⁸ Decision on Third to Sixth Motions, para. 44.

²⁹ Decision on Accused’s Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010, (“Decision on Eighteenth to Twenty-First Motions”), para. 30.

³⁰ Decision Eighteenth to Twenty-First Motions, para. 30.

15. While the Chamber is unconvinced by the arguments put forward by the Prosecution in support of the Request, it recognises, as a practical matter, that the Prosecution is simply not going to meet the 17 December 2010 deadline. In light of the fact that the deadline itself is irrelevant to the question of whether or not there has actually been a violation of Rule 68, as any disclosure of Rule 68 material which has been in the Prosecution's possession for many months would likely, regardless of that deadline, amount to a violation of Rule 68, the Chamber is minded to grant some extension of time to the Prosecution. The Chamber will therefore vary the Decision to the effect that the Prosecution should have identified and disclosed to the Accused all material falling within the ambit of Rule 68, which is already in its possession, on or before 18 April 2011, including material pertaining to *all* of the Prosecution's intended witnesses, not simply those scheduled to testify "in the near future". The Prosecution should, nonetheless, continue its efforts to disclose Rule 68 material that has already been discovered as a result of completed or ongoing searches in accordance with the timeline set out in the Request, as the date of actual disclosure of this material will be taken into account by the Chamber in considering whether the terms of Rule 68 have been breached.

16. Irrespective of this new deadline, the Chamber will consider any motion filed by the Accused for a finding of a violation of Rule 68 in relation to material provided to him by the Prosecution. It is in the context of such a motion or motions that the Chamber will consider whether any further adjournment of the proceedings is necessary.

IV. Disposition

17. For these reasons, pursuant to Rule 54 of the Rules, the Chamber hereby:

- a. **DECLINES** to reconsider its earlier Decision; and

- b. **VARIES** the Decision to the effect that, the Prosecution should identify and disclose to the Accused: (i) Rule 68 material from ongoing and related completed cases relating to the period before the Decision, by 23 December 2010, (ii) Rule 68 materials found in searches that have been completed but the search results are still subject to review, by 31 January 2011, (iii) Rule 68 materials identified from searches that are “currently being conducted”, by 28 February 2011, and (iv) Rule 68 material identified during witness-related searches for all Prosecution witnesses, by 18 April 2011.

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



Judge O-Gon Kwon
Presiding

Dated this tenth day of December 2010
At The Hague
The Netherlands

[Seal of the Tribunal]