



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-95-11-T
Date: 28 November 2006
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Janet Nosworthy
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Decision of: 28 November 2006

PROSECUTOR

v.

MILAN MARTIĆ

**DECISION ON APPLICANT'S MOTION SEEKING ACCESS
TO CONFIDENTIAL MATERIAL IN THE MARTIĆ CASE**

The Office of the Prosecutor:

Mr. Alex Whiting
Ms. Anna Richterova
Mr. Colin Black
Ms. Nisha Valabhji

Counsel for Milan Martić:

Mr. Predrag Milovančević
Mr. Nikola Perović

Counsel for Momčilo Perišić

Mr. James Castle

TRIAL CHAMBER I (“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”);

BEING SEISED of the “Applicant’s Motion Seeking Access to Confidential Material in the Martić Case”, filed on 6 March 2006 (“Motion”), in which counsel for the accused Momčilo Perišić (“Applicant”) requests access to confidential material in the case of the Prosecutor v. Milan Martić concerning events in Zagreb on 2 and 3 May 1995;¹

NOTING that the Prosecution has not filed a response to the Motion;

NOTING that the Applicant submits that “[i]n discussions with Mr. Stamp it has been the [P]rosecutor’s request that the Defence obtain disclosure of relevant materials in all relevant cases through a disclosure motion rather than through disclosure directly from the Prosecutor under Rule 68”;²

NOTING that the Applicant submits that there exists a nexus between the case of Milan Martić and the case of the Applicant, since both Indictments concern alleged crimes related to the shelling of Zagreb on 2 and 3 May 1995;

CONSIDERING that a party may seek material from any source, including from another case before the Tribunal, to assist in the preparation of its case, if it is able to describe the documents sought by their general nature as clearly as possible even though it cannot describe them in detail and if a legitimate forensic purpose for such access has been shown, but that in doing so, a party may not engage in a “fishing expedition”;³

CONSIDERING that the relevance of the material being sought by a party may be determined by showing the existence of a nexus between the applicant’s case and the case from which such material is sought, that is, where a geographical, temporal or other material overlap between the

¹ Motion, paras 1, 12-14.

² Motion, para. 15. The Trial Chamber notes that the paragraph numbers in the Motion are not entirely consecutive after paragraph 14. Rather, paragraph 15 is numbered as paragraph 13 in the Motion.

³ *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić, and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić & Čerkez* Case, 23 January 2003, p. 3; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Momčilo Gruban’s Motion for Access to Material, 13 January 2003, para. 5; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, “Decision on Appeal From Refusal to Grant Access to Confidential Material in Another Case”, 23 April 2002, p. 3.

cases exists the material sought is likely to be of assistance to the applicant's case, or at least, there is a good chance that it may assist the defence of the applicant(s);⁴

NOTING the Amended Indictment in the case of *Prosecutor v. Momčilo Perišić*;

CONSIDERING that a geographical and temporal overlap exists between the case of the Applicant and the case of Milan Martić, insofar as it concerns the shelling of Zagreb, and therefore that the material sought is likely to be of material assistance to the Applicant's case;

CONSIDERING, however, that *ex parte* material is of a special nature of confidentiality, as, by its very nature, it contains information not disclosed even between the parties because of security interests of a State, other public interest, or privacy interests of a person or institution ("special privacy interests") and that the party on whose behalf *ex parte* status has been granted enjoys a high degree of trust that the information will not be disclosed;⁵

CONSIDERING that the nature of the material sought has been described by its general nature as clearly as possible and that a legitimate forensic purpose for access has been shown with the exception of *ex parte* material;

CONSIDERING that according to Rule 75 (G) of the Rules of Procedure and Evidence ("Rules") a Chamber can rescind, vary, or augment protective measures only after having ordered the protective measures; and therefore that the Trial Chamber will only grant access to material which to date is subject to protective measures;⁶

PURSUANT TO Articles 20 and 21 of the Statute and Rules 54 and 75 of the Rules;

GRANTS the Motion, and

GRANTS the Applicant access to all confidential material to date in the present case, insofar as this material pertains to the shelling of Zagreb, subject to the following orders and protective measures:

1. for the purpose of this disposition:
 - (a) the "Prosecution" means the Prosecutor of the Tribunal and her staff;

⁴ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, "Decision on Appeal From Refusal to Grant Access to Confidential Material in Another Case", 23 April 2002, p. 3.

