

**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 IT-04-75-PT
Nos. IT-95-13/1-A
Date: 22 March 2012
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 22 March 2012

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON MOTION ON BEHALF OF GORAN HADŽIĆ
SEEKING ACCESS TO CONFIDENTIAL MATERIAL IN
*PROSECUTOR V. MRKŠIĆ ET AL.***

The Office of the Prosecutor:
Mr. Douglas Stringer

Counsel for Goran Hadžić:
Mr. Zoran Živanović
Mr. Christopher Gosnell

1. **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 “Defence Motion on Behalf of Goran Hadžić Seeking Access to All Confidential Material in *Prosecution v. Mrkšić et al.*”, filed by Goran Hadžić (“Hadžić”) on 3 February 2012 (“Motion”). On 17 February 2012, the “Prosecution Response to Defence Motion for Access to Confidential Material in *Mrkšić et al.*” was filed.

A. Submissions

2. Hadžić seeks access to all confidential information in the case the *Prosecutor v. Mrkšić et al.*, namely (a) confidential documents disclosed pursuant to Rule 66(A)(i) of the Rules of Procedure and Evidence (“Rules”), (b) transcripts from all closed and private sessions, (c) confidential exhibits, and (d) confidential filings.¹ In support of his request, Hadžić submits that such material is necessary for the preparation of his defence because there is temporal and geographical overlap between his case and the *Mrkšić* case in terms of crimes allegedly committed in the Vukovar area.² Hadžić further submits that these cases overlap because the indictments in both cases charge the accused with individual criminal responsibility under Article 7(3) of the Statute for having directed, commanded, controlled, or otherwise exercised effective control over Serb Forces.³

3. The Prosecution responds that it does not oppose Hadžić’s request for access to confidential information in the *Mrkšić* case,⁴ “provided the Chamber modifies existing protective measures and establishes clear conditions to protect the safety and security of witnesses and to guard against improper disclosure to third parties.”⁵ The Prosecution argues that Hadžić should not be granted access to *ex parte* material because he fails to meet the higher standard required to establish a legitimate forensic interest in accessing *ex parte* material.⁶ The Prosecution also argues that Hadžić should not be granted access to certain categories of confidential *inter partes* material that lack evidentiary value.⁷ The Prosecution’s position is that access to confidential *inter partes* Rule 70 and delayed disclosure materials should be withheld for the time being.⁸

¹ Motion, paras 1-3.

² *Mrkšić* Motion, paras 6-7, 10.

³ *Mrkšić* Motion, paras 8-9.

⁴ Response, paras 1, 5-6.

⁵ Response, para. 1.

⁶ Response, paras 1, 11.

⁷ Response, paras 1, 10.

⁸ Response, paras 2, 7-9.

B. Applicable Law

4. Rule 78 of the Rules provides that “[a]ll proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.” The Chamber observes that generally “[a] party is always entitled to seek material from any source to assist in the preparation of his case.”⁹ 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 the Rules.¹⁰ Such confidential material can be categorised into three types: *inter partes*, *ex parte*, and Rule 70.

5. In determining whether a party must be given access to confidential material, the Trial Chamber must “find a balance between the right of [that] party to have access to material to prepare its case and the need to guarantee the protection of witnesses.”¹¹ To that end, 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.¹²

6. The first requirement is not a particularly onerous one. The Appeals Chamber has held that requests for access to “all confidential material” can be sufficiently specific to meet the identification standard.¹³

7. With respect to the second requirement, the standards for access differ for each category of confidential material. With respect to 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.¹⁴ 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

⁹ *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. Brdanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić’s Motion for Access to All Confidential Materials in the *Brdanin Case*, 24 January 2007 (“*Brdanin Decision*”), para. 10.

¹⁰ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-PT, Decision on Vladimir Đorđević’s Motion for Access to All Material in *Prosecutor v. Limaj et al.*, Case Not. IT-03-66, 6 February 2008 (“*Đorđević Decision*”), para. 6.

¹¹ *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 2.

¹² *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.

