



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-T
IT-98-32-A
Date: 8 March 2012
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: 8 March 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO MODIFY THE DECISION GRANTING
THE ACCUSED ACCESS TO CONFIDENTIAL MATERIALS IN THE
VASILJEVIĆ CASE**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

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Mr. Vladimir Domazet
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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 “Prosecution Motion to Modify the Decision Granting the Accused Access to Confidential *Inter Partes* Materials in the *Vasiljević* Case”, filed on 21 February 2012 (“Motion”) by the Office of the Prosecutor (“Prosecution”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 5 June 2009, the Pre-Trial Chamber in this case issued its “Decision on Motion for Access to Confidential Materials in Completed Cases” (“Access Decision”), giving the Accused access to confidential *inter partes* materials in the case of *Prosecutor v. Vasiljević* on the basis that both cases were concerned with crimes committed in the municipality of Višegrad in Bosnia and Herzegovina.¹ On 8 October 2009, the Višegrad crimes were removed, pursuant to Rule 73 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), from the operative indictment in these proceedings, namely the Third Amended Indictment (“Indictment”).²

2. In the Motion, the Prosecution submits that because the crimes that formed the basis for granting access to confidential *inter partes* material in the *Vasiljević* case have been removed from the Indictment, he no longer has a legitimate forensic interest in such material, except insofar as that material relates to witnesses common to both cases.³ The Prosecution further submits that there are four such witnesses, namely Ferid Spahić, Ewa Tabeau, Amor Masović, and John Clark, and identifies the related confidential and *inter partes* material in the confidential Appendix A to the Motion.⁴ Accordingly, the Prosecution requests, pursuant to Rules 73 and 75 of the Rules, that the Chamber limit the Accused’s access to the confidential *inter partes* materials from the *Vasiljević* case only to the confidential and *inter partes* material listed in Appendix A.⁵

3. The Prosecution, relying on an Appeals Chamber decision in the *Lukić and Lukić* case, also submits that the Motion is not a request for reconsideration of the Access Decision because that Decision was issued by the Pre-Trial-Chamber rather than the Trial Chamber. Instead, the Prosecution seeks the modification of the Access Decision under Rule 75 (G) of the Rules, on the basis of the Appeals Chamber’s ruling that access decisions have an effect on protective

¹ Access Decision, paras. 27(t), 32.

² Decision on the Application of Rule 73 *bis*, 8 October 2009, para. 11. *See also* marked up Indictment of 19 October 2009, paras. 38, 48, Schedules A and C.

³ Motion, paras. 5–6.

⁴ Motion, para. 6, Appendix A.

measures.⁶ Alternatively, the Prosecution submits that in any case the reconsideration test has been met in this case, due to the “new circumstances described above”, namely the removal of the Višegrad crimes from the Indictment.⁷

4. On 22 February 2012, the Accused’s legal adviser informed the Chamber orally that the Accused does not oppose the Motion.⁸

II. Applicable Law

5. The Chamber recalls that there is no provision in the Rules for reconsideration of its decisions. However, the standard for reconsideration of a decision set forth by the Appeals Chamber posits that “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice’”.⁹ Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.¹⁰

6. The Chamber also notes the well-established principle that to the extent possible Tribunal proceedings should be conducted in a public manner.¹¹ 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.”¹² 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

⁵ Motion, paras. 1–2, 7.

⁶ Motion, para. 3, footnote 7, relying on *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-A, Decision on the Prosecution’s “Motion for Reconsideration and Rescission of the Order to Disclose Issued in Trial Chamber’s ‘Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the Lukić and Lukić Case’ of 10 July 2009” (“*Lukić Decision*”).

⁷ Motion, footnote 7, referring to paras. 1–2.

⁸ Hearing, T. 25049 (22 February 2012).

⁹ Decision on Accused’s Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010, para. 12, citing *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR108bis.3, confidential, Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, 6 April 2006, para. 25, fn. 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); see also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d’une Erreur Matérielle”, 14 June 2006, para. 2.

¹⁰ *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2; see also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić’s Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, pp. 2–3.

¹¹ Rule 78 provides, “All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.”

