



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-95-13/1-A
Date: 22 April 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrézia Vaz

Registrar: Mr. Hans Holthuis

Decision of: 22 April 2008

PROSECUTOR

v.

**MILE MRKŠIĆ
VESELIN ŠLJIVANČANIN**

PUBLIC

**DECISION ON VESELIN ŠLJIVANČANIN'S
MOTION SEEKING ACCESS TO CONFIDENTIAL
MATERIAL IN THE *KORDIĆ AND ČERKEZ* CASE**

The Office of the Prosecutor:

Ms. Helen Brady

Counsel for Veselin Šljivančanin:

Mr. Novak Lukić and Mr. Stéphane Bourgon

Counsel for Mile Mrkšić:

Mr. Miroslav Vasić and Mr. Vladimir Domazet

A. Introduction

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 ("Tribunal" and "Appeals Chamber", respectively), is seized of three appeals in this case.¹ It is also currently seized of an "Expedited Motion on Behalf of Veselin Šljivančanin Seeking Access to Confidential Material in the *Kordić Case*" ("Motion") submitted by Veselin Šljivančanin ("the Applicant") on 2 April 2008. The Prosecution opposes the Motion.² The Applicant replied on 14 April 2008.³

B. Submissions of the Parties

2. In his Motion, the Applicant requests the Appeals Chamber to issue an order granting him access to four confidential exhibits admitted into evidence in the case of *Prosecutor v. Dario Kordić and Marko Čerkez* ("the First Proceedings") for the purposes of his case in *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin* ("the Second Proceedings").⁴ The Applicant submits that these exhibits are relevant to the Prosecution Appeal in the present case and would thus be of assistance in responding to the Prosecution's submissions. In particular, the Applicant argues that the Appeals Chamber in the First Proceedings addressed some of the issues raised in the Prosecution Appeal regarding the scope of application of Article 5 of the Statute using the exhibits sought⁵ and that the Prosecution Appeal Brief refers to that Appeals Chamber's analysis of the exhibits sought.⁶ As the Applicant's Response Brief to the Prosecution Appeal Brief is due on 20 May 2008, the Applicant filed this Motion on an expedited basis.⁷

3. The Prosecution responds that the Motion should be denied because the Applicant has failed to show how accessing the exhibits sought may serve a legitimate forensic purpose and may assist him in responding to its legal submissions regarding the scope of application of Article 5 of the Statute.⁸ The Prosecution submits that, contrary to the Applicant's submissions, its Appeal Brief does not refer to the exhibits sought, but rather relies on the Appeals Chamber's legal findings in

¹ Prosecution Notice of Appeal, filed on 29 October 2007; Mr. Mrkšić's Defence Notice of Appeal and Request for Leave to Exceed the Word Limit, filed on 29 October 2007; Notice of Appeal from the Judgement of 27 September 2007 by the Defence of Veselin Šljivančanin, filed on 29 October 2007.

² Prosecution's Response to Expedited Motion on Behalf of Veselin Šljivančanin Seeking Access to Confidential Material in the *Kordić Case*, filed on 10 April 2008 ("Prosecution Response").

³ Respondent's Reply to Prosecution's Response to Expedited Motion on Behalf of Veselin Šljivančanin Seeking Access to Confidential Material in the *Kordić Case*, filed on 14 April 2008 ("Applicant's Reply").

⁴ The exhibits sought by the Applicant are Exhibits Z461, Z1594, Z1594.3 and Z2697.

⁵ Motion, paras 9 b) and c), referring to Prosecution Appeal Brief, filed on 8 February 2008, Ground 1 of Appeal, Error 1, paras 14-26 and Error 2, paras 37-59; *Kordić and Čerkez* Appeal Judgement, paras 410, 421, 500. See also Applicant's Reply, paras 7-10.

⁶ Motion, para. 9 d), referring to Prosecution Appeal Brief, paras 24, 41. See also Applicant's Reply, paras 7-10.

