

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 No. IT-05-87-A
Date: 16 February 2010
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 16 February 2010

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

**DECISION ON VLASTIMIR ĐORĐEVIĆ'S MOTION FOR
ACCESS TO TRANSCRIPTS, EXHIBITS AND DOCUMENTS**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Defence:

Mr. Toma Fila and Mr. Vladimir Petrović for Nikola Šainovic
Mr. Tomislav Višnjić and Mr. Peter Robinson for Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksander Aleksić for Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Sreten Lukić

The Office of the Prosecutor:

Mr. Chester Stamp
Ms. Daniela Kravetz

Counsel for the Accused Vlastimir Đorđević

Mr. Dragoljub Đorđević
Mr. Veljko Đurđić

1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of “Vlastimir Đorđević’s Motion for Access to Transcripts, Exhibits and Documents” filed by Counsel for Vlastimir Đorđević (“Đorđević”) on 29 December 2009 (“Motion”). The Office of the Prosecutor (“Prosecution”) filed its response on 8 January 2010.¹ Đorđević did not file a reply.

I. BACKGROUND

2. On 26 June 2006, Trial Chamber III (“Trial Chamber”) severed the case against Đorđević from the *Milutinović et al.* proceedings owing to his unavailability for trial.² The trial of Đorđević commenced on 27 January 2009 and is currently ongoing.

3. Throughout the *Milutinović et al.* proceedings, the Trial Chamber rendered a number of decisions granting Đorđević access to confidential transcripts and other documents with the exception of confidential *ex parte* material and any information subject to Rule 70 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) pending consent from the relevant provider.³

4. On 26 February 2009, the Trial Chamber rendered its judgement in the *Milutinović et al.* case (“Trial Judgement”), acquitting Milan Milutinović of all charges.⁴ Šainović, Pavković and Lukić were convicted of deportation, forcible transfer, murder and persecution as crimes against humanity and murder as a violation of the laws or customs of war pursuant to Articles 5(d), 5(i), 5(a), 5(h), 3 and 7(1) of the Tribunal’s Statute (“Statute”) and were sentenced to 22 years of imprisonment.⁵ Ojdanić and Lazarević were convicted of deportation and forcible transfer as crimes

¹ Prosecution’s Response to Vlastimir Đorđević’s Motion for Access to Transcripts, Exhibits and Documents, 8 January 2010 (“Response”). The Appeals Chamber notes that Nikola Šainović (“Šainović”), Dragoljub Ojdanić (“Ojdanić”), Nebojša Pavković (“Pavković”), Vladimir Lazarević (“Lazarević”) and Sreten Lukić (“Lukić”) (collectively, “Šainović et al. Defence”) did not respond to the Motion.

² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Order Replacing Third Amended Joinder Indictment and Severing Vlastimir Đorđević from the Trial, 26 June 2006. Đorđević was initially charged together with Milan Milutinović, Šainović, Ojdanić, Pavković, Lazarević and Lukić of having participated in a joint criminal enterprise (“JCE”) the purpose of which was, *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of Kosovo to ensure continued Serbian control over the province. See also *Prosecutor v. Milan Milutinović et al.*, and *Prosecutor v. Nebojša Pavković et al.*, Case No. IT-05-87-PT, Decision on Prosecution Motion for Joinder, 12 July 2005.

³ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Đorđević Motion for Access to Materials in *Milutinović et al.* Case, 21 November 2007; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Đorđević Motions for Access to Materials in the *Milutinović et al.* Case, 9 July 2008; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Đorđević Motion for Access to Materials in the *Milutinović et al.* Case, 9 September 2008.

⁴ Trial Judgement, vol. 3, para. 1207.

