



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-98-29/1-A

Date: 16 July 2012

Original: English

IN A SPECIALLY APPOINTED CHAMBER

Before: Judge Bakone Justice Moloto, Presiding
Judge Christoph Flügge
Judge Howard Morrison

Registrar: Mr. John Hocking

Decision of: 16 July 2012

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

**DECISION ON MOTION SEEKING VARIATION OF
PROTECTIVE MEASURES PURSUANT TO RULE 75(G)**

Applicant

Mr. Stéphane Bourgon

Office of the Prosecutor

Mr. Paul Rogers

Counsel for Dragomir Milošević

Mr. Branislav Tapušковиć

Ms. Branislava Isailović

THIS SPECIALLY APPOINTED CHAMBER (“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 “Motion seeking variation of protective measures pursuant to Rule 75(G)”, filed publicly on 9 May 2012 with four enclosures before the Appeals Chamber (“Motion”) by Mr. Stéphane Bourgon (“Applicant”), and hereby renders its decision thereon.

A. Procedural history

1. On 10 May 2012, the President of the Tribunal assigned the Motion to this Chamber, noting that no Chamber remained seized of *Prosecutor v. Dragomir Milošević* (Case No. IT-98-29/1-A).¹ On 6 June 2012, the Chamber issued an order for submissions from the Prosecution and the Registrar on the motion.² On 25 June 2012, the Registrar filed a submission (“Submission”) and the Prosecution responded (“Response”).³

B. Submissions

1. Applicant

2. The Applicant requests access to confidential *inter partes* material in the *Dragomir Milošević* case,⁴ arguing that access is necessary for him to fulfil his duties and responsibilities “as counsel assigned to assist Dragomir Milošević in relation to a possible review application in accordance with Rule 119 [of the Rules of Procedure and Evidence (“Rules”)].”⁵ The Applicant notes that on 12 November 2009, the Appeals Chamber affirmed Dragomir Milošević’s conviction and sentenced him to 29 years of imprisonment, which he is currently serving in Estonia.⁶ The Applicant also submits that on 10 March 2011, and at Dragomir Milošević’s request, he was:

assigned by the Registry for the purpose of assisting Milošević in conducting an initial assessment of his case to determine the viability of a request for review of his appeal judgement under Article 26 of the Statute of the Tribunal, and Rules 119 and 120.⁷

The Registry’s Office of Legal Aid and Detention Matters (“OLAD”) allocated a total of twenty hours of legal aid for the work assigned, following which the Applicant has assisted Dragomir Milošević *pro bono*.⁸

¹ Order on motion seeking variation of protective measures pursuant to Rule 75(G), public, 10 May 2012.

² Order for submissions from the Registrar and the Office of the Prosecutor, public, 11 Jun 2012.

³ Prosecution response to motion seeking variation of protective measures pursuant to Rule 75(G), confidential, 24 Jun 2012 (the Prosecution also submitted a response on 17 May 2012); Registrar’s submission regarding the applicant’s access to confidential material, public, 25 Jun 2012.

⁴ Application, p. 6.

⁵ *Id.*, para. 2.

3. The Applicant argues that access to confidential *inter partes* material is necessary for the purpose of assisting Dragomir Milošević in determining whether new information which the latter has identified “meets the requirements of a ‘new fact’ pursuant to the existing jurisprudence of the Tribunal.”⁹ Specifically, access is required in order to be able to verify whether the new information “was previously litigated before the Trial Chamber and/or the Appeals Chamber.”¹⁰ For these reasons, the Applicant argues that he has a legitimate forensic purpose for access to the material.¹¹

4. The Applicant submits that he, his legal associates and any employees instructed and authorised by him will fully respect the protective measures put in place in the *Dragomir Milošević* case and that the privacy and security of victims and witnesses will not be jeopardised in any way.¹² Lastly, the Applicant submits that counsel of record for Dragomir Milošević does not oppose the Applicant obtaining access to the material sought.¹³

2. Registrar

5. The Registrar takes no position regarding whether the Applicant should be granted access to the confidential material in question.¹⁴ He “deems it necessary, however, to clarify the Applicant’s status before the Tribunal to the extent that references in the Motion to the Applicant as ‘assigned counsel,’ may lead to the conclusion that he is entitled to receive these filings as of right.”¹⁵

6. The Registrar submits that neither the Statute nor the Rules “invest a convicted and detained person, such as Milošević, with the right to ongoing legal representation following the completion of appeal proceedings.”¹⁶ Referring to a decision in the *Karadžić* case, the Registrar submits that “for a convict to be assigned counsel at the Tribunal’s expense post-conviction” the Appeals Chamber must authorise post-appeal proceedings, such as review proceedings pursuant to Rules 119 and 120.¹⁷

⁶ Application, paras 4, 6.

