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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-04-81-T

Date: 30 September 2010

Original: English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Pedro David
Judge Michèle Picard

Registrar: **Mr. John Hocking**

Decision of: **30 September 2010**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

DECISION ON ZDRAVKO TOLIMIR'S URGENT REQUEST FOR DISCLOSURE OF CONFIDENTIAL MATERIAL FROM THE *PERIŠIĆ* CASE

Prosecutor v. Momčilo Perišić

The Office of the Prosecutor
Mr. Mark Harmon

Prosecutor v. Zdravko Tolimir

The Office of the Prosecutor
Mr. Peter McCloskey

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

For the Self-represented Accused

Mr. Zdravko Tolimir
Mr. Aleksandar Gajić

TRIAL CHAMBER I ("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 "Zdravko Tolimir's Urgent Request for Disclosure of Confidential Material from the *Perišić* Case" filed publicly on 8 September 2010 ("Request"), and hereby renders its Decision.

I. SUBMISSIONS

A. Applicant

1. In his Request, the Self-Represented Accused Zdravko Tolimir[1] ("Accused") seeks access to all confidential and *inter partes* material from the *Prosecutor v. Momčilo Perišić* ("*Perišić* case"), including all confidential transcripts, exhibits, submissions and decisions of the Trial and Appeals Chamber, that would assist him in the preparation of his case.[2] In particular, the Accused seeks access to confidential material related to the Srebrenica counts of the Indictment,[3] material related to general allegations,[4] as well as to all confidential and *inter partes* material in which he is mentioned personally.[5] This material should also include the one used during witness interview but not tendered into evidence.[6]

2. The Accused also requests the Trial Chamber to order the Prosecution and the Defence in the *Perišić* case to identify without delay which parts of the requested material falls under the provisions of Rule 70 of the Rules of Procedure and Evidence ("Rules") and to immediately contact the respective providers of the material and request their authorisation for its disclosure to the Tolimir Defence.[7]

3. The Accused submits that a significant factual nexus exists between the *Tolimir* case and *Perišić* case as they both relate to the events that took place in Srebrenica in July 1995 and believes that the material from the *Perišić* case "is likely to assist in the preparation of its case materially, or that there is a good chance that it would".[8]

[1] *See Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T ("*Tolimir* case").
[2] Request, paras 1-3.
[3] In his Request, the Accused specifies "items 9-14 of the Amended Indictment", Request, para. 4. The Trial Chamber assumes that the Accused refers to counts 9-13 of the Second Amended Indictment of 5 February 2008.
[4] Request, para. 4. The Accused specifies the relevant paragraphs as 4, 5, 7, 32, 35(b), 55-62 and 63-68 of the Indictment in the present case.
[5] Request, para. 4.
[6] Request, para. 5, footnote 5.
[7] Request, para. 5.
[8] Request, paras 3, 6.

B. Prosecution

4. On 22 September 2010, the Prosecution publicly filed its "Prosecution Response to Zdravko Tolimir's Urgent Request for the Disclosure of Confidential Material from the *Perišić* Case" ("Response"). The Prosecution does not object to the Accused's request in respect to *inter partes* confidential material from the current case relevant to (i) the Srebrenica counts of the Indictment, (ii) general allegations in the Indictment, and (iii) Zdravko Tolimir personally, provided that adequate protective measures are in place to protect the confidentiality of the material.[9] This comprises relevant *inter partes* material such as trial transcripts from testimony held in closed sessions, relevant confidential exhibits and relevant confidential filings and submissions which are not subject to Rule 70 of the Rules.[10]

5. As regards the relevant *inter partes* confidential material to which Rule 70 applies, the Prosecution does not object to the Accused's access, subject to the consent of the appropriate Rule 70 provider.[11] The Prosecution further notifies the Trial Chamber that it will seek such consent.[12]

6. Regarding the Accused's request concerning "other confidential material" such as "confidential material used during interviews but not tendered into evidence", the Prosecution submits that this request is misplaced, as material which is not part of the trial record cannot be considered "confidential material from the *Perišić* case".[13]

