



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
IT-03-68-A

Date: 18 November 2011

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: 18 November 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION FOR ACCESS TO EXHIBITS IN *ORIĆ* CASE

Office of the Prosecutor

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Ms. Hildegard Uertz-Retzlaff

Counsel for Naser Orić

Ms. Vasvija Vidović
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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 Accused’s “Motion for Access to Exhibits in *Orić* case”, filed on 18 October 2011 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused moves, pursuant to Rule 75(G)(ii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), for the Chamber to issue an order granting him access to “all documents” admitted into evidence in the *Prosecutor v. Orić* case through the testimony of Colonel Pyers Tucker who is scheduled to give evidence in the present proceedings. The Accused submits that during the course of Tucker’s testimony in the *Orić* case a number of exhibits were admitted under seal, and that he needs to have access to them to prepare for the cross-examination of the said witness.¹ The Accused further acknowledges that the Pre-Trial Chamber did not grant him access to confidential materials in the *Orić* case due to the lack of material overlap between the two cases. However, he argues that Tucker will give evidence in this case about the same events he testified to in the *Orić* case and that there is therefore a direct overlap between the two cases insofar as it concerns that evidence.²

2. On 10 November 2011, the Office of the Prosecutor (“Prosecution”) filed confidentially the “Prosecution’s Response to Accused’s Motion for Access to Exhibits in the *Orić* Case” (“Response”) noting that it does not oppose the Motion.³ The Prosecution also notes that seven exhibits were admitted under seal through Pyers Tucker in the *Orić* case, and that six of them have already been disclosed to the Accused. Five of those were disclosed back in 2009, pursuant to either Rule 65 *ter* or Rule 68 of the Rules, while the sixth, despite being on the Prosecution’s Rule 65 *ter* list of documents, was disclosed only on 2 November 2011, due to an oversight.⁴

3. With respect to the seventh document that has not yet been provided to the Accused,⁵ the Prosecution submits that it cannot be disclosed until permission to do so is given by the Rule 70

¹ Motion, paras. 1–3.

² Motion, paras. 4–5.

³ The Chamber, having received no response from the Prosecution by the 14-day deadline, first inquired on 8 November 2011 why no response was forthcoming and then, the following day, ordered the Prosecution to file a written response. *See* T. 20991–20992 (8 November 2011) (private session); T. 21141–21142 (9 November 2011).

⁴ Response, paras. 1–4.

⁵ The Prosecution has attached this document in the Confidential and *Ex Parte* Appendix A to the Motion.

provider. The Prosecution further submits that it has asked the Rules 70 provider for such permission on 4 November 2011 and is still awaiting the response.⁶

II. Applicable Law

4. The Chamber notes the well-established principle that to the extent possible Tribunal proceedings should be conducted in a public manner.⁷ Further, the Chamber observes that generally, “[a] party is always entitled to seek material from any source to assist in the preparation of his case.”⁸ 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.⁹ Such confidential material can be categorised into three types: *inter partes*, *ex parte*, and Rule 70.

5. It is well 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.¹⁰ 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.¹¹

6. The first requirement is not a particularly onerous one. Indeed, requests for access to “all confidential material” can be sufficiently specific to meet the identification standard.¹²

7. With respect to the second requirement, the standards for access differ for each category of confidential material. With regards to confidential *inter partes* material, a “legitimate

⁶ Response, para. 5.

⁷ Rule 78 provides, “All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.”

⁸ *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.

⁹ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-PT, Decision on Vladimir Đorđević’s Motion for Access to All Material in *Prosecutor v. Limaj et al.*, Case Not. IT-03-66, 6 February 2008 (“*Đorđević* Decision”), para. 6.

¹⁰ *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.

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

¹² *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.

forensic purpose” for disclosure in subsequent proceedings will be shown if the applicant can demonstrate that the material is relevant and essential.¹³ 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.”¹⁴ To establish a nexus, the applicant is required to demonstrate a “geographical, temporal or otherwise material overlap” between the two proceedings.¹⁵ 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.”¹⁶ The standard does not require the applicant to go so far as to establish that the material sought would likely be admissible evidence.¹⁷

8. Material can be deemed confidential by virtue of the fact that it has been provided by a state or organisation subject to restrictions on its use pursuant to Rule 70.¹⁸ 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.¹⁹ This is the case even where the Rule 70 provider(s) consented to the use of the material in one or more prior cases.²⁰

9. Finally, while protective measures ordered in one case, continue *mutatis mutandis* in subsequent cases before the Tribunal,²¹ according to Rule 75(G), a party in a subsequent case, can seek to rescind or vary protective measures ordered in the earlier proceeding. If no Chamber is seised of the earlier proceeding, the party must apply to the Chamber seised of the subsequent proceeding.

