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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: 26 May 2009
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr. John Hocking

Decision of: 26 May 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON MOTION BY RADOVAN KARADŽIĆ
FOR ACCESS TO CONFIDENTIAL MATERIAL IN THE
PERIŠIĆ CASE**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

The Applicant

Radovan Karadžić *pro se*

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 the “Motion by Radovan Karadžić for Access to Confidential Materials in the Perišić case”, dated 9 April 2009 and filed on 14 April 2009 (“Motion”), and hereby renders its Decision thereon.

I. SUBMISSIONS

A. Applicant

1. In the Motion, filed pursuant to Rule 75(G)(i) of the Rules of Procedure and Evidence (“Rules”), Dr. Radovan Karadžić (“Applicant”) seeks disclosure of the confidential material from the *Prosecutor v. Momčilo Perišić* case (“Perišić case”). The Applicant seeks access “for the duration of the trial proceedings” to (i) all confidential closed and private session testimony transcripts; (ii) all closed session hearings transcripts; (iii) all confidential exhibits; and (iv) all confidential *inter partes* filings and submissions, including all confidential Trial Chamber decisions.¹

2. The Applicant explains that both cases are “exceptionally intertwined” and that there is “an interrelation between the factual basis for the allegations against himself [Karadžić] and Mr. Perišić”.² The Applicant also argues that there is a significant geographical and temporal overlap between the two cases, in particular with respect to the crimes that are alleged to have happened in Srebrenica and Sarajevo.³

3. The Applicant further maintains that the material and information sought are of vital importance to the effective investigation and preparation of his case, as they directly impact the allegations of participation in a Joint Criminal Enterprise levelled at him. He also expects that there is likely to be a significant overlap in the witnesses who will testify in both cases.⁴

4. The Applicant notes that the Trial Chamber before which his case is currently pending has already determined that there is sufficient overlap between the *Karadžić* and *Perišić* cases to warrant the disclosure of material from his case to the Perišić Defence.⁵

¹ Motion, para. 1.

² Motion, para. 6.

³ Motion, paras 7-8.

⁴ Motion, para. 10.

⁵ Motion, para. 12.

5. In addition, the Applicant submits that his Motion should be granted based on the principle of equality of arms, so as not to put him at a disadvantage vis-à-vis his opponent.⁶ He assures the Trial Chamber that he will abide by the existing orders regarding witness protection.⁷

B. Prosecution

6. On 28 April 2009, the Prosecution filed the “Prosecution Response to Motion by Radovan Karadžić for Access to all Confidential Material” (“Response”) in which it does not oppose the Applicant’s Motion in as far as it relates to closed session testimony transcripts and confidential exhibits, referring to material listed in categories (i) and (iii) above.⁸ It alleges, however, that such access should be limited to material related to incidents that took place in Sarajevo and Srebrenica, since Perišić is also charged with crimes that are alleged to have occurred in Croatia, but the Karadžić indictment is geographically limited to Bosnia and Herzegovina.⁹

7. Furthermore, the Prosecution opposes granting the Applicant “blanket access” to the non-evidentiary confidential material, referring to material listed in categories (ii) and (iv) above, namely confidential hearing transcripts, confidential *inter partes* filings and submissions; and all confidential Trial Chamber decisions.¹⁰ It alleges that beyond evidentiary material, the Applicant’s broad request constitutes a fishing expedition, and that he has not shown any basis for access to non-evidentiary material, which cannot assist him with material factual issues in his own case.¹¹

8. The Prosecution also opposes granting the Applicant access to Rule 70 material, for which the consent of the provider is necessary; it will, however, seek the consent of the Rule 70 providers to allow the Applicant access.¹²

9. In addition, the Prosecution objects to the Applicant being granted access to any information related to the protected witnesses in the *Perišić* case, who may be called in the Applicant’s case and for whom delayed disclosure may be justified.¹³

10. The Prosecution also makes an argument in relation to *ex parte* material. Although it acknowledges that the Applicant did not specifically mention *ex parte* material in his Motion, it alleges, however, that since paragraph 1(d) of the Motion omits to qualify “all confidential Trial Chamber decisions” with the words “*inter partes*”, the phrase is susceptible to a reading that the

⁶ Motion, paras 6 and 11.