II. APPLICABLE LAW

7. It is well-established in the jurisprudence of the Tribunal that "a party is always entitled to seek material from any source, including another case before the Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown".[14]

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[9] Response, paras 5, 8.
[10] Response, para. 5.
[11] Response, para. 9.
[12] Response, paras 7, 9.
[13] Response, para. 6.
[14] *Prosecutor v. Dragomir Milosević*, Case No. IT-98-29/1-A, Decision on Radovan Karadžić's Motion for Access to Confidential Material in the *Dragomir Milošević* case, 19 May 2009 ("*Milošević* 19 May Decision"), para. 7, referring to *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Momčilo Perišić Request for Access to Confidential Material in the Dragomir Milošević case, 27 April 2009 ("*Milošević* 27 April Decision"), para. 4; *Prosecutor v. Milan 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 February 2008 ("*Martić* Decision"), para. 9; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on "Motion by Mićo Stanišić for Access to All Confidential Materials in the Krajišnik Case", 21 February 2007 ("*Krajišnik* Decision"), p. 4. *See also Prosecutor v. Radovan Karadžić* Case No. IT-95-5/18-PT, Decision on Jovica Stanišić's Motion for Access to Confidential Materials in the *Karadžić* case, 20 May 2009 ("*Karadžić* Decision"), p. 4; *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case

8. With regard to *inter partes* confidential material, a requesting party must establish a legitimate forensic purpose for access to confidential material from another case by demonstrating the existence of a nexus between the applicant's case and the case from which the material is sought. Such a nexus can consist of a geographical, temporal or otherwise material overlap between the two cases.[15] According to the established practice of the Tribunal, "such access may be granted if the Trial Chamber is satisfied that the requesting party has established that the material in question is likely to assist the applicant's case materially, or that there is a good chance that it would".[16] For material that has been provided under Rule 70, the parties must obtain the consent of the provider before the material or its source can be disclosed to another accused before the Tribunal.[17]

9. Rule 75(F) of the Rules provides that once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal, such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal unless and until they are rescinded, varied or augmented in accordance with the procedure set out in Rule 75.[18] Rule 75(G) of the Rules provides that a party seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply to any Chamber, however constituted, remaining seised of the first proceedings.[19]

III. DISCUSSION

10. The Trial Chamber is satisfied that there is a strong nexus between the two cases as regards crimes alleged to have been committed in Srebrenica in July 1995. The Trial Chamber finds that the Accused has shown a legitimate forensic purpose for being granted access to confidential transcripts, exhibits, submissions, and confidential decisions of the Trial and Appeals Chambers related to the Srebrenica counts of the Indictment, general allegations in the Indictment and Zdravko Tolimir personally.

11. The Trial Chamber agrees with the Prosecution's submission that the Accused's request for access to "other confidential material" such as "confidential material used during witness interviews

No. IT-08-91-PT, Decision on Stojan Župljanin's Access to Confidential Material in the *Krajišnik, Mrda, Stakić* and *Brdanin* Cases, 24 April 2009, ("*Župljanin* Decision"), para. 11.

[15] *Tolimir* 2 June Decision para. 9; *Milošević* 19 May Decision, para. 8; *Milošević* 27 April Decision, para. 5; *Martić* Decision, para. 9; *Krajišnik* Decision, para. 4.; *See also Karadžić* Decision, para. 7; *Župljanin* Decision, para. 11.

[16] *Ibid.*

[17] *Karadžić* Decision, para. 9; *Prosecutor v. Ante Gotovina et. al.*, Case No. IT-06-90-T, Decision on Motion by Radovan Karadžić, for Access to Confidential Materials in the *Gotovina et al.* case, 12 May 2009, para. 5; *Krajišnik* Decision, pp. 5-6. *See also Milošević* 19 May Decision, para 15; *Milošević* 27 April Decision, para. 13.