⁵ Trial Judgement, vol. 3, paras 1208, 1210, 1212.

against humanity pursuant to Articles 5(d), 5(i) and 7(1) of the Statute and were each sentenced to 15 years of imprisonment.⁶

5. Six appeals have been lodged against the Trial Judgement.⁷ As a result, on 10 June 2009, the *Dorđević* Trial Chamber granted the *Šainović et al.* Defence, with prospective effect, access to confidential transcripts, exhibits and documentary evidence in the *Dorđević* trial, with the exception of confidential *ex parte* material and any information pursuant to Rule 70 of the Rules subject to consent from the relevant provider.⁸

II. SUBMISSIONS

6. In his Motion, *Dorđević* seeks access to confidential materials from the present case, including all confidential transcripts, documents, and evidentiary material⁹ and requests that the Appeals Chamber order the identification and disclosure of all confidential materials of the present case to date. He further requests that such an order continue until the termination of the present case or the termination of the *Dorđević* proceedings, whichever occurs first.¹⁰

7. *Dorđević* submits that these materials “are necessary to [his] right to a fair and expeditious trial and adequate resources to prepare his Defence case”, given that there is a sufficient nexus between the two cases.¹¹ He emphasizes the close correlation between his own case and the present case and underscores that the cases share the same crime-base and allegations of participation in a JCE.¹² Furthermore, he states that the said overlap between these cases underpinned the *Dorđević*’s Trial Chamber’s decision to grant the *Šainović et al.* Defence access to confidential material in the *Dorđević* case.¹³ He avers that such access should be reciprocal.¹⁴ *Dorđević* undertakes to treat all

⁶ Trial Judgement, vol. 3, paras 1209, 1211.

⁷ Defence Submission: Notice of Appeal, 27 May 2009 (filed by Counsel for *Šainović*); General Ojđanić’s [*sic*] Second Amended Notice of Appeal, 16 October 2009 (filed as Annex C to General Ojđanić’s [*sic*] Motion to Amend his Amended Notice of Appeal of 29 July 2009, 16 October 2009); Vladimir Lazarević’s [*sic*] Defence Notice of Appeal, 27 May 2009 (confidential) and Defence Submission: Lifting Confidential Status of the Notice of Appeal, 29 May 2009; Notice of Appeal from the Judgement of 26 February 2009, 29 September 2009 (filed by Counsel for Pavković as Annex A to General Pavković Submission of his Amended Notice of Appeal, 29 September 2009); Sreten Lukić’s [*sic*] Notice of Appeal from Judgment and Request for Leave to Exceed the Page Limit, 27 May 2009; Prosecution Notice of Appeal, 27 May 2009.

⁸ *Prosecutor v. Vlastimir Dorđević*, Case No. IT-05-87/1-T, Decision on Defence Motion for Access to Transcripts, Exhibits and Documents in the *Dorđević* Case, 10 June 2009 (“*Dorđević* Decision”).

⁹ Motion, para. 5.

¹⁰ *Ibid.*, p. 5.

¹¹ *Ibid.*, para. 6.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 7.

confidential case materials as such and respect any additional protective measures ordered by the Appeals Chamber.¹⁵

8. In response, the Prosecution does not object to allowing Đorđević access to all materials classified as *inter partes* and confidential in the present case, but submits that Rule 70 material should be withheld subject to the provider's consent.¹⁶ The Prosecution further notes that Đorđević does not appear to seek access to confidential *ex parte* materials and makes no attempt to demonstrate that the higher standard required for the disclosure of confidential *ex parte* material has been met. On this basis, the Prosecution argues, the Motion should be denied with respect to *ex parte* materials.¹⁷ Finally, the Prosecution takes no position on whether Đorđević should have access to confidential material contained in provisional release applications.¹⁸

III. APPLICABLE LAW

9. The Appeals Chamber recalls that a party is always entitled to seek material from any source, including from 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.¹⁹ The Appeals Chamber notes that access to confidential material is granted whenever the party seeking access has demonstrated that such material may be of material assistance to his case.²⁰ Furthermore, the requesting party may demonstrate the relevance of the material sought "by showing the existence of a nexus between the applicant's case

¹⁵ *Ibid.*, para. 8.

¹⁶ Response, para. 10.

¹⁷ *Ibid.*, para. 8.

¹⁸ *Ibid.*, para. 3.