⁷ Motion, para. 11.

the First Proceedings. In this last respect, the Prosecution avers that the evidence underpinning the Appeals Chamber's factual findings is irrelevant to its legal findings.⁹ Moreover, the Prosecution argues that granting this Motion would set the wrong precedent as it would lead to parties being entitled to access confidential material cited or in some way related to jurisprudence relied upon by an opposing party, regardless of whether or not the material had been shown to be of likely assistance to that party.¹⁰

4. The Applicant replies that it would be contrary to the principle of equality of arms to deny his Motion. He asserts that the Prosecution has no ownership of the exhibits submitted in previous cases, whether confidential or not, and that the Prosecution should not object to such a motion unless it has grounds to believe that granting access might cause prejudice to, or endanger, witnesses.¹¹ Moreover, the Applicant emphasizes that it is all the more appropriate for him to have access to the exhibits sought in order to understand the evidential basis of the Appeals Chamber's conclusions in the First Proceedings in light of the *Mrkšić* Trial Chamber's analysis of these conclusions.¹²

C. Discussion

5. The Appeals Chamber recalls that Rule 75 (F)(i) of the Rules of Procedure and Evidence ("Rules") stipulates that "[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures: shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ("second proceedings") or another jurisdiction unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule."

6. At the outset, the Appeals Chamber notes that pursuant to Rule 75(G)(ii) of the Rules, since no Chamber remains seized of the First Proceedings, the Applicant has properly filed his Motion before this Appeals Chamber as the Chamber seized of the Second Proceedings.¹³

7. The Appeals Chamber also recalls that a party is always entitled to seek material from any source, including from another case before the International Tribunal, to assist in the preparation of

⁸ Prosecution Response, paras 2, 6.

⁹ Prosecution Response, para. 4.

¹⁰ Prosecution Response, para. 5.

¹¹ Applicant's Reply, paras 3-5.

¹² Applicant's Reply, paras 13-14, referring to Prosecutor v. *Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13/1-T, 27 September 2007 ("*Mrkšić* Trial Judgement"), fn. 1692.

¹³ Under Rule 75(G)(i) of the Rules "[a] party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply: (i) to any Chamber, however constituted, remaining seized of the first proceedings; or (ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings."

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 The Appeals Chamber has held that “[a]ccess to confidential material from another case may be granted wherever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case.”¹⁵ Furthermore, the “relevance of the material sought by a party may be determined by showing the existence of a nexus between the applicant’s case and the cases from which such material is sought, *i.e.* if the cases stem from events alleged to have occurred in the same geographic area and at the same time.”¹⁶

8. The Appeals Chamber is satisfied that the Applicant has identified the material sought with sufficient particularity. The Appeals Chamber observes however that the exhibits sought by the Applicant are not sought because they relate to any of the material facts arising in the Second Proceedings, but rather because they are alleged to be of assistance to the Applicant in interpreting the findings of the Appeals Chamber in the First Proceedings and in responding to the Prosecution’s arguments regarding an alleged legal error. As such, the Appeals Chamber is not satisfied that the Applicant has shown a legitimate forensic purpose justifying access to the exhibits sought.

9. Furthermore, the Appeals Chamber considers that the exhibits sought, although referred to by the Appeals Chamber in the First Proceedings in its findings, are not of any assistance to an understanding of the legal findings in the First Proceedings or of the legal issue alive in this case regarding the scope of application of Article 5 of the Statute. In this regard, the Appeals Chamber observes that the Prosecution does not refer to these exhibits in its Appeal Brief. Having due regard to the relevant findings of the Appeals Chamber in the First Proceedings, the *Mrkšić* Trial Chamber’s findings and the Prosecution’s relevant arguments in its Appeal Brief regarding the scope of application of Article 5 of the Statute,¹⁷ the Appeals Chamber is not convinced that access to the exhibits may be of material assistance to the Applicant’s case in the Second Proceedings.

¹⁴ See *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, 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.

¹⁵ *Krajišnik* Decision, p. 4, quoting *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.

¹⁶ *Krajišnik* Decision, p. 4, quoting *Blaškić* Decision, para. 15.

¹⁷ See *Kordić and Čerkez* Appeal Judgement, paras 410, 421-422, 480, 500, 570-571; *Mrkšić* Trial Judgement, paras 449-462; Prosecution Appeal Brief, paras 12-73, in particular 24 and 41.

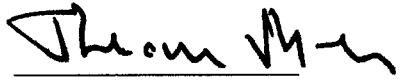
D. Disposition

For the foregoing reasons, the Appeals Chamber

DENIES the Motion in its entirety.

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

Done this 22nd day of April 2008,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding Judge

[Seal of the International Tribunal]