¹³ *Brdanin Decision*, para. 11; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Materials in the *Blagojević and Jokić Case*, 18 January 2006, para. 8; *Prosecutor v. Blaškić*, Case No. IT-95-14-R, Decision on Defence Motion on Behalf of Rasim Delić Seeking Access to All Confidential Material in the *Blaškić Case*, 1 June 2006, p. 12.

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

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 The essential nature of the material, in turn, means that the party seeking it must demonstrate “a good chance that access to this evidence will materially assist the applicant in preparing his case.”¹⁷ The standard does not require the applicant to go so far as to establish that the material sought would likely be admissible evidence.¹⁸

8. With respect to *ex parte* confidential material, the Appeals Chamber has required an applicant to meet a higher standard in establishing a legitimate forensic purpose for its disclosure. The Appeals Chamber has held that *ex parte* material is of a “higher degree of confidentiality”, as it contains information that has not been disclosed to the other party in that case “because of security interests of a State, other public interests, or privacy interests of a person or institution” and that therefore “the party on whose behalf the *ex parte* status has been granted enjoys a protected degree of trust that the *ex parte* material will not be disclosed.”¹⁹

9. Material can be deemed confidential by virtue of the fact that it has been provided by a state or person subject to restrictions on its use pursuant to Rule 70 of the Rules. In such cases, where an applicant has satisfied the legal standard for access to *inter partes* material, the entity that has provided the material must still be consulted before the material can be given to another accused before the Tribunal, and the material must remain confidential.²⁰ This is the case even where the Rule 70 provider(s) consented to the use of the material in one or more prior cases.²¹

10. Pursuant to Rule 75(F)(i) of the Rules, protective measures that have been ordered for a witness or victim in any proceedings before the Tribunal shall continue to have effect *mutatis mutandis* in any other proceedings, unless and until they are rescinded, varied, or augmented.

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

¹⁸ *Đorđević* Decision, para. 7.

¹⁹ *Prosecutor v. 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, 12 April 2005, p. 4; *Prosecutor v. 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, para. 17; *Brdanin* Decision, para. 14; *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. Šainović et al.*, Case No. IT-05-87-A, Decision on Vlastimir Đorđević’s Motion for Access to Transcripts, Exhibits and Documents, 16 February 2010, para. 10.

²⁰ See *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Prosecution’s Preliminary Response and Motion for Clarification Regarding the Appeal Chamber’s Decision Dated 4 December 2002 on Paško Lubičić’s Motion for Access to Confidential Material, Transcripts and Exhibits in the *Blaškić* Case, 8 March 2004, paras 11-12; *Đorđević* Decision, para. 15; *Delić* Order, p. 6.

C. Discussion

11. As a preliminary matter, the Chamber notes that the *Mrkšić* case has been completed. Accordingly, there is no Chamber currently seised of the *Mrkšić* case, and thus this Chamber is properly seised of the Motion.²²

12. Hadžić has requested access to “confidential documents disclosed pursuant to Rule 66(A)(i) of the Rules, transcripts from all closed and private sessions, confidential exhibits, and confidential filings” in the *Mrkšić* case.²³ The Chamber accordingly finds that Hadžić has identified the material sought with sufficient particularity.

13. The indictment in the *Mrkšić* case is limited to crimes allegedly committed in the Vukovar area in November 1991.²⁴ The indictment in the present case also charges Hadžić in relation to crimes allegedly committed in the Vukovar area in November 1991.²⁵ The Chamber therefore finds that Hadžić has shown a legitimate forensic purpose for disclosure of the requested material and that there is a good chance that access to confidential *inter partes* materials in the *Mrkšić* case will materially assist Hadžić in the preparation of his case.

14. Although Hadžić requests access to all confidential material, which in the *Mrkšić* case would encompass *ex parte* material, he makes no specific submission that he requires confidential *ex parte* material nor does he attempt to satisfy the threshold applicable to requests for access to such material. The Trial Chamber therefore will not order that he have access to such material.

