



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-98-29/1-A

Date: 11 September 2012

Original: English

IN A SPECIALLY APPOINTED CHAMBER

Before: Judge Bakone Justice Moloto, Presiding
Judge Christoph Flügge
Judge Howard Morrison

Registrar: Mr. John Hocking

Decision of: 11 September 2012

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

**DECISION ON MOTION SEEKING
CLARIFICATION AND RELATED RELIEF**

The Applicant

Mr. Stéphane Bourgon

Counsel for Dragomir Milošević

Mr. Branislav Tapušković
Ms. Branislava Isailović

The Office of the Prosecutor

Mr. Paul Rogers

THIS SPECIALLY APPOINTED CHAMBER (“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 “Motion seeking clarification and related relief concerning the decision on motion seeking variation of protective measures pursuant to Rule 75(G)”, filed publicly by Mr. Stéphane Bourgon (“Applicant”) on 7 August 2012 (“Motion”), and hereby renders its decision thereon.

I. BACKGROUND AND SUBMISSIONS

1. On 9 May 2012, the Applicant requested access to confidential and *inter partes* material in this case in order to fulfil his duties and responsibilities “as counsel assigned to assist Dragomir Milošević in relation to a possible review application in accordance with Rule 119”.¹ On 16 July 2012, the Chamber granted this motion in part, allowing access to the confidential *inter partes* evidence of the Prosecution and the Defence of Dragomir Milošević and other confidential material, which relates specifically to such evidence (“Decision”).² The Chamber ordered “the Prosecution and Counsel of Record to identify, without delay, the confidential evidence, which they respectively tendered into evidence during the trial and appeals proceedings in this case, and other confidential material, which relates specifically to such evidence and to inform the Registry thereof”.³

2. On 2 August 2012, the Prosecution submitted a notice of compliance with two confidential annexes (“Prosecution Notice”, “Annex A” and “Annex B”, respectively).⁴ On the same day, the Prosecution filed a confidential and *ex parte* notice with annex (“Confidential *ex parte* Annex”).⁵ In Annex A, the Prosecution listed confidential and *inter partes* material to which the Applicant could be given immediate access.⁶ Annex B contained a list of confidential and *inter partes* material which had not been tendered by the Prosecution and which it, therefore, considered as falling “beyond the scope of the Decision”.⁷ In the Confidential *ex parte* Annex, the Prosecution listed

¹ Application, para. 2. The Chamber notes that on 29 May 2012 the Applicant filed a motion requesting disclosure of Rule 68 material that had come into the Prosecution’s possession after the rendering of the appeals judgement in the present case. On 27 June 2012, the President assigned this motion to a Chamber consisting of Judges Orić, Moloto and Delvoic, which, on 7 September 2012, denied the motion.

² Decision on the motion seeking variation of protective measures pursuant to Rule 75(G), public, 16 July 2012, para. 14. The Chamber also held that it was “not persuaded that the Applicant would require access to other confidential material which pertains to protective measures of witnesses or the reasons therefor or which does not concern the confidential evidence as such”, *ibid.*

³ *Id.*

⁴ Prosecution notice on compliance with decision on Applicant’s motion seeking variation of protective measures pursuant to Rule 75(G), public with confidential annexes, 2 August 2012.

⁵ Prosecution notice of materials in *Milošević* to which the applicant cannot have access, confidential and *ex parte*, 2 Aug 2012.

⁶ Prosecution Notice, para. 2; Annex A, p. 1.

⁷ Prosecution Notice, para. 3.

confidential *inter partes* evidence and material to which the Applicant should not be given access in light of the Decision.⁸

3. By the Motion, the Applicant requests the following relief:⁹
- A. to clarify and/or confirm that the material included in Annex B falls within the scope of the Decision (“first request”);
 - B. to modify the order issued in the Decision to the Prosecution and Counsel of Record to identify, without delay, also confidential Chamber evidence adduced during the presentation of their respective cases (“second request”); and
 - C. to set a time limit for Counsel of Record to comply with the Chamber’s order to identify the material to which the Applicant can be given access, or, in the event that Counsel of Record fails to comply within the time limit, to grant the Applicant access to all confidential material listed in Annex B subject to the protective measures in force and to consider ordering the Registry “to review the *other confidential material* tendered by the Defence and to remove from the same any material to which the Applicant was not granted access”¹⁰ (“third request”).

