



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-04-81-AR108bis.4
Date: 15 April 2010
Original: English

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 15 April 2010

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON THE REPUBLIC OF SERBIA'S REQUEST FOR
REVIEW OF THE TRIAL CHAMBER'S DECISION OF 15
FEBRUARY 2010**

The Office of the Prosecutor:

Mr. Mark B. Harmon
Mr. Daniel Saxon

Government of the Republic of Serbia:

Mr. Rasim Ljajić

Counsel for the Accused:

Mr. Novak Lukić
Mr. Gregor Guy-Smith

1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of the “Request of the Republic of Serbia’s [*sic*] for Review of the Trial Chamber’s Decision on Serbia’s Third Motion for Protective Measures from 15 February 2010” filed confidentially by the Republic of Serbia (“Serbia”) on 9 March 2010 (“Request”) against the “Decision on Serbia’s Third Motion for Protective Measures” issued confidentially by Trial Chamber I (“Trial Chamber”) on 15 February 2010 (“Impugned Decision”).¹

I. BACKGROUND

2. On 2 February 2010, Serbia filed a confidential motion requesting protective measures pursuant to Rule 54*bis* of the Rules of Procedure and Evidence (“Rules”) for four groups of documents voluntarily provided to the Prosecution:

- i. VJ Personnel Files provided to the Prosecution in response to Requests for Assistance (“RFA”) 795, 547, 794, 835, 793, 830 and 611-A (“First Group”);
- ii. VJ documents provided to the Prosecution in response to RFA 1350 and 1350A (“Second Group”);
- iii. VJ documents provided to the Prosecution in response to RFA 1302-I (“Third Group”);
- iv. VJ documents provided to the Prosecution in response to RFA 1504A and 1579 (“Fourth Group”).²

3. With respect to the First Group, the Trial Chamber found that Serbia had not adequately demonstrated national security interests warranting protective measures pursuant to Rule 54*bis* of the Rules.³ With respect to the Second, Third and Fourth Groups, the Trial Chamber found that Serbia had not adequately demonstrated the potential harm to its national security interests, thereby failing to fulfil the terms of Rule 54*bis* of the Rules.⁴

¹ The Appeals Chamber issues the present decision publicly in light of the fact that no confidential information is disclosed therein.

² *The Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Republic of Serbia’s Motion for Protective Measures for the Documents Provided to the OTP in Response to the RFAs 547, 611-A, 793, 794, 795, 835, 830, 1350, 1350A, 1302-I, 1504-A and 1579, filed confidentially on 2 February 2010 (“Motion for Protective Measures”), paras 6, 26, Annexes A-D.

³ Impugned Decision, para. 9.

⁴ Impugned Decision, para. 15.

4. In the Request, Serbia asks the Appeals Chamber to reverse the Impugned Decision and grant protective measures for the four groups of documents.⁵ Serbia further asks the Appeals Chamber to suspend the execution of the Impugned Decision pending the decision of the Appeals Chamber on the Request.⁶ On 23 March 2010, the Appeals Chamber granted this part of the Request and ordered the suspension of the execution of the Impugned Decision pending the final decision on the Request.⁷ The Prosecution filed its confidential response on 23 March 2010, in which it asks the Appeals Chamber to dismiss the Request.⁸

II. STANDARD OF REVIEW

5. The Appeals Chamber recalls that, pursuant to Rule 54*bis*(I) of the Rules, a Trial Chamber may direct the application of appropriate protective measures in the interests of a State's national security interests to documents voluntarily produced by a State. The Appeals Chamber considers that a decision rendered pursuant to Rule 54*bis* of the Rules is a discretionary one to which it must accord deference.⁹ For the Appeals Chamber to intervene in a discretionary decision, it must be demonstrated that the Trial Chamber has committed a "discernible error" resulting in prejudice. The Appeals Chamber will only overturn a Trial Chamber's exercise of discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹⁰

III. DISCUSSION

A. Preliminary Matters

6. Pursuant to Rule 108*bis*(A) of the Rules, a request for review is to be filed within fifteen days from the date of an interlocutory decision. As the Impugned Decision was filed on 15 February 2010, Serbia's Request should have been filed by 1 March 2010. Thus, the Request is untimely.

⁵ Request, para. 28.

⁶ Request, para. 29.

⁷ Order Suspending the Execution of the Trial Chamber's Decision of 15 February 2010 Pursuant to Rule 108*bis* of the Rules, confidential, 23 March 2010.

⁸ Prosecution's Response to Republic of Serbia's Request for Review of Trial Chamber's Decision of 15 February 2010, filed confidentially on 23 March 2010 ("Prosecution Response"), paras 1, 19.

⁹ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-AR108*bis*.3, Decision on the Republic of Serbia's Request for Review of Trial Chamber's Decision of 9 February 2009, confidential, 30 March 2009 ("Perišić Decision of 30 March 2009"), para. 6; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-AR108*bis*.2, Decision on the Request of the Republic of Serbia for Review of the Trial Chamber's Decision on Protective Measures of 11 November 2008, confidential, 27 February 2009 ("Perišić Decision of 27 February 2009"), para. 7; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108*bis*.2, Decision on Request of the United States of America for Review, 12 May 2006 ("Milutinović Decision of 12 May 2006"), para. 6.