15. The Prosecution wishes to exclude certain confidential *inter partes* material, namely material relating to the health of any of the accused in the *Mrkšić* case, provisional release, protective measures, subpoenas, memoranda concerning witness scheduling, orders concerning appearances to give testimony, redaction of the public transcript and public broadcast of a hearing, and the designation of a state for service of sentence.²⁶ The Chamber considers that most of these materials are indeed of little or no evidentiary value to Hadžić, the exception being material related to protective measures. The Chamber also finds, *proprio motu*, that material relating to conditions of detention and the remuneration or assignment of counsel have little or no evidentiary value to

²¹ *Prosecutor v. Delić*, Case No. IT-04-83-PT, Order on Jadranko Prlić’s Motion for Access to All Confidential Material in *Prosecutor v. Rasim Delić*, 2 December 2005, p. 4.

²² See *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT & IT-03-66, 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, para. 1; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT & IT-02-54, Decision on Vlastimir Đorđević’s Motion for Access to Transcripts, Exhibits and Documents in *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, 6 February 2008, para. 1.

²³ Motion, para. 3.

²⁴ *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, Third Consolidated Amended Indictment, 15 November 2004.

²⁵ First Amended Indictment, paras 21(a), 32.

Hadžić. Accordingly, the Chamber shall not order the Registry to disclose to Hadžić the confidential and *inter partes* material relating to (a) conditions of detention (b) remuneration or assignment of counsel, (c) provisional release, (d) the health of any of the accused in the *Mrkšić* case, (e) subpoenas, (f) memoranda concerning witness scheduling, (g) orders concerning appearances to give testimony, (h) redaction of the public transcripts and public broadcast of a hearing, and (i) the designation of a state for service of sentence. All other types of *inter partes* confidential filings shall be disclosed.

16. Confidential *inter partes* material requested by Hadžić might fall into the category of Rule 70 material. In respect to such material, if any, the Chamber will order the Prosecution to seek the consent of the Rule 70 provider(s) before the material can be disclosed to Hadžić.

17. Certain witnesses in the *Mrkšić* case may testify in the present case. The protective measures granted to these witnesses, including protective measures of delayed disclosure, continue to have effect in the present case. The Chamber has already authorised the Prosecution, when making disclosure of materials under Rule 66(A)(ii) of the Rules, to withhold from Hadžić the identities of witnesses who have been granted the protective measures of delayed disclosure or for whom the Prosecution will apply for delayed disclosure.²⁷ Accordingly, the Chamber considers that Hadžić should not be given immediate access to materials relating to any witness who has been granted delayed disclosure or to any witness for whom delayed disclosure may be sought, until such time as the Chamber has issued further orders in relation to these witnesses.

18. Due to the fact that the *Mrkšić* case is closed, the Chamber will order the Prosecution to identify the material to which Hadžić is to be granted access.²⁸ Any issues in relation to Rule 70 material provided to the Defence in the *Mrkšić* case that are identified by the Prosecution can be brought to the attention of the Chamber if necessary and on a case-by-case basis.

D. Disposition

19. Accordingly, for all the foregoing reasons, the Trial Chamber, pursuant to Rules 54, 69, 70, 75, and 78 of the Rules, hereby **GRANTS** the Motion in part and:

²⁶ Response, para. 10.

²⁷ Decision on Prosecution Second Motion for Protective Measures for Victims and Witnesses and Documentary Evidence, 30 November 2011, para. 12.

²⁸ See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Zdravko Tolimir's Motion for Disclosure of Confidential Materials from the *Karadžić* Case, 12 January 2012, para. 19.