¹³ See *Blaškić* Decision, para. 14; First *Blagojević and Jokić* Decision, para. 11; See also *Delić* Order, p. 6; *Dorđević* Decision, para. 7.

¹⁴ *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.

¹⁵ 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.

¹⁶ First *Blagojević and Jokić* Decision, para. 11; *Dorđević* Decision, para. 7; *Blaškić* Decision, para. 14.

¹⁷ *Dorđević* Decision, para. 7.

¹⁸ Material produced pursuant to an order under Rule 54 *bis* may also require similar procedures before it can be disclosed to an accused in another case.

¹⁹ 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.

²⁰ *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.

²¹ Rule 75(F) of the Rules.

III. Discussion

10. The Chamber notes that no Chamber is currently seised of the *Orić* case. Accordingly, this Chamber can dispose of the Motion in accordance with Rule 75(G)(ii) of the Rules.

11. While the Accused requests in the Motion that “all documents admitted in connection with the testimony of Piers Tucker in the *Orić* case be disclosed to the Accused”,²² the Chamber interprets the Motion as a request for confidential documents alone, since the Accused and his team have access to public exhibits from the *Orić* case.

12. As is clear from the above summary of the parties’ submission, due to the operation of Rules 65 *ter* and 68, the Motion is essentially moot in respect of all but one of the confidential documents sought. The remaining document has been provided to the Prosecution under Rule 70 (“Rule 70 Document”). Accordingly, the Chamber will confine its ruling to that Document alone.

13. The Chamber is satisfied that the Rule 70 Document, which has been provided in confidential and *ex parte* Appendix A to the Motion, has been sufficiently identified.

14. The Chamber is also satisfied that a legitimate forensic purpose exists for the Accused’s access to the Rule 70 Document. The Chamber considers that there is a material overlap between this case and the *Orić* case *insofar as Piers Tucker’s evidence is concerned* and thus the Rule 70 Document is relevant to the Accused’s case. Furthermore, given that Tucker is due to testify in this case, there is a good chance that access to the Rule 70 Document that was used during Tucker’s cross-examination in the *Orić* case will materially assist the Accused in preparing for his own cross-examination of the witness.

15. The Chamber recalls that the Prosecution has already requested clearance from the Rule 70 provider to disclose the Rule 70 Document to the Accused. Furthermore, both the Accused and the Chamber have been informed that Piers Tucker will not be giving evidence before the Christmas recess. Accordingly, should the Rule 70 provider consent to the disclosure of the Rule 70 Document, the Prosecution shall provide the said Document to the Accused promptly and notify the Registry and the Chamber accordingly.

²² Motion, para. 6.

IV. Disposition

16. Accordingly, the Trial Chamber, pursuant to Rules 54, 70, and 75(G)(ii) of the Rules, hereby:

(a) **GRANTS** the Motion, **IN PART**, and **ORDERS** as follows:

- (i) Should the Rule 70 provider consent to the disclosure of the Rule 70 Document to the Accused, the Prosecution shall immediately disclose the said Document to the Accused and his legal advisers assigned by the Registry, as well as to the Standby Counsel and his team, and shall inform the Registry and the Chamber accordingly.
- (ii) Should the Rule 70 Document be disclosed to the Accused, the Accused and his legal advisers assigned by the Registry, as well as the Standby Counsel and his team, shall not disclose it to the public, or to any third party, unless permission to do so has been given by the Rule 70 provider.
- (iii) For the purposes of this Decision, “the public” means and includes all persons, governments, organisations, entities, clients, associations, and groups, other than the Rule 70 provider, the Judges of the Tribunal, the staff of the Registry, the Prosecutor and his representatives, the Standby Counsel and his team, and the Accused and his legal advisers assigned by the Registry. “The public” also includes, without limitation, families, friends, and associates of the Accused; accused and defence counsel in other cases or proceedings before the Tribunal; and the media and journalists.

- (iv) Nothing in this Decision shall affect the disclosure obligations of the Prosecution under Rules 66 and 68.
- (v) The Accused shall, on completion of proceedings against him, including any appeal, return the Rule 70 Document to the Registry.
- (b) **DISMISSES** the remainder of the Motion as moot.

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



Judge O-Gon Kwon
Presiding

Dated this eighteenth day of November 2011
At The Hague
The Netherlands

[Seal of the Tribunal]