

**UNITED
NATIONS**



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-04-75-T
IT-95-11-A
Date: 17 April 2014
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 17 April 2014

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR ACCESS TO CONFIDENTIAL
MATERIAL IN *PROSECUTOR V. MILAN MARTIĆ***

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović
Mr. Christopher Gosnell

Counsel for Milan Martić:

Mr. Stéphane Bourgon

1. **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 Defence’s “Motion for Access to Confidential Material in *Prosecutor v. Milan Martić*”, filed publicly on 1 April 2014 (“Motion”).

A. Submissions

2. In the Motion, the Defence seeks access to all confidential materials in the case *Prosecutor v. Milan Martić*, namely (a) confidential *inter partes* filings; (b) confidential and under seal exhibits; and (c) any relevant closed session transcripts.¹ In support of its request, the Defence submits that such material is necessary for the preparation of its case because there is a geographical and temporal overlap between this case and the *Martić* case for the period of 1992 and 1993 in the territory of the former Republic of Serbian Krajina.² The Defence submits that the indictments in both cases also allege that Goran Hadžić and Milan Martić were members of the same joint criminal enterprise and this may lead to a substantially broader evidential overlap.³ The Defence further submits that these cases overlap because the indictments in both cases allege that Hadžić and Martić had control over some of the same forces.⁴ The Defence thus submits that access to the confidential information will substantially assist in the preparation of the Defence case, as it may expand on or contextualise materials already heard in the *Hadžić* case, which originally hailed from the *Martić* case.⁵

3. The Prosecution did not respond to the Motion within the prescribed time limit.

B. Applicable Law

4. Rule 78 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) provides that “[a]ll proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.” The Chamber observes that generally “[a] party is always entitled to seek material from any source to assist in the preparation of his case.”⁶ In exceptional circumstances, however, a Chamber may restrict the access of the public, as well as the access of a

¹ Motion, para. 1.

² Motion, para. 3.

³ Motion, para. 3.

⁴ Motion, para. 4.

⁵ Motion, para. 5.

⁶ *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. Brdanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić’s Motion for Access to All Confidential Materials in the *Brdanin* Case, 24 January 2007 (“*Brdanin* Decision”), para. 10.

party, to certain material under the provisions of the Rules.⁷ Such confidential material can be categorised into three types: *inter partes*, *ex parte*, and Rule 70.

5. In determining whether a party must be given access to confidential material, the Trial Chamber must “find a balance between the right of [that] party to have access to material to prepare its case and the need to guarantee the protection of witnesses.”⁸ To that end, 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.⁹

6. The first requirement is not a particularly onerous one. The Appeals Chamber has held that requests for access to “all confidential material” can be sufficiently specific to meet the identification standard.¹⁰

7. With respect to the second requirement, the standards for access differ for each category of confidential material. With respect to 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 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.”¹² To establish a nexus, the applicant is required to demonstrate a “geographical, temporal or otherwise material overlap” between the two proceedings.¹³ 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.”¹⁴ The standard does not require

⁷ *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 No. IT-03-66, 6 February 2008 (“*Đorđević* Decision”), para. 6.

⁸ *Prosecutor v. 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. 2.

⁹ *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.

¹⁰ *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.

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

¹² *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; *Đorđević* Decision, para. 7.

¹³ *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; *Đorđević* Decision, para. 7.

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

the applicant to go so far as to establish that the material sought would likely be admissible evidence.¹⁵

8. With respect to *ex parte* confidential material, the Appeals Chamber has required an applicant to meet a higher standard in establishing a legitimate forensic purpose for its disclosure. The Appeals Chamber has held that *ex parte* material is of a “higher degree of confidentiality”, as it contains information that has not been disclosed to the other party in that case “because of security interests of a State, other public interests, or privacy interests of a person or institution” and that therefore “the party on whose behalf the *ex parte* status has been granted enjoys a protected degree of trust that the *ex parte* material will not be disclosed.”¹⁶

9. 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 of the Rules. 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.¹⁷ This is the case even where the Rule 70 provider(s) consented to the use of the material in one or more prior cases.¹⁸

10. Pursuant to Rule 75(F)(i) of the Rules, protective measures that have been ordered for a witness or victim in any proceedings before the Tribunal shall continue to have effect *mutatis mutandis* in any other proceedings, unless and until they are rescinded, varied, or augmented.