¹⁹ *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the Rasim Delić Case, 19 May 2009 ("*Delić Decision*"), para. 7; *Prosecutor v. Dragomir Milošević*, 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, para. 7 ("*Milošević Decision of 19 May 2009*"); *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 April 2009 ("*Milošević Decision of 27 April 2009*"), para. 4; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on Veselin Šljivančanin's Motion Seeking Access to Confidential Material in the *Kordić and Čerkez* Case, 22 April 2008 ("*Šljivančanin Decision*"), para. 7; *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.

²⁰ *Delić Decision*, para. 7; *Milošević Decision of 27 April 2009*, para. 5; *Šljivančanin Decision*, para. 7; *Krajišnik Decision*, p. 4; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005, para. 8; *Prosecutor v. Tihomir 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.

and the cases from which such material is sought, *i.e.*, if the cases stem from events alleged to have occurred in the same geographical area and at the same time”.²¹

10. The Appeals Chamber further recalls that “*ex parte* material, being of a higher degree of confidentiality, by nature contains information which has not been disclosed *inter partes* because of security interests of a State, other public interests, or privacy interests of a person or institution”²² and that consequently, “the party on whose behalf *ex parte* status has been granted enjoys a protected degree of trust that the *ex parte* material will not be disclosed”.²³

IV. DISCUSSION

11. With respect to the first criterion of gaining access to confidential material, the Appeals Chamber recalls that although this burden “is not considered particularly onerous”,²⁴ “it is incumbent on the party seeking access to avoid engaging in a fishing expedition”.²⁵ Even though the scope of Đorđević’s request for access may appear too broad, especially inasmuch as it refers to all confidential “documents (in particular, but not limited to, filings)”,²⁶ the Appeals Chamber finds that there is a “good chance” that he will be able to better understand and make use of confidential evidentiary material (tendered or admitted) in the present case, if he also has access to the filings, submissions, decisions and hearing transcripts relating to that material.²⁷ Consequently, the Appeals Chamber is satisfied that Đorđević has sufficiently identified the confidential material to which he seeks access in the present case, namely “all confidential transcripts, documents (in particular, but not limited to, filings), and evidentiary material (especially that submitted pursuant to ICTY Rule 115).”²⁸

12. In assessing whether a legitimate forensic purpose has been shown, the Appeals Chamber recalls that in its decision on access to confidential materials, the *Đorđević* Trial Chamber stated

²¹ *Delić* Decision, para. 7. See also *Milošević* Decision of 27 April 2009, para. 5; *Šljivančanin* Decision, para. 7; *Martić* Decision, para. 9; *Krajišnik* Decision, p. 4; *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 January 2003, p. 4; *Blaškić* Decision, para. 15.

²² *Prosecutor v. Miroslav 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 (“*Bralo* Decision”), para. 17. See also *Prosecutor v. Blagoje 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, 13 April 2005 (“*Simić* Decision”), p. 4.

²³ *Bralo* Decision, para. 17. See also *Krajišnik* Decision, p. 5; *Simić* Decision, p. 4.

²⁴ *Milošević* Decision of 19 May 2009, para. 9 (internal citations omitted).

²⁵ *Ibid.*, para. 11 (internal citations omitted).

²⁶ Motion, para. 5.

²⁷ *Milošević* Decision of 19 May 2009, para. 11, referring to *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motion by Radivoje Miletić for Access to Confidential Information, 9 September 2005, p. 4.

²⁸ Motion, para. 5.

The indictment in the *Đorđević* trial and the indictment in the *Milutinović et al.* trial concern the same events, namely crimes against humanity (deportation, other inhumane acts, murder and persecutions on political, racial and religious grounds), and violations of the laws or customs of war (murder), that allegedly took place during the same time period in the same municipalities in Kosovo. Further, the indictments in both cases allege that the crimes charged against the Applicants and *Vlastimir Đorđević* were committed in the course of the same transaction, in that *Vlastimir Đorđević* and the Applicants are alleged to have participated in one JCE the purpose of which was, *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.²⁹

The Appeals Chamber considers that these findings remain applicable to the assessment of the Motion. Furthermore, the Appeals Chamber notes that the Prosecution does not contest the existence of a nexus between the cases.³⁰

13. In light of these factors, the Appeals Chamber considers that there is a sufficient factual nexus between the *Đorđević* case and the present case, and that this nexus warrants granting *Đorđević* access to confidential *inter partes* documents, including filings, exhibits and tendered evidentiary material, as well as to private and closed session transcripts in the present case.