⁷ *Id.*, para. 5 (emphasis in the original) and enclosure 1.

⁸ *Id.*, para. 7. The Applicant also submits that on 14 November 2011, Dragomir Milošević requested his assignment as counsel of record on a permanent basis and submitted a power of attorney to this effect. On 26 January 2012, OLAD denied this request (Application, enclosures 2 and 3).

⁹ Application, para. 22.

¹⁰ *Ibid.*

¹¹ *Id.*, para. 26.

¹² *Ibid.* and *id.*, p. 6. See also *id.*, para. 3.

¹³ *Id.*, para. 3 and enclosure 4.

¹⁴ Submission, paras 4, 9.

¹⁵ *Id.*, para. 5, footnote, referring to paras 2, 26 of the Motion, omitted.

¹⁶ *Id.*, para. 6.

¹⁷ *Ibid.*, referring to *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on motion for assignment of counsel to Dragomir Milošević, public, 6 Jan 2012, para. 8.

7. The Registrar also refers to the “longstanding Registry practice to make available legal assistance and advice to convicts who claim, post-conviction, that they are in possession of new facts which would warrant the opening of review proceedings.”¹⁸ In his submission, when such assessment is undertaken by counsel of record, “it raises no issue regarding access to confidential material and counsel representing an accused has access to the entire case file.”¹⁹ With respect to the Motion, however, the Registrar notes that “the lawyer selected by Mr. Milošević to make this assessment, did not represent him during trial or appeal.”²⁰ He submits that the Applicant’s assignment – which is not to be understood as an assignment to assist suspects or accused within the meaning of Article 21 of the Statute and Rules 44 and 45 of the Rules – “given its very limited scope and purpose, does not automatically result in access to the confidential case file.”²¹

3. Prosecution

8. The Prosecution does not oppose providing the Applicant access to the confidential *inter partes* material on this case “on the basis of his assignment as counsel for Dragomir Milošević.”²²

C. Applicable law

9. Pursuant to Rule 75(F), protective measures ordered in respect of a victim or witness in any proceedings before the Tribunal continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (“second proceedings”) or another jurisdiction unless and until they are rescinded, varied or augmented.

10. A party is always entitled to apply for material from any source, including from another case before the Tribunal, to assist in the preparation of its case provided the applicant identifies the material by its general nature and shows a legitimate forensic purpose for access.²³ A legitimate forensic purpose may be demonstrated by establishing that the requested material “is likely to assist

¹⁸ Submission, para. 7.

¹⁹ *Ibid.*

²⁰ *Id.*, fn 11.

²¹ *Id.*, para. 8. The Registrar submits that “appointment and assignment decisions issued pursuant to Rules 44 and 45 [...] are filed on the case record as they legitimise the attorney appointed or assigned as the one representing the accused in proceedings before the Tribunal”, *id.*, fn. 15.

²² Response, para. 1.

²³ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Momčilo Perišić’s request for access to confidential material in the Dragomir Milošević Case, 27 Apr 2009 (“27 April 2009 *Dragomir Milošević* decision”), para. 4, referring to *Prosecutor v. Martić*, Case No. IT-95-11-A, Decision on motion by Jovica Stanišić for access to confidential testimony and exhibits in the Martić case pursuant to Rule 75(G)(i), 22 Feb 2008, para. 9. See also, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on “Motion by Mićo Stanišić for access to all confidential testimony and exhibits in the Krajišnik case”, 21 Feb 2007 (“*Krajišnik* decision”), p. 4.

the [party's] case materially, or at least [that] there is a good chance that it would.”²⁴ To establish a “good chance,” the applicant may show a factual nexus between his case and the case from which he seeks material”.²⁵ The applicant need not establish a specific reason that each individual item is likely to be useful.²⁶ Where a Chamber grants access to confidential exhibits or closed session testimony, an applicant should not be prevented from accessing filings, submissions, decisions and hearing transcripts which may relate to such confidential evidence.²⁷ However, the Trial Chamber has a duty under Article 20(1) of the Statute to ensure due regard for the protection of victims and witnesses, which is relevant in this context.²⁸

D. Discussion

11. The Chamber will first consider the Applicant's standing to file the Motion.

12. In accordance with its policy, OLAD exceptionally allotted legal aid to Dragomir Milošević corresponding to twenty hours of work for the purpose of enabling the Applicant to assess the viability of a review application under Rules 119 and 120. Following the exhaustion of the allotted funds, the Applicant has continued to assist Dragomir Milošević in a *pro bono* capacity. Notwithstanding the terms of Rules 44 and 45, being limited to suspects and accused, and that there exist counsel of record, the Applicant's position is more akin to that of a counsel appointed under Rule 44, than that of a counsel assigned pursuant to Rule 45.