¹² *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.

the Rules.¹³ 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.¹⁴ 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.¹⁵ 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.”¹⁶

III. Discussion

7. The Chamber considers that, despite the Prosecution’s argument to the contrary, the present Motion is in fact a request for reconsideration of the Access Decision. The Appeals Chamber decision in the *Lukić and Lukić* case concerned a situation where a motion was filed before the Appeals Chamber as, *inter alia*, a request for reconsideration of a decision issued by the Trial Chamber in that case.¹⁷ As a result, the Appeals Chamber held that the motion was not a request for reconsideration because requests for reconsideration have to be made before the same Chamber that rendered the impugned decision.¹⁸ However, the Motion presently before the Chamber is distinguishable from that situation as there is nothing in the Tribunal’s Statute or the Rules referring to a distinct “Pre-Trial Chamber”. On the contrary, pre-trial proceedings are conducted by the Trial Chamber assigned by the President of the Tribunal.¹⁹ Accordingly, notwithstanding the various changes that may alter the composition of that Trial Chamber,²⁰ decisions issued during pre-trial can be said to emanate from the Trial Chamber assigned to the trial.

¹³ *Prosecutor v. Dorđević*, Case No. IT-05-87/1-PT, Decision on Vladimir Dorđević’s Motion for Access to All Material in *Prosecutor v. Limaj et al.*, Case No. IT-03-66, 6 February 2008 (“*Dorđević* Decision”), para. 6.

¹⁴ *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.

¹⁵ *See Blaškić* Decision, para. 14; *First Blagojević and Jokić* Decision, para. 11; *see also Delić* Order, p. 6; *Dorđević* Decision, para. 7.

¹⁶ *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.

¹⁷ *Lukić* Decision, paras. 2–4.

¹⁸ *Lukić* Decision, para. 4.

¹⁹ Rules 62(A); 65 *ter*(A).

²⁰ In this case, for instance, *see* Order on Composition of Pre-Trial Bench, 22 August 2008; Order Replacing a Judge in a Case Before a Trial Chamber, 31 August 2009; Order Assigning ad litem Judges to a Case Before a Trial Chamber, 4 September 2009.

8. Bearing all of the above in mind, in this particular case, the Access Decision had essentially varied the protective measures granted in the *Vasiljević* case by allowing the Accused access to all confidential and *inter partes* materials from that case.²¹ Since the present Motion is seeking to modify the terms of this earlier variation, it amounts in the Chamber's view to a request for reconsideration.²² Accordingly, the Chamber shall dispose of this Motion by considering whether the Prosecution has satisfied the test for reconsideration.

9. As stated above, the Prosecution does not assert that the Chamber has committed a clear error of reasoning in granting the Accused access to the confidential and *inter partes* materials from the *Vasiljević* case. Rather, the Prosecution appears to focus its argument on the second limb of the test for reconsideration, namely, that reconsideration of the Access Decision is necessary in order to prevent injustice arising from the removal of the Višegrad crimes from the Indictment.²³ The Chamber will therefore consider whether requiring the Prosecution to disclose all confidential and *inter partes* materials from the *Vasiljević* case to the Accused would cause injustice to the Prosecution.

10. As noted above, the confidential and *inter partes* material from one case should be disclosed to the applicant in the subsequent proceedings if a "legitimate forensic purpose" exists for such access, such as there being a nexus between the subsequent case and the original case from which the material is sought.²⁴ In this particular case, once the Višegrad crimes were removed from the Indictment, the nexus between the *Vasiljević* case and the present case ceased to exist, with the exception of the four witnesses the two cases have in common. In addition, the Chamber no longer sees any reason to essentially continue varying the protective measures granted in the *Vasiljević* case by allowing the Accused access to confidential and *inter partes* material he has no legitimate forensic interest in. Accordingly, the Chamber considers that in these circumstances disclosing to the Accused *all* the confidential and *inter partes* materials from the *Vasiljević* case would cause injustice. For that reason, the Chamber shall order that the Accused, as well as the Standby Counsel and his team, be granted access only to confidential and *inter partes* material identified in the Appendix A to the Motion. This access shall be granted in accordance with the same conditions outlined in paragraphs 36 to 42 of the Access Decision.

²¹ See *Lukić* Decision, para. 4.

²² Cf. Decision on Accused's Motion for Access to Exhibits in *Orić* Case, 18 November 2011 where the Chamber issued its decision under Rule 75(G) due to the fact that the Access Decision did not vary the protective measures granted in the *Orić* case.

²³ Motion, footnote 7.

²⁴ See *above* para. 6.

IV. Disposition

11. Accordingly, the Trial Chamber, pursuant to Rules 54 and 73 of the Rules, hereby **GRANTS** the Motion and **ORDERS** that the Accused, as well as the Standby Counsel and his team, shall have access to the confidential and *inter partes* materials listed in the Appendix A to the Motion, under the conditions outlined in paragraphs 36 to 42 of the Access Decision.

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



Judge O-Gon Kwon
Presiding

Dated this eighth day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]