



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 Nos. IT-95-5/18-PT &
IT-04-81-T
Date: 14 October 2008
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Iain Bonomy, Pre-Trial Judge
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 14 October 2008

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON MOMČILO PERIŠIĆ'S MOTION FOR ACCESS
TO CONFIDENTIAL MATERIALS IN
THE RADOVAN KARADŽIĆ CASE**

Prosecutor v. Radovan Karadžić (Case No. IT-95-5/18-PT)

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark B. Harmon

The Accused:

Mr. Radovan Karadžić

Prosecutor v. Momčilo Perišić (Case No. IT-04-81-T)

The Office of the Prosecutor:

Mr. Mark B. Harmon

Counsel for Momčilo Perišić:

Mr. Novac Lukić
Mr. Gregor Guy-Smith
Mr. James Castle



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 “Momčilo Perišić’s Motion for Access to Confidential Materials in the Radovan Karadžić Case”, filed publicly on 18 September 2008 (“Perišić Motion”) by Momčilo Perišić, an accused in another case before the Tribunal, and also the Accused Karadžić’s “Motion for Extension of Time to Respond to Perišić Motion for Access to Confidential Material”, filed publicly on 6 October 2008 (“Karadžić Motion”), and hereby renders its decision thereon.

I. Submissions

1. In the Perišić Motion, Momčilo Perišić (“the Applicant”), pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), seeks access to all *inter partes* and *ex parte* confidential material from the instant case, *Prosecutor v. Radovan Karadžić* (Case No. IT-95/18-PT) (“*Karadžić case*”), for the duration of the pre-trial and trial proceedings, including:

- (a) all confidential closed and private session testimony transcripts;
- (b) all hearing transcripts;
- (c) all confidential exhibits; and
- (d) all confidential filings and submissions, including all confidential Trial Chamber decisions.¹

2. The Applicant argues that there is a significant geographical and temporal overlap between his case and the *Karadžić case*, as well as an interrelation between the factual bases for the allegations against himself and the Accused.² Consequently, the Applicant argues that he should be granted access to the materials requested based upon (a) the possible significance of such material to the effective investigation and preparation of his defence and (b) the principle of equality of arms.³ The Applicant assures the Trial Chamber that he will respect all protective measures ordered by the Trial Chamber in the *Karadžić case*.⁴

3. The Prosecution filed a Response to the Perišić Motion on 2 October 2008, in which it does not object to the Applicant gaining access to confidential *inter partes* material from the instant

¹ Perišić Motion, para. 1.

² Perišić Motion, paras. 6-11.

³ Perišić Motion, para. 12, 14.

⁴ Perišić Motion, para. 5.

case, subject to certain measures to maintain confidentiality.⁵ However, the Prosecution does oppose the Applicant gaining access to any confidential *ex parte* material, arguing that the Applicant has not discharged the burden of proving that disclosure should occur.⁶

4. The Perišić Motion was intimated to the Accused Karadžić in B/C/S on 29 September 2008. According to the Rules and to the established practice of this Trial Chamber, that is the date on which commenced the 14-day period during which the Accused has the opportunity to submit a response to the Perišić Motion. In the Karadžić Motion, filed on 6 October 2008, the Accused requests an extension of the time within which he may respond to the Perišić Motion.⁷ This request is founded upon the representation that the Accused Karadžić does not have adequate time and facilities to respond to the Perišić Motion within the time prescribed under the Rules because the Accused “needs the assistance of a defence team”⁸ and the Registry has not yet reached a decision on his application for funding thereof.⁹ The Accused requests that the time for response be extended “until 14 days after the Registry has approved an acceptable level of funding for his defence team”.¹⁰