13. There is nothing before the Chamber to suggest that the conditions of Rule 44 would not be met in respect of the Applicant; in fact, OLAD found the Applicant competent and assigned him – whichever definition one elects to give that word in the current circumstances – to Dragomir Milošević for the purpose of assisting him to assess the viability of a motion pursuant to Rule 119. Moreover, Dragomir Milošević has submitted a power of attorney, which, although not accepted by OLAD for reasons set out in its letter of 26 January 2012,²⁹ clearly states that he wishes the

²⁴ *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Decision on Slobodan Prljak's motion for access to confidential testimony and documents in *Prosecutor v. Naletilić and Martinović* and Jadranko Prlić's notice of joinder to Slobodan Prljak's Motion for Access, 13 June 2005, p. 6.

²⁵ 27 April 2009 *Dragomir Milošević* decision, para. 5; *Prosecutor v. Dario Kordić and 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 and Čerkez case, 23 Jan 2003, p. 4.

²⁶ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on motion by Radivoje Miletić for access to confidential information, 9 Sep 2005, p. 4; *Prosecutor v. Dragomir Milošević*, IT-29-98/1-A, Decision on Radovan Karadžić's motion for access to confidential material in the Dragomir Milošević case, 19 May 2009 (“19 May 2009 *Dragomir Milošević* decision”), para. 11.

²⁷ 19 May 2009 *Dragomir Milošević* decision, para. 11.

²⁸ Chambers shall “strike a reasonable balance between the rights of the accused [...] and the protection of witnesses and victims”, which applies by analogy to the present case (*Prosecutor v. Blaskić*, Case No. IT-95-14-A, Decision on “Prosecution's preliminary response and motion for clarification regarding decision on joint motion of Hadžihasanović, Alagić and Kubura of 24 January 2003”, 26 May 2003, para. 26).

²⁹ Application, enclosure 3.

Applicant to represent him in any review proceedings.³⁰ In light of these facts, and given the nature of the Applicant's assignment, which, though limited in purpose, is not limited in scope, the Chamber finds that the Applicant has standing to file the Motion.

14. With respect to the merits of the Motion, it is appropriate to distinguish two types of confidential *inter partes* material:

- 1) confidential evidence, in the form of closed or private session testimony or exhibits admitted under seal ("confidential evidence"), and
- 2) confidential filings, submissions and decisions ("other confidential material").

The Applicant has demonstrated a legitimate forensic purpose for access to confidential evidence, which he has also identified with sufficient precision. Given the purpose of the Applicant's assessment, the Chamber holds that he may also benefit from having access to other confidential material which relates specifically to the confidential evidence to which the Chamber grants access. However, on the basis of the submissions before it and in light of its duty to ensure due regard for the protection of victims and witnesses, the Chamber is not persuaded that the Applicant would require access to other confidential material which pertains to protective measures of witnesses or the reasons therefor or which does not concern the confidential evidence as such.

E. Disposition

15. Pursuant to Article 22 of the Statute and Rules 54 and 75 of the Rules, the Chamber:

GRANTS the Application with respect to the confidential evidence and other confidential material, which relates specifically to such evidence in the present case;

VARIES the relevant protective measures to the extent necessary for the implementation of this decision;

ORDERS the Prosecution and Counsel of Record to identify, without delay, the confidential evidence, which they respectively tendered into evidence during the trial and appeals proceedings in this case, and other confidential material, which relates specifically to such evidence and to inform the Registry thereof;

³⁰ Application, enclosure 2. The Registrar has submitted that in the event that review proceedings are authorised by the Appeals Chamber "Mr. Milošević will be eligible for the assignment of counsel to represent him in such proceedings, pursuant to Rule 45", Submission, paras 8, 10. The Chamber underlines that the present decision is not to be read as granting legal aid.

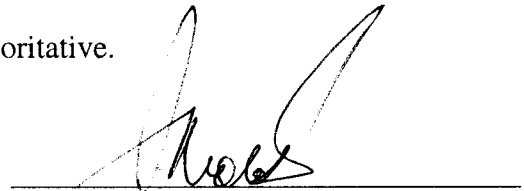
ORDERS the Registry to provide the material to which access is granted by this decision to the Applicant as soon as practicable and in electronic form;

DENIES the Application without prejudice insofar as it requests access to other confidential material which does not relate specifically to confidential evidence;

ORDERS the Applicant, his legal associates and any employee instructed or authorised by him not disclose to the public, or to any third party, any confidential evidence disclosed as a result of this decision; and

ORDERS the Applicant to ensure that any person to whom confidential evidence is provided by him or by someone for whom he is responsible be informed that he or she is forbidden to copy, reproduce, or publicise the confidential evidence or to disclose it to any other person.

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



Judge Bakone Justice Moloto
Presiding

Dated this sixteenth day of July 2012
At The Hague
The Netherlands

[Seal of the Tribunal]