⁷ Motion, para. 5.

⁸ Response, para. 2.

⁹ Response, paras 7-8.

¹⁰ Response, para. 5.

¹¹ Response, para. 3.

¹² Response, para. 9.

Applicant requests access to *ex parte* decisions as well.¹⁴ Based on its analysis of the Motion, the Prosecution opposes granting the Applicant access to *ex parte* materials.¹⁵

II. APPLICABLE LAW

11. It is an accepted principle in the jurisprudence of the Tribunal that “a party is always entitled to seek materials from any source, including from another case before the International Tribunal, to assist in the preparation of its case if the materials sought have been identified or described by their general nature and if a legitimate forensic purpose for such access has been shown.”¹⁶

12. The identification requirement is not particularly onerous and requests for “all confidential materials” can be considered sufficiently specific to meet this standard.¹⁷

13. Regarding the requirement of a legitimate forensic purpose, the Appeals Chamber has held that “access 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.”¹⁸ The Appeals Chamber also held that “it is sufficient that access to the material sought is likely to assist the applicant’s case materially or that there is at least a good chance that it would”.¹⁹ 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.”²⁰

14. Having said that, the Trial Chamber notes that the jurisprudence of the Tribunal has developed specific criteria that must be met when access to *ex parte* confidential material is sought.

¹³ Motion, para. 9.

¹⁴ Response, para. 10.

¹⁵ Response, para. 10.

¹⁶ *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; Decision on Momčilo Perišić’s Request for Access to Confidential Material in the *Dragomir Milošević Case*, 27 April 2009, para. 4, referring to the Martić Decision. See also *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.

¹⁷ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Motion by Jovica Stanišić for Access to All Confidential Materials in the Brđanin case, 24 January 2007 (“*Brđanin Decision*”), para. 11, as referred to by *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Momčilo Perišić’s Motion for Access to Confidential Materials in the *Radovan Karadžić Case*, 14 October 2008 (“*Karadžić Decision*”), para. 18, with further references. See also *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. 9.

¹⁸ *Martić Decision*, para. 9.

¹⁹ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in Blagojević and Jokić Case, 18 January 2006. See also *Krajišnik Decision*, p. 4, with further references.

²⁰ *Martić Decision*, para. 9 with further references.

The Appeals Chamber stressed 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” 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”.²¹ It follows that the Applicant will have to meet a higher standard of proving a legitimate forensic purpose justifying such disclosure.²²

15. The general rules described above are additionally qualified by the requirements of Rule 70 of the Rules. According to the case-law, “material provided under Rule 70 shall not be released to the Accused in another case unless the provider consents to such disclosure.”²³ This limitation applies to all material provided under Rule 70 to either the Prosecution or Defence in a case and does not depend upon whether or not such material was used as evidence in a previous case.²⁴

16. Rule 75 (F) of the Rules provides, in relevant part:

Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures:

- (i) 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;

...

17. Rule 75 (G) of the Rules of the Rules provides that

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 seised of the first proceedings; or
- (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

III. DISCUSSION

18. The Trial Chamber agrees with the Applicant that there is a strong nexus between the two cases as regards crimes alleged to have been committed in Srebrenica and Sarajevo. The Trial Chamber considers, however, that the Applicant failed to show a geographical overlap between his case and the *Perišić* case as far as the latter is concerned with events in Croatia. Accordingly, the Trial Chamber finds that the Applicant has shown a legitimate forensic purpose for being granted

²¹ *Krajišnik* Decision, p. 5.

²² See *Brđanin* Decision, para. 14. See also *Karadžić* Decision, para. 12.

²³ *Krajišnik* Decision, p. 5 quoting *Prosecutor v. Tihomir 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. 8; *Martić* Decision, para. 12.

access to the categories (i) and (iii) as described above, namely confidential testimony transcripts and exhibits, as far as they relate to Srebrenica and Sarajevo.