C. Discussion

11. As a preliminary matter, the Chamber notes that the *Martić* case has been completed. Accordingly, there is no Chamber currently seized of the *Martić* case, and thus this Chamber is properly seized of the Motion.¹⁹

¹⁵ *Dordević* Decision, para. 7.

¹⁶ *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, p. 4; *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, para. 17; *Brdanin* Decision, para. 14; *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, p. 5; *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Vlastimir Dordević’s Motion for Access to Transcripts, Exhibits and Documents, 16 February 2010, para. 10.

¹⁷ 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; *Dordević* Decision, para. 15; *Delić* Order, p. 6.

¹⁸ *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.

¹⁹ See *Prosecutor v. Vlastimir Dordević*, Case No. IT-05-87/1-PT & IT-03-66, Decision on Vlastimir Dordević’s Motion for Access to all Material in *Prosecutor v. Limaj et al.*, Case No. IT-03-66, 6 February 2008, para. 1;

12. The Defence has requested access to confidential material in the *Martić* case, in particular “confidential *inter partes* filings, confidential and under seal exhibits, and any relevant closed session transcripts”.²⁰ The Chamber accordingly finds that the Defence has identified the material sought with sufficient particularity.

13. The indictment in the *Martić* case concerns crimes allegedly committed in Croatia during the period of 4 January 1991 until August 1995.²¹ The indictment in the present case charges Hadžić in relation to crimes allegedly committed in Croatia during the period of 25 June 1991 until December 1993.²² Further, the indictments in both cases allege that Hadžić and Martić were members of the same joint criminal enterprise, the purpose of which was the permanent removal of the majority of the Croat and other non-Serb population from certain self-proclaimed regions within the Republic of Croatia, including the Serbian Autonomous District of Krajina and the Serbian Autonomous District of Slavonia, Baranja, and Western Srem.²³ There is significant geographical and temporal overlap between the two cases as they both relate to crimes allegedly committed in the same parts of Croatia. The Chamber therefore finds that the Defence has shown a legitimate forensic purpose for disclosure of the requested material and that there is a good chance that access to confidential *inter partes* materials in the *Martić* case related to this period will materially assist the Defence in the preparation of its case.

14. The Chamber finds, *proprio motu*, that material relating to conditions of detention, the health of Milan Martić, subpoenas, memoranda concerning witness scheduling, orders concerning appearances to give testimony, redaction of the public transcript and public broadcast of a hearing, provisional release, and the remuneration or assignment of counsel have little or no evidentiary value to Hadžić.²⁴ Accordingly, the Chamber shall not order the Registry to disclose to Hadžić the confidential *inter partes* material relating to (a) conditions of detention, (b) remuneration or assignment of counsel, (c) the health of Milan Martić, (d) provisional release, (e) subpoenas, (f) memoranda concerning witness scheduling, (g) orders concerning appearances to give testimony, and (h) redaction of the public transcript and public broadcast of a hearing. All other types of confidential *inter partes* filings shall be disclosed.

Prosecutor v. Vlastimir Đorđević, Case No. IT-05-87/1-PT & IT-02-54, Decision on Vlastimir Đorđević’s Motion for Access to Transcripts, Exhibits and Documents in *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, 6 February 2008, para. 1.

²⁰ Motion, para. 1.

²¹ *Prosecutor v. Milan Martić*, Case No. IT-95-11, Amended Indictment, 9 September 2003 (“*Martić* Indictment”).

²² Second Amended Indictment, paras 4, 6.

²³ *Martić* Indictment, paras 4-6; Second Amended Indictment, paras 6-8, 10.

²⁴ See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Zdravko Tolimir’s Motion for Disclosure of Confidential Materials from the *Karadžić* Case, 12 January 2012, para. 19.

15. Confidential *inter partes* material requested by the Defence might fall into the category of Rule 70 material. In respect of such material, if any, the Chamber will order the Prosecution to seek the consent of the Rule 70 provider(s) before it can be disclosed to the Defence.

16. Due to the fact that the *Martić* case is closed, the Chamber will order the Prosecution to identify the material to which the Defence is to be granted access.²⁵ Any issues in relation to Rule 70 material provided to the Defence in the *Martić* case that are identified by the Prosecution can be brought to the attention of the Chamber if necessary and on a case-by-case basis.