¹⁰ Perišić Decision of 30 March 2009, para. 6; Perišić Decision of 27 February 2009, para. 7; Milutinović Decision of 12 May 2006, para. 6.

Serbia has not shown good cause for the delay. However, given that the Prosecution has not objected to the late filing, and that the question of protective measures is an important one, the Appeals Chamber considers that it is in the interests of justice to consider the Request.

B. Admissibility

7. Rule 108*bis* of the Rules provides a mechanism under which a State may request a review by the Appeals Chamber of a Trial Chamber's interlocutory decision. For such a request to be admissible, the State in question must demonstrate that (i) it is directly affected by the Trial Chamber's decision and (ii) the decision concerns issues of general importance relating to the powers of the Tribunal.¹¹

8. Serbia submits that it is directly affected by the Impugned Decision,¹² which the Prosecution concedes.¹³ As the Impugned Decision would have the effect of publicly revealing documents that Serbia wishes to keep confidential, the Appeals Chamber finds that Serbia is directly affected by the Impugned Decision.

9. While Serbia makes reference to the second requirement for admissibility under Rule 108*bis* of the Rules,¹⁴ it fails to provide any argument as to whether the Impugned Decision concerns issues of general importance to the powers of the Tribunal. In response, the Prosecution submits that Serbia has not established that this criterion is met.¹⁵

10. In the Impugned Decision, the Trial Chamber found that Serbia had failed to substantiate its claim that national security interests justified the protective measures sought and rejected Serbia's application on that basis.¹⁶ The Appeals Chamber notes that the approach of the Trial Chamber accords with the practice of the Tribunal.¹⁷ The Impugned Decision limits itself to applying the established legal standard to the facts submitted by Serbia. By arguing that the Impugned Decision is "based on an erroneous interpretation of the practice of the Tribunal and insufficient and

¹¹ Rule 108*bis*(A) of the Rules; *Perišić* Decision of 30 March 2009, para. 7; *Perišić* Decision of 27 February 2009, para. 8.

¹² Request, para. 5.

¹³ Prosecution Response, para. 5.

¹⁴ Request, para. 4.

¹⁵ Prosecution Response, para. 5.

¹⁶ Impugned Decision, paras 9, 15.

¹⁷ See *Perišić* Decision of 30 March 2009, paras 10, 16, 21; *Perišić* Decision of 27 February 2009, paras 11, 18; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis*.2, Decision on Serbia and Montenegro's Request for Review, confidential, 20 September 2005 ("*Milošević* Decision of 20 September 2005"), paras 19, 23.

erroneous consideration of the facts presented to the Trial Chamber”,¹⁸ Serbia does not indicate that the decision concerns issues of general importance relating to the powers of the Tribunal.¹⁹

11. The Appeals Chamber therefore finds that Serbia has failed to demonstrate that the Request falls within the ambit of Rule 108*bis* of the Rules. However, in light of the importance of the alleged interests at issue and taking into account the fact that Serbia has voluntarily provided the Prosecution with relevant material, the Appeals Chamber will nevertheless consider the merits of Serbia’s request.

C. Serbia’s Request

1. First Group

12. Serbia argues that it has a legitimate expectation that protective measures would be granted to the First Group of documents in light of the fact that protective measures were granted to these documents in the *Slobodan Milošević* proceedings.²⁰ Serbia submits that the Trial Chamber failed to provide reasons for the alteration of protective measures and that despite the extraordinary circumstances which influenced the *Milošević* Decision of 20 September 2005, this is nonetheless a sufficient basis for Serbia’s legitimate expectation that protective measures would continue to apply.²¹

13. The Prosecution responds that protective measures granted pursuant to Rule 54*bis* of the Rules do not have effect *mutatis mutandis* in other proceedings before the Tribunal.²² The Prosecution further submits that Serbia has not demonstrated any error in relation to the Trial Chamber’s finding that Serbia failed to adequately demonstrate national security interests in relation to these documents.²³

14. In the Impugned Decision, the Trial Chamber correctly noted that protective measures granted under Rule 54*bis* of the Rules in a specific case do not apply *mutatis mutandis* in other proceedings.²⁴ The Trial Chamber reiterated its finding that, given that protective measures for these documents were granted in the *Slobodan Milošević* proceedings on an extraordinary basis,

¹⁸ Request, para. 2

¹⁹ See *Perišić* Decision of 30 March 2009, para. 10; *Perišić* Decision of 27 February 2009, para. 11.

²⁰ Request, paras 19-20, referring to *Milošević* Decision of 20 September 2005.

²¹ Request, para. 21.

²² Prosecution Response, para. 12.

²³ Prosecution Response, para. 14.

²⁴ Impugned Decision, para. 8.

