

IT-99-36-T
D8214-D8211
09 April 2002

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**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-99-36-T
Date: 9 April 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Ivana Janu
Judge Chikako Taya

Registrar: Mr. Hans Holthuis

Decision of: 9 April 2002

PROSECUTOR

v.

**RADOSLAV BRĐANIN
and
MOMIR TALIĆ**

**DECISION ON "MOTION FOR PRODUCTION OF
DOCUMENTS – DZONLIĆ TESTIMONY" OF 11 MARCH 2002**

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman and Ms. Milka Maglov, for Radoslav Brđanin
Mr. Xavier de Roux and Ms. Natacha Fauveau-Ivanović, for Momir Talić

TRIAL CHAMBER II 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 “Motion for production of documents – Dzonlić testimony” filed by the accused Radoslav Brđanin (“Brđanin”) on 11 March 2002 (the “Motion”).

I. INTRODUCTION

1. On 1 March 2002, during trial proceedings, counsel for Brđanin during cross-examination of the witness Amir Dzonlić (the “Witness”), questioned the Witness as to documents he had previously referred to in his examination-in-chief. The Witness was a practising lawyer in the former Yugoslavia. The Witness had testified that clients of his had been dismissed from their employment following certain decisions of the ARK Crisis Staff. The Witness claimed that he had in his possession documents brought to him by clients showing that they had been dismissed from their employment (the “Documents”), and that the Documents had been made available to the Prosecution’s investigators. Counsel for Brđanin advised that the Documents had not been disclosed to the Defence. The Prosecution subsequently clarified that the Documents were never taken because, in the Prosecution’s view, they came from client files and were subject to legal professional privilege.¹

2. On 6 March 2002, during trial proceedings, counsel for Brđanin asked the Trial Chamber to request or order the Prosecution to obtain the Documents and make them available to the Defence. The Prosecution responded that, were the Trial Chamber to make such an order, the Witness would comply. The Prosecution reiterated however that its initial reluctance to take the Documents was because it believed the documents to be privileged.²

3. On 7 March 2002, during trial proceedings, the Trial Chamber requested counsel for Brđanin to file a written motion, specifically identifying the documents it sought from the Witness and giving the Prosecution an opportunity to respond to it.³

4. On 11 March 2002, counsel for Brđanin filed the Motion requesting the Trial Chamber to order the Prosecution to request the Witness to produce all documents showing, on their face, that clients were dismissed from their positions based on orders of the ARK Crisis Staff.

¹ Transcript, pp 2562-2565. The Witness subsequently confirmed the Prosecution’s position and stated that he would not object to supplying the documents to the Trial Chamber if so ordered. See Transcript, pp 2581-2582.

² Transcript, pp 2798-2799.

³ Transcript, pp 2807-2808.

5. On 19 March 2002, during trial proceedings, the Prosecution stated that it would not be filing a written response to the Motion and confirmed that the Witness would do whatever the Trial Chamber ordered.⁴ The Prosecution at no stage provided the Trial Chamber with the reasons for its belief that the Documents are privileged.

II. DISCUSSION

6. Legal professional privilege is a rule of evidence, which provides that confidential communications between legal practitioner and client made for the sole purpose of the client obtaining, or the legal practitioner giving, legal advice or for use in existing or contemplated litigation, cannot be given in evidence nor disclosed by the client or by the legal practitioner, without the consent of the client.⁵ Legal professional privilege is the privilege of the client and not the legal adviser.⁶

7. The Trial Chamber emphasises that legal professional privilege extends only to confidential communications and documents⁷ that come into existence or are generated for the purpose of giving or getting legal advice or in regard to prospective or pending litigation.

8. In the present context, the Trial Chamber observes that the Documents in the possession of the Witness and sought by the Defence are in fact documents received by clients of the Witness from their employers. In this sense, they are public documents. They cannot be said to have come into existence or to have been generated by the Witness or the clients (and their respective agents) for the purpose of giving legal advice or for prospective/pending litigation. Rather, the Documents constitute the original evidence or basis of the claim upon which the clients consulted the Witness for legal advice or to commence litigation. In addition, the Witness himself has not only mentioned the existence of these documents, but also gave details as to their content in the course of his testimony. Accordingly, in the Trial Chamber's view, legal professional privilege does not attach to any of the Documents, and there is no reason that would prevent the Witness disclosing them. Accordingly, the Trial Chamber requires the Witness to disclose them to the defence. The Trial Chamber will, however, permit the names of the clients and any other identifying information relating to them to be redacted from the Documents.

⁴ Transcript, pp 3645.

⁵ The principle of legal professional privilege is recognised both in common law and civil law jurisdictions. An example of legal professional privilege in a civil law jurisdiction is in Germany, where the privilege is enshrined in the German criminal code in §53 of the Strafprozessordnung.

⁶ *Wilson v Rastall* (1792) 4 T.R. 753.

⁷ *Bursill v Tanner* (1885) 16 Q.B.D. 1.

III. DISPOSITION

For the foregoing reasons,

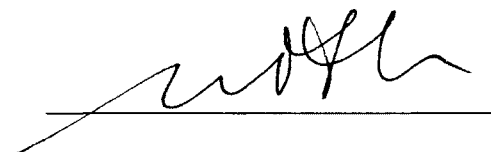
TRIAL CHAMBER II HEREBY grants the Motion and orders that the Prosecution communicates the terms of this Decision to the Witness and ensures that the Documents are provided to the respective defence teams for Brđanin and Talić, as well as to the Trial Chamber, within fourteen (14) days of the date of this Decision.

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

Dated this 9th day of April 2002,

At The Hague

The Netherlands



Carmel Agius

Presiding Judge

[Seal of the Tribunal]