D. Disposition

17. Accordingly, for all the foregoing reasons, the Trial Chamber, pursuant to Rules 54, 69, 70, 75, and 78 of the Rules, hereby **GRANTS** the Motion in part and:

- (a) **ORDERS** the Prosecution to identify for the Registry the following confidential *inter partes* material relating to the period of 1991 to 1993 of the *Martić* case for disclosure to the Defence, which are not subject to Rule 70 of the Rules:
- i. confidential *inter partes* filings excluding material related to (a) conditions of detention, (b) remuneration or assignment of counsel, (c) the health of Milan Martić, (d) provisional release, (e) subpoenas, (f) memoranda concerning witness scheduling, (g) orders concerning appearances to give testimony, and (h) redaction of the public transcript and public broadcast of a hearing;
 - ii. confidential and under seal exhibits; and
 - iii. transcripts from all relevant closed and private sessions.
- (b) **ORDERS** the Prosecution to determine which of the material outlined in sub-paragraph (a) above is subject to the provisions of Rule 70 of the Rules, and to contact the providers of such material to seek their consent for its disclosure to the Defence, and where Rule 70 providers consent to such disclosure, to notify the Registry of such consent.
- (c) **REQUESTS** that the Registry withhold disclosure of any material subject to Rule 70 of the Rules 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

²⁵ See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Motion for Access to Confidential Materials in Completed Cases, 5 June 2009, para. 33(c).

relevant material in a prior case. Where consent cannot be obtained from the provider(s) of any material subject to Rule 70 of the Rules, the material shall not be disclosed.


- (d) **REQUESTS** the Registry to disclose to the Defence:
- i. the confidential *inter partes* and non-Rule 70 material once it has been identified by the Prosecution in accordance with sub-paragraph (a) above; and
 - ii. Rule 70 material once the Prosecution has identified such material and informed the Registry of the consent of the Rule 70 provider(s) in accordance with sub-paragraphs (a) and (b).
- (e) **ORDERS** that no confidential *ex parte* material from the *Martić* case be disclosed to Hadžić.
- (f) **ORDERS** that the Defence, Hadžić, and any employees who have been instructed or authorised by him (“Hadžić Defence”), shall not disclose to the public any confidential material disclosed from the *Martić* case, including witness identities, whereabouts, statements, transcripts, or exhibits, except to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of the Defence case.
- i. If the Hadžić Defence finds it directly and specifically necessary to make disclosures pursuant to this limited purpose, they shall inform each person among the public to whom non-public material or information is shown or disclosed that such person is not to copy, reproduce, or publicise such material or information, and is not to show, disclose, or convey it to any other person. If provided with the original or any copy or duplicate of such material or information, such person shall return it to the Hadžić Defence when continued possession of the material or information is no longer necessary for the preparation and presentation of the case. The Hadžić Defence shall maintain a list of persons to whom the material is disclosed, recording the name of the persons, a description of the material disclosed, and the dates of both disclosure and return of the material.
 - ii. For the purposes of this decision, the “public” means all persons, including corporations; governments and organs/departments thereof; organisations; entities; associations; groups; family members, friends, and associates of Goran Hadžić; accused and defence counsel in other proceedings before the

Tribunal (and/or national courts); and the media. However, for purposes of this decision, the “public” does not mean Judges of the Tribunal; staff of the Registry and the Office of the Prosecutor; Goran Hadžić himself; or members of the Hadžić Defence.

- iii. Should a member of the Hadžić Defence who is authorised to have access to confidential material withdraw or otherwise leave the defence team, any confidential material to which access has been granted and that remains in his or her possession shall be handed over to the person serving as Lead Counsel for the Hadžić Defence at that time.
- (g) **ORDERS** that nothing in this Decision shall affect the disclosure obligations of the Prosecution under Rules 66 and 68 of the Rules.
- (h) **RECALLS** that, pursuant to Rule 75(F)(i) of the Rules, any protective measures that have been ordered in respect of a witness in the *Martić* case shall continue to have effect in the present case, except in so far as they have been varied in accordance with this decision.
- (i) **DENIES** the remainder of the Motion.

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

Done this seventeenth day of April 2014,
At The Hague,
The Netherlands.



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]