- (a) **ORDERS** the Prosecution to identify for the Registry the following confidential *inter partes* material in the *Mrkšić* case for disclosure to Hadžić, which are not subject to Rule 70 of the Rules or delayed disclosure:
- i. confidential documents disclosed pursuant to Rule 66(A)(i) of the Rules;
 - ii. transcripts from all closed and private sessions;
 - iii. confidential exhibits; and
 - iv. confidential filings, excluding material related to (a) conditions of detention (b) remuneration or assignment of counsel, (c) provisional release, (d) the health of any of the accused in the *Mrkšić* case, (e) subpoenas, (f) memoranda concerning witness scheduling, (g) orders concerning appearances to give testimony, (h) redaction of the public transcripts and public broadcast of a hearing, and (i) the designation of a state for service of sentence. All other types of confidential filings shall be disclosed.
- (b) **ORDERS** the Prosecution to determine which of the material outlined in sub-paragraph (a) above is subject to the provisions of Rule 70 of the Rules, and to contact the providers of such material to seek their consent for its disclosure to Hadžić, and where Rule 70 providers consent to such disclosure, to notify the Registry of such consent.
- (c) **ORDERS** the Prosecution to determine which of the material outlined in sub-paragraph (a) above may be subject to the protective measure of delayed disclosure, and thereafter to notify the Registry of when such material can be disclosed to Hadžić.
- (d) **REQUESTS** that the Registry withhold disclosure of any material subject to Rule 70 of the Rules until such time as the Prosecution 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 for disclosure to Hadžić cannot be obtained from the provider(s) of any material subject to Rule 70 of the Rules, the material shall not be disclosed.
- (e) **REQUESTS** that the Registry withhold disclosure to Hadžić of any material subject to delayed disclosure, as described in sub-paragraph (c) above, until such time as the Prosecution informs the Registry that such material can be disclosed to Hadžić.
- (f) **REQUESTS** the Registry to disclose to Hadžić:

- i. the confidential *inter partes* and non-Rule 70 material once it has been identified by the Prosecution in accordance with sub-paragraph (a) above;
 - ii. Rule 70 material once the Prosecution has identified such material and informed the Registry of the consent of the Rule 70 provider(s) in accordance with sub-paragraphs (a) and (b); and
 - iii. material subject to delayed disclosure, once the Prosecution has informed the Registry that such material can be disclosed to Hadžić.

- (g) **ORDERS** that no confidential *ex parte* material from the *Mrkšić* case be disclosed to Hadžić.

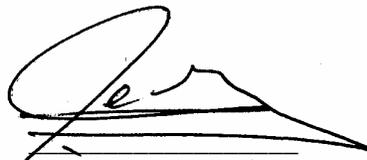
- (h) **ORDERS** that Hadžić, as well as his defence team, and any employees who have been instructed or authorised by him (“Hadžić Defence”), shall not disclose to the public any confidential material disclosed from the *Mrkšić* case, including witness identities, whereabouts, statements, transcripts, or exhibits, except to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of his case.
 - i. If the Hadžić Defence finds it directly and specifically necessary to make disclosures pursuant to this limited purpose, they shall inform each person among the public to whom non-public material or information is shown or disclosed that such person is not to copy, reproduce, or publicise such material or information, and is not to show, disclose, or convey it to any other person. If provided with the original or any copy or duplicate of such material or information, such person shall return it to the Hadžić Defence when continued possession of the material or information is no longer necessary for the preparation and presentation of the case. The Hadžić Defence shall maintain a list of persons to whom the material is disclosed, recording the name of the persons, a description of the material disclosed, and the dates of both disclosure and return of the material.
 - ii. For the purposes of this decision, the “public” means all persons, including corporations; governments and organs/departments thereof; organisations; entities; associations; groups; family members, friends, and associates of Goran Hadžić; accused and defence counsel in other proceedings before the Tribunal (and/or national courts); and the media. However, for purposes of

this decision, the “public” does not mean Judges of the Tribunal; staff of the Registry and the Office of the Prosecutor; Goran Hadžić himself; or members of the Hadžić Defence.

- iii. Should a member of the Hadžić Defence who is authorised to have access to confidential material withdraw or otherwise leave the defence team, any confidential material to which access has been granted and that remains in his or her possession shall be handed over to the person serving as Lead Counsel for the Hadžić Defence at that time.
- (i) **ORDERS** that nothing in this Decision shall affect the disclosure obligations of the Prosecution under Rules 66 and 68 of the Rules.
- (j) **RECALLS** that, pursuant to Rule 75(F)(i) of the Rules, any protective measures that have been ordered in respect of a witness in the *Mrkšić* case shall continue to have effect in the present case, except in so far as they have been varied in accordance with this decision.
- (k) **DENIES** the remainder of the Motion.

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

Done this twenty-second day of March 2012,
At The Hague,
The Netherlands.



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]