II. Applicable law

A. Extension of time to respond

5 Pursuant to Rule 127(A)(i) of the Rules, a Trial Chamber may, on good cause shown by motion, vary time limits prescribed under the Rules. The Chamber finds instructive a decision rendered in the case of *Prosecutor v. Krajišnik*,¹¹ in which the Appeals Chamber considered whether there was good cause for a request for extension of time from an accused who had a private arrangement with his legal representatives for the payment of fees. That accused argued that the request was appropriate because his transfer of funds to one of his representatives had been blocked, and he submitted that the Chamber should delay proceedings to allow him time to apply for the funds to be cleared and for that application to be processed. The Appeals Chamber held that this did not constitute good cause for delay in those proceedings.¹²

⁵ Prosecution Response to the Request of Momčilo Perišić for Confidential Materials in the Radovan Karadžić Case, 2 October 2008 (“Response”), para. 3.

⁶ Response, para. 4.

⁷ Karadžić Motion, para. 5.

⁸ Karadžić Motion, paras. 2, 4.

⁹ Karadžić Motion, para. 4.

¹⁰ Karadžić Motion, para. 5.

¹¹ *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on Mr Krajišnik’s Motion to Reschedule the Deadline for Submission of Mr. Dershowitz’s Supplementary Brief, 27 March 2008 (“First *Krajišnik* Decision”).

¹² First *Krajišnik* Decision, p. 2.

B. Access to materials

6. The Chamber notes the well-established principle of the Tribunal that proceedings should be conducted in a public manner to the extent possible.¹³ Further, the Chamber observes that, in general, “[a] party is always entitled to seek material from any source to assist in the preparation of his case”.¹⁴ In exceptional circumstances, however, a Chamber may restrict the access of the public, as well as the access of a party, to certain material under the provisions of the Rules.¹⁵ Such confidential material can be categorised into three types: *inter partes*, *ex parte*, and Rule 70.

7. In determining access to such material, the Tribunal must “find a balance between the right of a party to have access to material to prepare its case and the need to guarantee the protection of witnesses”.¹⁶ It is established that a party may obtain confidential material from another case to assist it in the preparation of its case, if (a) the material sought has been “identified or described by its general nature”; and (b) a “legitimate forensic purpose” exists for such access.¹⁷

8. The first requirement is not a particularly onerous one. The Applicant correctly asserts that the Appeals Chamber has held that requests for access to “all confidential material” can be sufficiently specific to meet the identification standard.¹⁸

9. With respect to the second requirement, each category of confidential material will be dealt with separately, as the standards for access differ for each type.

C. Access to confidential *inter partes* material

10. *Inter partes* material, while available to both Parties to a proceeding, may be restricted from public access due to its sensitive nature; for example, where public release of the material may

¹³ Rule 78 provides, “All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.”

¹⁴ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*, 16 May 2002 (“*Blaškić Decision*”), para. 14; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić’s Motion for Access to All Confidential Materials in the *Brđanin Case*, 24 January 2007 (“*Brđanin Decision*”), para. 10.

¹⁵ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-PT, Decision on Vlastimir Đorđević’s Motion for Access to All Material in *Prosecutor v. Limaj et al.*, Case No. IT-03-66, 6 February 2008 (“*Đorđević Decision*”), para. 6.

¹⁶ *Prosecutor v. Hadzihasanovic 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. 2.

¹⁷ *Blaškić Decision*, para. 14; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Material, 16 November 2005 (“*First Blagojević and Jokić Decision*”), para. 11; *see also Prosecutor v. Delić*, Case No. IT-04-83-PT, Order on Defence Motions for Access to All Confidential Material in *Prosecutor v. Blaškić* and *Prosecutor v. Kordić and Čerkez*, 7 December 2005 (“*Delić Order*”), p. 6.