4. Regarding the first request, the Applicant submits that Annex B “is problematic on the basis of the Prosecution’s contention that the material listed therein “falls beyond the scope of the Decision”.¹¹ The Applicant contends that the only difference between Annex A and Annex B is that the confidential material in the latter was neither tendered nor reviewed by the Prosecution and hence clarification by the Chamber could solve the issue.¹²

5. With regard to his second request, the Applicant avers that there is “an additional difficulty” in that Annex B “includes confidential Chamber evidence” which should be identified.¹³

6. Concerning the third request, the Applicant submits that Counsel of Record has not yet abided by the Decision which prevents the Applicant from gaining access to the material listed in Annex B.¹⁴ In this regard, he submits that the Registry could alternatively review Annex B “*in lieu*

⁸ Confidential Annex, para. 1.

⁹ Motion, p. 5.

¹⁰ *Id.*, para. 16.

¹¹ *Id.*, para. 12.

¹² *Id.*, para. 13.

¹³ *Id.*, paras. 17-19.

¹⁴ *Id.*, paras. 15-16.

of Counsel of Record” and remove any material from the list to which the Applicant was not granted access.¹⁵

II. DISCUSSION

7. The Chamber recalls that it set out the applicable law in the Decision.¹⁶

8. Regarding the first request, the Chamber recalls that it ordered the Prosecution to identify the confidential evidence, which *it* had tendered into evidence during the trial and appeals proceedings.¹⁷ While Annex B contains a list of documents not tendered by the Prosecution, but by the Defence, and, therefore, is not beyond the scope of the Decision, the documents listed in Annex B do not fall under the review obligation of the Prosecution, but that of the Defence. In any event, and in view of its findings on the third request, the Chamber holds that there is nothing to be decided with respect to the first request, which, thus, is moot.

9. With regard to the second request, the Chamber notes that no confidential Chamber evidence was admitted either at the trial or appeals proceedings. The second request is, therefore, moot.

10. Concerning the third request, the Chamber notes with displeasure the fact that Counsel of Record has so far failed to comply with the Decision which was issued more than a month and a half ago. As the Decision ordered the parties to comply “without delay”, this failure is remarkable.¹⁸ Recalling Defence counsel’s duty to retain a complete and accurate case file for five years after the completion of proceedings relating to the client¹⁹ – a duty which remains active in the present case – and noting Rule 77 of the Rules of Procedure and Evidence, the Chamber will order Counsel of Record to comply urgently with the Decision.

III. DISPOSITION

11. Pursuant to Article 22 of the Statute and Rules 54 and 75 of the Rules, the Chamber:

GRANTS the Application **IN PART**;

ORDERS Counsel of Record to comply with the Decision by 4 p.m. on 18 September 2012;

¹⁵ Motion, para. 16.

¹⁶ Decision, paras. 9-10.

¹⁷ See Disposition of Decision.

¹⁸ *Id.*

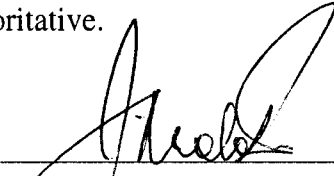
¹⁹ Directive on the assignment of Defence counsel (Directive No. 1/94), IT/73/Rev.11, Art. 16(I).

ORDERS the Registry to provide to the Applicant the material to which access is granted as soon as practicable and in electronic form;

REAFFIRMS the Decision; and

DENIES the Application in all other respects.

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



Judge Bakone Justice Moloto
Presiding

Dated this eleventh day of September 2012

At The Hague

The Netherlands

[Seal of the Tribunal]