14. The Appeals Chamber further considers that in this particular case it is appropriate to order this disclosure to continue prospectively until the date of termination of the present case or the date of termination of the *Đorđević* proceedings, whichever occurs at an earlier time.

15. As regards *ex parte* confidential material, the Appeals Chamber observes that while *Đorđević* has identified the sought material by its general nature, he does not explicitly seek access to *ex parte* confidential material in the present case, nor does he attempt to satisfy the threshold applicable to requests for access to such material. For this reason, the Appeals Chamber considers that granting *Đorđević* access to any *ex parte* confidential material is not warranted at this stage.

16. In the absence of any submissions from the *Šainović et al.* Defence, the Appeals Chamber considers that the confidential filings and decisions pertaining to applications for provisional release and other health-related matters contain information personal to the respective appellants and are unlikely to assist *Đorđević*'s case. Consequently, and subject to the submissions from the concerned appellants, the Appeals Chamber declines to grant *Đorđević* access to confidential information with respect to material, including filings and decisions, related to applications for provisional release

²⁹ *Đorđević* Decision, para. 22.

³⁰ See *supra*, para. 8.

decisions or other confidential health-related matters in the present case. In this regard, the Appeals Chamber urges the parties to identify such material as discussed below.³¹

17. In light of the foregoing, the Appeals Chamber grants Đorđević prospective access to the identified *inter partes* confidential material, subject to the conditions of access described below.

V. CONDITIONS OF ACCESS

A. Rule 70

18. Pursuant to Rule 70(B) of the Rules, information “provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence [...] shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information”. The same restriction may be applied to information in possession of the Defence pursuant to Rule 70(F) of the Rules. In respect of motions seeking access to confidential material in another case, the Appeals Chamber has previously ruled that material provided under Rule 70 of the Rules shall not be released to the accused in another case unless the provider consents to such disclosure.³² Accordingly, the Appeals Chamber holds that any material that has been provided to the Prosecution under Rule 70(B) of the Rules, in addition to any material that may have been provided to the *Šainović et al.* Defence under Rule 70(F) of the Rules, shall not be released to Đorđević unless and before the providers give their consent.

B. Protective measures

19. The Appeals Chamber notes that protective measures ordered in one proceeding “shall continue to have effect *mutatis mutandis* in any other proceeding before the Tribunal”.³³ It further recognizes that once the Appeals Chamber has granted access to confidential materials from another case, it then determines if and what additional protective measures are necessary in order to “strike a balance between the rights of a party to have access to material to prepare its case and guaranteeing the protection and integrity of confidential information”.³⁴

³¹ See *infra*, paras 21 *et seq.*

³² *Milošević* Decision of 19 May 2009, para. 15; *Milošević* Decision of 27 April 2009, para. 13; *Krajišnik* Decision, p. 5; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the *Galić* Case, 16 February 2006, para. 12.

³³ Rule 75(F)(i) of the Rules.

³⁴ *Milošević* Decision of 19 May 2009, para. 16; *Milošević* Decision of 27 April 2009, para. 14 and references cited therein.

20. The Appeals Chamber finds that any protective measures ordered in the present case should continue to apply to any material released to Đorđević. This does not prevent the parties to the present case from requesting additional protective measures, if they so choose.

VI. DISPOSITION

21. For the foregoing reasons, the Appeals Chamber **GRANTS** the Motion **IN PART** and allows Đorđević, subject to the conditions set forth below, prospective access to *inter partes* confidential material in the present case, including private and closed session transcripts of court proceedings, all confidential exhibits, all *inter partes* confidential filings and submissions and confidential Appeals Chamber's decisions, with the exception of material subject to Rule 70 of the Rules and any filings, exhibits and transcripts relating to the health of the *Šainović et al.* Defence and their applications for provisional release.