¹⁸ *Brđanin Decision*, para 11; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Materials in the *Blagojević and Jokić Case*, 18 January 2006, para. 8; *Prosecutor v. Blaškić*, Case No. IT-95-14-R, Decision on Defence Motion on behalf of Rasim Delić Seeking Access to All Confidential Material in the *Blaškić Case*, 1 June 2006, p.12.

create a security risk, or where it contains personal information about the accused so that disclosure would breach his or her privacy interests. In respect of confidential *inter partes* material, a “legitimate forensic purpose” for disclosure in subsequent proceedings will be shown if the applicant can demonstrate that the material is relevant and essential.¹⁹ The relevance of such material may be determined “by showing the existence of a nexus between the applicant’s case and the original case from which the material is sought”.²⁰ To establish a nexus, the applicant is required to demonstrate a “geographical, temporal or otherwise material overlap” between the two proceedings.²¹

11. The essential nature of the material, in turn, means that the party seeking it must demonstrate “a good chance that access to this evidence will materially assist the applicant in preparing his case.”²² The standard does not require the applicant to go so far as to establish that the material sought would likely be admissible evidence.²³

B. Access to confidential *ex parte* material

12. Material may also be filed as *ex parte* and confidential because the opposing party is not supposed to be informed of the submission or afforded access to it. This is done for a specific purpose, such as where a submission pertains to the ill-health of an accused. Due to the “special considerations of confidentiality” relating to confidential *ex parte* material,²⁴ and the “protected degree of trust” that the material will not be disclosed enjoyed by the party on whose behalf the *ex parte* status has been granted,²⁵ the Appeals Chamber has required an applicant to meet a higher standard in establishing a legitimate forensic purpose for its disclosure.²⁶

¹⁹ See *Blaškić* Decision, para. 14; First *Blagojević and Jokić* Decision, para. 11; see also *Delić* Order, p. 6; *Dorđević* Decision, para. 7.

²⁰ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision on Haradinaj Motion for Access, Balaj Motion for Joinder, and Balaj Motion for Access to Materials in the *Limaj* case, 31 October 2006, para. 7; *Dorđević* Decision, para. 7.

²¹ See *Blaškić* Decision, para. 15; *Prosecutor v. Kordić and 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 and Čerkez* Case, 23 January 2003, p. 4; *Dorđević* Decision, para. 7.

²² First *Blagojević and Jokić* Decision, para. 11; *Dorđević* Decision, para. 7; *Blaškić* Decision, para. 14.

²³ *Dorđević* Decision, para. 7.

²⁴ *Brdanin* Decision, para. 14.

²⁵ *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. 17; *Prosecutor v. Simić*, Case No. IT-95-9-A, 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 (“*Simić* Decision”), p. 4.

²⁶ *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on Motion by Mićo Stanišić for Access to All Confidential Material in the *Krajišnik* Case, 21 February 2007 (“Second *Krajišnik* Decision”) p. 5; *Brdanin* Decision, para. 14; *Bralo* Decision, para. 17; *Simić* Decision, p. 4.

C. Access to confidential Rule 70 Material

13. Finally, material can be deemed confidential by virtue of the fact that it has been provided by a state or person subject to restrictions on its use pursuant to Rule 70.²⁷ In such cases, where an applicant has satisfied the legal standard for access to *inter partes* material, the entity that has provided the material must still be consulted before the material can be given to another accused before the Tribunal, and the material must remain confidential.²⁸ This is the case even where the Rule 70 provider(s) consented to the use of the material in one or more prior cases.²⁹

III. Discussion

A. Extension of time to respond

14. In respect of the Karadžić Motion, the Trial Chamber notes that the Accused has so far opted to proceed *pro se* in his case, and there is no guarantee that the Registry will act favourably upon his application for funding of persons who are not to be assigned as his counsel. As the Trial Chamber has pointed out on prior occasions, the Accused must realise the disadvantages of his decision to represent himself in these proceedings,³⁰ and, in the words of the Appeals Chamber, “must take the bitter with the sweet when making this choice”.³¹ It is an ongoing practice at the Tribunal that, where an accused seeks authorization by the Office of Legal Aid and Detention (OLAD) of a defence team, a temporary assignment may be made and delay thereby avoided, irrespective of a final determination of indigency. Declining to exercise that reasonably available option does not constitute good cause for extending the time-limit for response. The Chamber does not find that the requested extension of time is warranted, and accordingly the deadline for the submission of a response by the Accused was 13 October 2008.