[18] Rule 75(F)(i) of the Rules.

[19] Rule 75(G)(i) of the Rules.

but not tendered into evidence"[20] is misplaced, as material which is not part of the trial record cannot be considered "confidential material from the *Prosecutor v. Momčilo Perišić* case".[21] The Trial Chamber therefore finds that it is not competent to decide on the Accused's request to "other confidential material"[22] and reminds the Accused that indeed the Prosecution in the *Tolimir* case has a disclosure obligation pursuant to Rules 66(A)(ii) and 68 of the Rules.

12. Finally, the Trial Chamber holds that no *inter partes* confidential material provided to the Prosecution or Defence in the *Perišić* case under Rule 70 should be disclosed to the Accused unless and until such time as the provider of said material has consented.

IV. DISPOSITION

13. For the foregoing reasons and pursuant to Rule 54, 70 and 75 of the Rules, the Trial Chamber

GRANTS the request as regards access to all relevant *inter partes* confidential material in the case of *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, related to (i) the crimes alleged to have occurred in Srebrenica, (ii) general allegations and (iii) Zdravko Tolimir personally, including all relevant confidential transcripts from closed sessions, all relevant confidential exhibits, all relevant confidential submissions of the parties and relevant confidential decisions of the Trial and Appeals Chambers.

DENIES the Request in all other aspects;

ORDERS the Prosecution and the Defence, on an ongoing basis, to identify for the Registry the following *inter partes* material in the case of *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, for disclosure to the Accused:

(i) all confidential closed and partially closed sessions trial transcripts, which are not subject to Rule 70;

(ii) all confidential exhibits, which are not subject to Rule 70;

(iii) all confidential submissions of the parties and confidential decisions of the Trial Chamber and the Appeals Chamber, which are not subject to Rule 70;

[20] Request, para. 3.
[21] Response, para. 6.
[22] Request, para. 2.

ORDERS the Prosecution and the Defence to determine without delay which of the material requested is subject to the provisions of Rule 70, and without undue delay contact the providers of such material to seek their consent for disclosure to the Accused, and, where such consent is given, to notify the Registry on a regular/ongoing basis of such consent;

REQUESTS the Registry to withhold disclosure of any material subject to Rule 70 until such time as the Prosecution or Defence informs the Registry that consent for disclosure has been obtained, even in respect of those providers who have consented to the use of the relevant material in a prior case. Where consent cannot be obtained from the provider(s) of any material subject to Rule 70, the material shall not be disclosed;

REQUESTS the Registry to disclose to the Accused:

i. the confidential and *inter partes* material, including closed session transcripts, relevant confidential exhibits and relevant confidential filings and submissions, which are not subject to Rule 70;

ii. the Rule 70 material once the Prosecution and Defence have identified such material and informed the Registry of the consent of the Rule 70 provider(s) in accordance with this Decision;

ORDERS that the Self-represented Accused Zdravko Tolimir and his ICTY appointed legal advisors, shall not disclose to the public, or to any third party, any confidential or non-public material disclosed from the *Perišić* case, including witness 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 *Tolimir* case. If any confidential and 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 Tolimir and his ICTY appointed legal advisors as soon as it is no longer needed for the preparation of the *Tolimir* case. 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 Accused and his ICTY appointed legal advisors. "The public" also includes, without limitation, non-Registry assigned members of the Accused's defence team, families, friends, and associates of the accused and defence counsel in other cases or proceedings before the Tribunal, the media and journalists;

ORDERS that nothing is this Decision shall affect the disclosure obligations of the Prosecution under Rules 66 and 68; and

AFFIRMS that, pursuant to Rule 75(F)(i), any protective measures that have been ordered in respect of a witness in the *Perišić* case shall continue to have effect in the case against the Accused, except insofar as they have been varied in accordance with this Decision.

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

Judge Bakone Justice Moloto
Presiding Judge

Dated this thirtieth day of September 2010
At The Hague
The Netherlands

[Seal of the Tribunal]