22. The Appeals Chamber **ORDERS** the Prosecution and the *Šainović et al.* Defence:

- a. to identify to the Appeals Chamber and the Registry, within 10 working days from the date of this decision what, if any, documents or exhibits contain material that has been provided to them subject to Rule 70 of the Rules, or to do so within 10 working days of their admission into evidence hereafter;
- b. to seek leave from the Rule 70 providers to disclose this material to Đorđević within 15 working days from the date of this decision or within 15 working days of their admission into evidence under Rule 115 of the Rules hereafter;
- c. to notify the Registry, on an ongoing basis, of consents of providers to the disclosure of Rule 70 material to Đorđević received by the Prosecution or the *Šainović et al.* Defence pursuant to Order (b) above;
- d. to apply to the Appeals Chamber for additional protective measures or redactions, if required, within 10 working days from the date of this decision or, where appropriate, within 10 working days of the admission of additional evidence under Rule 115 of the Rules hereafter.

23. The Appeals Chamber **REQUESTS** the Registry:

- a. to withhold any material provided pursuant to Rule 70 of the Rules, as identified by the Prosecution or *Šainović et al.* Defence, until the responses of the providers have been relayed;

- b. where the providers have consented to further disclosure, to provide Đorđević, his Counsel and any employees who have been instructed or authorised by Counsel, with all such material, in electronic format where possible;
- c. where the providers have refused consent to further disclosure, to withhold that material;
- d. where no additional protective measures or redactions are requested within 10 working days from the date of this decision or within 10 working days of its admission into evidence hereafter, and where material has not, within the relevant deadline, been identified by the Prosecution or *Šainović et al.* Defence as having been provided pursuant to Rule 70 of the Rules, to provide Đorđević, all of his Counsel and any employees who have been instructed or authorised by Counsel with all *inter partes* confidential and under seal material described above, in electronic format where possible;
- e. where additional protective measures or redactions are requested, to withhold that material until the Appeals Chamber has issued a decision on the request.

24. The Appeals Chamber, unless otherwise required by this decision, **ORDERS** that the *inter partes* confidential material provided by the Registry shall remain subject to any protective measures imposed by the Trial Chamber.

25. The Appeals Chamber **ORDERS** that Đorđević, all of his Counsel and any employees who have been instructed or authorised by Counsel to have access to the *inter partes* confidential and under seal material described above shall not, without the express leave of the Appeals Chamber through a finding that it has been sufficiently demonstrated that third party disclosure is necessary for the preparation of Đorđević's defence:

- a. disclose to any third party the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;
- b. disclose to any third party any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony; or
- c. contact any witness whose identity was subject to protective measures.

26. The Appeals Chamber **ORDERS** that if, for the purposes of the preparation of Đorđević's defence, non-public material is disclosed to third parties – pursuant to authorisation by the Appeals Chamber – any person to whom disclosure of the confidential material is made shall be informed

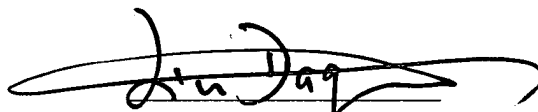
that he or she is forbidden to copy, reproduce or publicise, in whole or in part, any non-public information or to disclose it to any other person, and further that, if any such person has been provided with such information, he or she must return it to the *Đorđević* defence team as soon as the information is no longer needed for the preparation of his defence.

27. For the purposes of the above paragraph, third parties exclude: (i) *Đorđević*; (ii) his Counsel; (iii) any employees who have been instructed or authorised by Counsel to have access to confidential material; and (iv) personnel of the Tribunal, including members of the Prosecution.

28. The Appeals Chamber **ORDERS** that if Counsel for *Đorđević* or any members of his Defence team who are authorised to have access to confidential material should withdraw from the case, any confidential material to which access is granted in this decision and that remains in their possession shall be returned to the Registry.

29. The Appeals Chamber **DISMISSES** the Motion in all other respects.

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



Judge Liu Daqun
Presiding

Dated this 16th day of February 2010,
At The Hague,
The Netherlands.

[Seal of the Tribunal]