B. Access to confidential *inter partes* material

15. Applying the legal standards to the Perišić Motion, the Trial Chamber finds that, in respect of the confidential *inter partes* material requested, the Perišić Motion establishes that a substantial

²⁷ Material produced pursuant to an order under Rule 54 *bis* may also require similar procedures before they can be disclosed to an accused in another case.

²⁸ See *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Prosecution’s Preliminary Response and Motion for Clarification Regarding the Appeal Chamber’s Decision Dated 4 December 2002 on Paško Lubičić’s Motion for Access to Confidential Material, Transcripts and Exhibits in the *Blaškić* Case, 8 March 2004, paras. 11–12; *Dorđević* Decision, para. 15; *Delić* Order, p. 6.

²⁹ *Prosecutor v. Delić*, Case No. IT-04-83-PT, Order on Jadranko Prlić’s Motion for Access to All Confidential Material in *Prosecutor v. Rasim Delić*, 2 December 2005, p. 4.

³⁰ In this respect, the Trial Chamber endorses the language and approach of the Appeals Chamber in the First *Krajišnik* Decision, where, as noted above, the Appeals Chamber held at page 2 that it would not countenance delays in proceedings on a similar basis.

overlap exists in the timeframes and locations of the crimes charged in the *Perišić* and *Karadžić* indictments, particularly as regards events in Sarajevo between 1993 and 1995, and Srebrenica in July 1995. Further, as highlighted in the *Perišić* Motion, the factual bases for the charges in the Indictment appear to interrelate, particularly in regards to the alleged co-operation between the Yugoslav Army and the Army of the Republika Srpska, in which the Applicant and the Accused *Karadžić* respectively held positions of superiority. Moreover, the Prosecution has not objected to this access. The Applicant has thus shown a legitimate forensic purpose for access to the requested confidential and *inter partes* material in the *Karadžić* case.

C. Access to confidential *ex parte* material

16. In relation to the confidential *ex parte* material, the Applicant argues that access should be granted due to the “exceptional complexity” of his case and in order to ensure “comprehensive preparation”.³² The Prosecution objects. The Trial Chamber finds that the Applicant has not established a legitimate forensic purpose for access to confidential and *ex parte* material by reference to the higher standard required in respect of such material.³³

D. Access to confidential Rule 70 Material

17. In respect of the Rule 70 material, the Chamber will order that the Prosecution and the Defence seek the consent of the Rule 70 provider(s) before it can be disclosed to the Applicant.

E. Nature of access requested: Prospective basis

18. As a final point, the Trial Chamber notes that the Applicant requests access to all confidential materials filed up to this point and for the duration of the pre-trial and trial proceedings. It has been the preferred approach of Trial Chambers to limit access to materials to the date of the request (or decision upon that request). The Trial Chamber is not of the view that delay in disclosure will unduly prejudice the Applicant. However, as a matter of judicial economy, and based upon the particular circumstances of both of the proceedings involved, the Chamber considers that the Applicant’s access to the material in the *Karadžić* case should be accomplished in as streamlined a manner as possible and that access on an ongoing basis is warranted.

19. The parties are always free to object to the Applicant’s access to specific materials, if and when such issues arise in the case over particular material.

³¹ *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on Momčilo Krajišnik’s Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear, 28 February 2008, para. 8.

³² *Perišić* Motion, para. 13.

³³ Second *Krajišnik* Decision, p. 5; *Brđanin* Decision, para. 14; *Bralo* Decision, para. 17; *Simić* Decision, p. 4.

