

**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-95-5/18-PT &
IT-04-81-T
Date: 13 November 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: 13 November 2008

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON SUPPLEMENT TO 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 seized of the “Supplement to Momčilo Perišić’s Motion for Access to Confidential Materials in the Radovan Karadžić Case, with Annexes A and B”, filed publicly on 15 October 2008 (“Perišić Supplement”) by Momčilo Perišić, an accused in another case before the Tribunal, and hereby renders its decision thereon.

I. Background

1. On 18 September 2008, Momčilo Perišić (“the Applicant”) filed a Motion for 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 (“original Motion”).¹ The Prosecution filed a Response to the original Motion on 2 October 2008, in which it did not object to the Applicant gaining access to confidential *inter partes* material,² but opposed the Applicant gaining access to any confidential *ex parte* material.³

2. On 14 October 2008, in its “Decision on Momčilo Perišić’s Motion for Access to Confidential Materials in the *Radovan Karadžić* Case” (“initial Decision”), the Trial Chamber granted the Applicant’s request in part, allowing access to confidential *inter partes* materials from the *Karadžić* case, but not to confidential *ex parte* materials.⁴

II. Submissions

3. In the Perišić Supplement, the Applicant states that he omitted in his original Motion to seek access to confidential materials from proceedings held under Rule 61 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) in the *Karadžić* case.⁵ He now seeks access to those materials.⁶

4. The Applicant adopts the arguments he presented in his original Motion, specifically that there is a geographical and temporal nexus between the *Karadžić* case and his own case, which establishes a “legitimate forensic purpose” for access.⁷ He contends that Rule 61 materials presented in the *Karadžić* case stand a good chance of materially assisting his defence “as the material is the basis upon which the Trial Chamber affirms the indictment and issues an

¹ Momčilo Perišić’s Motion for Access to Confidential Materials in the Radovan Karadžić Case, 18 September 2008.

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

³ Response, para. 4.

⁴ Decision on Momčilo Perišić’s Motion for Access to Confidential Materials in the *Radovan Karadžić* Case, 14 October 2008, para. 20.

⁵ Perišić Supplement, para. 3.

⁶ Perišić Supplement, para. 6.

international arrest warrant” under Rule 61(C) and (D).⁸ He further argues that the fact that the Prosecution at one time considered joining the *Perišić* and *Karadžić* cases additionally evidences a “substantial overlap” between the indictments, and refers to Annexes A and B in support of this claim.⁹

5. The *Perišić* Supplement was intimated to the Accused *Karadžić* in B/C/S on 27 October 2008. Neither the Prosecution nor the Accused have issued any response.

III. Applicable law

A. Rule 61

6. Proceedings are held pursuant to Rule 61 of the Rules in cases where a warrant of arrest, issued after an indictment has been confirmed by one Judge, has not been executed and, consequently, the indictment has not been personally served on the accused.¹⁰ During an open hearing before a Trial Chamber, the Prosecution submits the indictment and all the evidence supporting it, and may call to give testimony any witness whose statement is included in that supporting material.¹¹ If, on the basis of that evidence, the Trial Chamber is satisfied that there are reasonable grounds to believe that the accused committed all or any of the crimes charged, they will issue an international arrest warrant in respect of the accused.¹²

B. Access to confidential materials

7. 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.¹³ In respect of confidential *inter partes*

⁷ *Perišić* Supplement, para. 4.

⁸ *Perišić* Supplement, para. 5.

⁹ *Perišić* Supplement, para. 5. Annex A comprises copies of two pages of the Ninth Report of the President and Prosecutor of the Tribunal to the United Nations Security Council regarding implementation of the Completion Strategy of the Tribunal pursuant to paragraph 6 of Council Resolution 1534, dated 14 May 2008.⁹ The second of these pages is headed “Possible Schedule for on-going and future trials”. At the bottom of the page, a list under the heading “Fugitives: to be tried if the fugitives arrive” contains the words “(Karadžić)/(Mladić) – possible joinder with *Perišić*”. Annex B is a copy of the “Order of the President of the Tribunal Reassigning a Case to a Trial Chamber” dated 21 August 2008, which states that, although the Prosecution had provided “longstanding and consistent” representation that it would seek to join the *Karadžić* and *Perišić* cases, it had advised the Chambers that it would now not seek to do so.

¹⁰ Rule 61(A).

¹¹ Rule 61(B).

¹² Rule 61(C)–(D).

¹³ *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. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Material, 16 November 2005 (“*Blagojević and Jokić* Decision”), para. 11; see also *Prosecutor v. Delić*, Case No. IT-04-83-PT, Order on

material, a “legitimate forensic purpose” for access in subsequent proceedings will be shown if the applicant can demonstrate “a good chance that access to this evidence will materially assist the applicant in preparing his case”,¹⁴ based on “the existence of a nexus between the applicant’s case and the original case from which the material is sought”.¹⁵ To establish a nexus, the applicant is required to demonstrate a “geographical, temporal or otherwise material overlap” between the two proceedings.¹⁶ In respect of *ex parte* confidential material, the Appeals Chamber has required an applicant to meet a higher standard in establishing a legitimate forensic purpose for access.¹⁷

IV. Discussion

8. In the *Karadžić* case, Rule 61 proceedings were conducted before the Tribunal during June and July 1996. The Applicant seeks access to the non-public materials presented in evidence during those proceedings.

1. As it did in its initial Decision, the Trial Chamber finds here that the Perišić Motion and Supplement together establish that a substantial overlap exists in the timeframes and locations of the crimes charged in the *Perišić* and *Karadžić* indictments, and that the factual bases for the charges in the indictments appear to interrelate. Moreover, neither the Prosecution nor the Accused objects to access. The Applicant has thus shown a legitimate forensic purpose for access to the requested confidential and *inter partes* material from the Rule 61 proceedings in the *Karadžić* case. However, the Trial Chamber finds that the Applicant has not established a legitimate forensic purpose for access to confidential and *ex parte*¹⁸ material by reference to the higher standard required in respect of such material.

9. In respect of any 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.

V. Disposition

Defence Motions for Access to All Confidential Material in *Prosecutor v. Blaškić* and *Prosecutor v. Kordić and Čerkez*, 7 December 2005, p. 6.

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

¹⁵ *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.

¹⁶ 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.

¹⁷ *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. 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, para. 14.

¹⁸ The Trial Chamber here refers to confidential materials to which the Accused *Karadžić* is not afforded access.

10. Accordingly, the Trial Chamber, pursuant to Rules 54 and 61 of the Rules of Procedure and Evidence of the Tribunal, hereby GRANTS the Perišić Supplement, in part, and DENIES the Perišić Supplement, in part, and:

- a. ORDERS the Prosecution to identify for the Registry the *inter partes* confidential material from *Prosecutor v. Karadžić and Mladić*, Case Nos. IT-95-5-R61 and IT-95-18-R61, for disclosure to the Applicant.
- b. REQUESTS the Registry to disclose to the Applicant the *inter partes* confidential material once it has been identified by the Prosecution in accordance with paragraph (a).
- c. ORDERS the Prosecution to determine without delay which, if any, 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.
- d. ORDERS that no confidential and *ex parte* material from *Prosecutor v. Karadžić and Mladić*, Case Nos. IT-95-5-R61 and IT-95-18-R61, be disclosed to the Applicant.
- e. 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.
- f. 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.

- g. 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.
- h. 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 text being authoritative.



Judge Patrick Robinson
Presiding

Dated this thirteenth day of November 2008
At The Hague
The Netherlands

[Seal of the Tribunal]