⁵ *Prosecutor v. Blagoje Simić et al.*, "Decision on Defence Motion by Franko Simatović for Access to Transcripts, Exhibits, Documentary Evidence and Motions Filed by the Parties in the *Simić et al.* Case", 12 April 2005, p. 4.

(b) the “Applicant” means Momčilo Perisić, his Defence counsel and immediate legal assistants and staff and others specifically assigned by the Tribunal to the Defence team and identified in a list to be maintained by the lead counsel and filed with the Trial Chamber *ex parte* and under seal within ten days of the entry of this order. Any and all additions and deletions to the initial list in respect of any of the above categories of persons who are necessarily identified and properly involved in the preparation of the defence shall be notified to the Trial Chamber in similar fashion within seven days of such additions or deletions;

(c) the “public” means all persons, governments, organisations, entities, clients, associations and groups, other than the Judges of the Tribunal and the staff of the Registry (assigned to either Chambers or the Registry), the Prosecution and the accused, as defined above. The “public” specifically includes, without limitations, family, friends and associates of the Applicant, the Applicant in other cases or proceedings before the Tribunal and Defence counsel in other cases or proceedings before the Tribunal;

(d) the “media” means all video, audio and print media personnel, including journalists, authors, television and radio personnel, their agents and representatives;

2. as the Prosecution is familiar with the material, it shall provide that material to the Registry for disclosure to the Applicant;
3. *ex parte* material shall not be disclosed;
4. the Applicant shall not disclose to the media any confidential or non public materials provided by the Prosecution;
5. save as is directly and specifically necessary for the preparation and presentation of his case and only after obtaining leave of the Chamber, the Applicant shall not disclose to the public, to the media, or to the family members and associates of the Applicant;

(a) the names, identifying information or whereabouts of any witness or potential witness identified by the Prosecution, copies of witness

⁶See, e.g., *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-63-T, “Decision on Joint Motion by Momcilo Krajišnik and Biljana Plavšić for Access to Trial Transcripts of Both Open and Closed Sessions and Documents and Things Filed Under Seal”, 13 March 2002, paras 21-22.

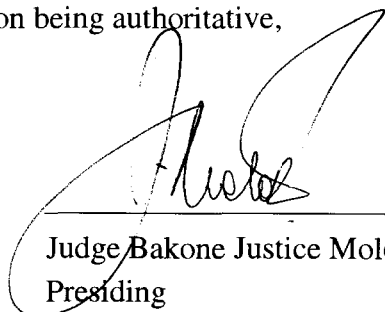
statements, the contents thereof, or any other information which would enable them to be identified and would breach the confidentiality of the protective measures already in place, unless absolutely necessary for the preparation of the Applicant's case and always with the leave of the Chamber; or

(b) any evidence (including documentary, audio visual, physical, or other evidence) or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony disclosed to the Applicant;

6. if the Applicant finds it directly and specifically necessary to disclose such information for the preparation and presentation of their case and having obtained leave from the Trial Chamber to do so, the Applicant shall inform each person among the public to whom non-public material or information (such as witness statements, transcripts of testimonies, exhibits, prior testimony, videos, or the contents thereof), is shown or disclosed, that he or she is forbidden to copy, reproduce or publicise such non-public material or information, and is not to show or disclose it to any other person. If provided with the original or any copy or duplicate of such material, such person shall return it to the Applicant when such material is no longer necessary for the preparation and presentation of the Defence;
7. if a member of the Defence team withdraws from the case, all material in his or her possession shall be returned to the lead Defence counsel;
8. the Applicant shall have no contact with the witnesses concerned with the material to be disclosed, unless otherwise decided by the Trial Chamber under the conditions set by the latter;
9. subject to the protective measures and orders prescribed above, the protective measures that are already in place in relation to the material disclosed should remain in place;

REQUESTS the Registrar to provide the Defence with the material for which disclosure is granted.

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



Judge Bakone Justice Moloto
Presiding

Dated this twenty-eighth day of November 2006

At The Hague

The Netherlands

[Seal of the Tribunal]