Serbia could not legitimately expect them to be granted in the current proceedings.²⁵ The Appeals Chamber notes that it has previously upheld this reasoning,²⁶ and emphasizes that it is for the Trial Chamber seized of a State's request to determine whether national security interests warrant protective measures in a specific case.²⁷

15. The Trial Chamber found that since Serbia provided no other justification for protective measures, Serbia had not adequately demonstrated national security interests warranting protective measures.²⁸ Apart from reiterating the same arguments it made before the Trial Chamber, Serbia does not demonstrate that the Trial Chamber erred in so finding. The Appeals Chamber emphasizes that it is not within its jurisdiction to "reconsider" the Trial Chamber's decision as Serbia requests;²⁹ rather it can intervene only upon the demonstration of a discernible error committed by the Trial Chamber.³⁰

16. The Appeals Chamber finds that Serbia fails to show that the Trial Chamber erred in the exercise of its discretion in denying protective measures for the First Group of documents.

2. Second, Third, and Fourth Groups

17. Serbia makes two arguments with respect to the Second, Third, and Fourth Groups of documents. First, Serbia argues that it has a legitimate expectation for protective measures based on the conditions under which the documents were provided to the Prosecution.³¹ While Serbia acknowledges that it is the Trial Chamber that must determine whether national security interests warrant protective measures, Serbia submits that the Trial Chamber should have considered those conditions in order to fully appreciate Serbia's request.³²

18. The Prosecution responds that the Trial Chamber is not bound by the conditions which prevailed over the disclosure of material between the Prosecution and a State.³³ Further, the Prosecution submits that Serbia's assertion that a failure to take these conditions into account was

²⁵ Impugned Decision, para. 7, referring to *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Serbia's Motion and Supplemental Motion for Protective Measures, confidential, 11 November 2008 ("*Perišić* Decision of 11 November 2008"), para. 23.

²⁶ *Perišić* Decision of 27 February 2009, para. 18.

²⁷ *Perišić* Decision of 30 March 2009, para. 21; *Perišić* Decision of 27 February 2009, para. 18; *Milutinović* Decision of 12 May 2006, para. 35; *Milošević* Decision of 20 September 2005, para. 14.

²⁸ Impugned Decision, para. 9.

²⁹ Request, para. 22.

³⁰ *Perišić* Decision of 27 February 2009, para. 25.

³¹ Request, para. 23.

³² Request, paras 10-11.

³³ Prosecution Response, para. 7.

an error is patently incorrect as it was open to Serbia to present any relevant national security arguments to the Trial Chamber in order to demonstrate the need for protective measures.³⁴

19. Contrary to Serbia's assertion, the Trial Chamber did consider the conditions under which the documents were provided to the Prosecution, and found that the existence of conditions attaching to disclosure was not a determining factor in its assessment.³⁵ Given that a Trial Chamber is not bound by the conditions that attach to the disclosure of material between a State and the Prosecution,³⁶ the Appeals Chamber finds no error in the Trial Chamber's reasoning in this respect.

20. Second, Serbia argues that any public use of these documents could seriously harm Serbia's national security interests "since the documents in question contain data that are of particular importance for the defence system and security of the Republic of Serbia".³⁷ The Prosecution responds that the Trial Chamber conducted a reasoned analysis before finding that Serbia had not demonstrated national security interests warranting protective measures and that Serbia has failed to demonstrate any discernible error in the Trial Chamber's conclusion.³⁸

21. In reaching its decision, the Trial Chamber recalled that a state bears the burden of demonstrating national security interests in order to receive protective measures under Rule 54*bis* of the Rules.³⁹ The Trial Chamber found that Serbia offered a severely limited argument in support of its claim for protective measures, which it characterised as vague.⁴⁰ The Trial Chamber concluded that Serbia failed to substantiate its claim that the documents contained data of importance for the defence system and security of Serbia and noted its previous holding that granting protective measures in such circumstances would impinge upon the guarantee of a fair and public trial.⁴¹

22. Thus, the Trial Chamber clearly considered Serbia's claim; the mere argument that the Trial Chamber should have sustained the claim does not suffice to demonstrate that the Trial Chamber erred in the exercise of its discretion.⁴² The Appeals Chamber thus finds that Serbia has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion in finding that Serbia had not demonstrated national security interests warranting protective measures for the Second, Third and Fourth Groups of documents.

³⁴ Prosecution Response, para. 8.

³⁵ Impugned Decision, paras 10, 13.

³⁶ *Perišić* Decision of 30 March 2009, paras 16, 25; *Perišić* Decision of 27 February 2009, paras 23, 29.

³⁷ Request, para. 26.

³⁸ Prosecution Response, paras 15-17.

³⁹ Impugned Decision, para. 13.

⁴⁰ Impugned Decision, para. 14.

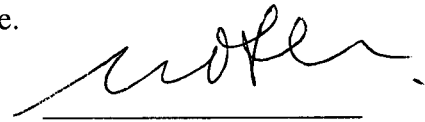
⁴¹ Impugned Decision, paras 14-15, referring to *Perišić* Decision of 11 November 2008, para. 31.

⁴² Request, para. 26.

IV. DISPOSITION

23. For the foregoing reasons, the Appeals Chamber **DENIES** Serbia's Request to reverse the Impugned Decision.

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



Judge Carmel Agius
Presiding Judge

Dated this fifteenth day of April 2010
At The Hague
The Netherlands

[Seal of the Tribunal]