IV. Disposition

20. Accordingly, the Trial Chamber, pursuant to Rules 54, 70, and 75 of the Rules of Procedure and Evidence of the Tribunal, hereby DENIES the Karadžić Motion, and GRANTS the Perišić Motion, in part, and DENIES the Perišić Motion, in part, and:

- a. ORDERS the Prosecution and the Defence, on an ongoing basis, to identify for the Registry the following *inter partes* material in the case of *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, for disclosure to the Applicant:
 - (i) all closed and private session testimony transcripts produced in the pre-trial and trial proceedings, which are not subject to Rule 70;
 - (ii) all confidential and under seal trial exhibits, which are not subject to Rule 70;
 - (iii) all confidential and under seal filings made by the parties in the pre-trial and trial proceedings, which are not subject to Rule 70; and
 - (iv) all confidential and under seal decisions, orders, and other documents issued by the Chamber in the pre-trial and trial proceedings, which are not subject to Rule 70.
- b. ORDERS the Prosecution and the Defence to determine without delay which of the material requested is subject to the provisions of Rule 70, and immediately thereafter to contact the providers of such material to seek their consent for its disclosure to the Applicant, and, where Rule 70 providers consent to such disclosure, to notify the Registry on a periodic basis of such consent.
- c. REQUESTS the Registry to withhold disclosure of any material subject to Rule 70 until such time as the Prosecution informs the Registry that consent for disclosure has been obtained, even in respect of those providers who have consented to the use of the relevant material in a prior case. Where consent cannot be obtained from provider(s) of any material subject to Rule 70, the material shall not be disclosed.
- d. REQUESTS the Registry to disclose to the Applicant
 - (i) the confidential and *inter partes* and non-Rule 70 material once it has been identified by the Prosecution and Defence in accordance with paragraph (a); and
 - (ii) the Rule 70 material once the Prosecution and Defence has identified such material and informed the Registry of the consent of the Rule 70 provider(s) in accordance with paragraphs (a), (b), and (c).

- e. ORDERS that no confidential and *ex parte* material from the case of *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT be disclosed to the Applicant.
- f. ORDERS that the Applicant, his Defence team, and any employees who have been instructed or authorised by the Applicant shall not disclose to the public, or to any third party, any confidential or non-public material disclosed from the *Karadžić* case, including witness identities, whereabouts, statements, or transcripts, except to the limited extent that such disclosure to members of the public is directly and specifically necessary for the preparation and presentation of the Applicant's case. If any confidential or non-public material is disclosed to the public where directly and specifically necessary, any person to whom disclosure is made shall be informed that he or she is forbidden to copy, reproduce, or publicise confidential or non-public information or to disclose it to any person, and that he or she must return the material to the Applicant as soon as it is no longer needed for the preparation of the Applicant's case.
- g. For the purpose of this Decision, "the public" means and includes all persons, governments, organisations, entities, clients, associations, and groups, other than the Judges of the Tribunal, the staff of the Registry, the Prosecutor and his representatives, the Applicant and his defence team, and the Applicant, his counsel, and any employees who have been instructed or authorised by the Applicant's counsel to have access to the confidential material. "The public" also includes, without limitation, families, friends, and associates of the Applicant; accused and defence counsel in other cases or proceedings before the Tribunal; the media; and journalists.
- h. ORDERS that nothing in this Decision shall affect the disclosure obligations of the Prosecution under Rules 66 and 68; and RECALLS that it is the responsibility of the Prosecution to determine whether there is additional material related to the *Karadžić* case that should be disclosed to the Applicant but which is not covered by the terms of this Decision.
- i. RECALLS that, pursuant to Rule 75(F)(i), any protective measures that have been ordered in respect of a witness in the *Karadžić* case shall continue to have effect in the case against the Applicant, except insofar as they have been varied in accordance with this Decision.

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



Judge Patrick Robinson
Presiding

Dated this *14th day of October 2008*
At The Hague
The Netherlands

[Seal of the Tribunal]