19. As regards to categories (ii) and (iv), the Trial Chamber finds that the Applicant will be able to better understand and make use of confidential exhibits and testimony transcripts in the *Perišić* case if he has access to the filings, submissions, decisions and hearing transcripts related to this material. The Trial Chamber recalls that the applicable standard for access to all confidential material is only that there be a “good chance” that the material in question would materially assist the case of the Applicant and that it does not require that the applicant “seeking access to *inter partes* confidential materials in other cases to establish a specific reason that each individual item is likely to be used”.²⁵

20. The Trial Chamber recalls that the principle of equality of arms supports giving the applicant a similar chance to understand the proceedings and evidence and evaluate their relevance to his own case, in common with Prosecution, which has access to all *inter partes* filings.²⁶ Accordingly, once an applicant has been granted access to confidential material of another case before the Tribunal, he should not be prevented from accessing filings, submissions, decisions and hearing transcripts which may relate to such confidential material. The Trial Chamber therefore grants the Applicant’s request for access to all closed session hearing transcripts and all confidential *inter partes* filings and submissions and all confidential Trial Chamber decisions.²⁷ It notes, however, as it is the practice of the Tribunal,²⁸ that the Prosecution and Perišić will have the opportunity to file a request with the Trial Chamber to withhold certain specifically identified material or grant any additional protective measures or redactions, should they deem it necessary.

21. In relation to *ex parte* confidential material, the Trial Chamber recalls that the jurisprudence of the Tribunal requires a party seeking access to such material to meet a higher threshold. The Trial Chamber notes that the Applicant has failed to advance any arguments demonstrating a legitimate forensic purpose in this regard. Consequently, the Applicant’s request for access to *ex parte* confidential material in the *Perišić* case must be denied.

²⁴ *Krajišnik* Decision, p. 6.

²⁵ *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 (“*Miletić* Decision”).

²⁶ *Miletić* Decision, para. 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. 11.

²⁷ Motion, para. 1.

²⁸ Decision on Momčilo Perišić’s Request for Access to Confidential Material in the *Dragomir Milošević* Case, 27 April 2009, paras 15, 19; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005, paras 16, 19(c).

22. 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 Applicant unless the provider of such material has consented. Consequently, the Prosecution and Defence in the *Perišić* case shall approach the providers of such material with a view to obtaining such consent.

23. In light of the foregoing and subject to the conditions detailed below, the Trial Chamber grants the Applicant's request for access to all *inter partes* confidential material in the *Perišić* case related to the crimes alleged to have occurred in Srebrenica and Sarajevo, including all confidential closed and private session testimony transcripts, all closed session hearing transcripts, all confidential exhibits, all *inter partes* confidential filings and submissions, including all confidential Trial Chamber decisions.

IV. CONDITIONS OF ACCESS

24. The Trial Chamber recalls the Prosecution's request that it be able to withhold material from the Applicant that may relate to protected witnesses in the *Perišić* case, who may be called in the *Karadžić* case for whom delayed disclosure may be justified,²⁹ "in accordance with the time frames set out in such orders as may be issued by the *Karadžić* Trial Chamber".³⁰ It submits that, should it subsequently decide not to call one or more protected witnesses from the *Perišić* case in the *Karadžić* case, it will notify the Registry.³¹

25. The Trial Chamber favours the approach suggested by the Prosecution. Mindful of any order for delayed disclosure pursuant to Rule 69 issued in the *Karadžić* case, and any pending or future application under that Rule, the Trial Chamber allows the Prosecution to withhold the relevant material until the Trial Chamber seised of the *Karadžić* case has decided on the matter.

V. DISPOSITION

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

GRANTS the Motion as regards access to all *inter partes* confidential material in the case *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, except for material relating to alleged crimes in Zagreb, subject to the conditions set forth below;

DENIES the Motion in all other respects;

²⁹ Response, p. 7, paras (a) and (b).

ORDERS the Prosecution and 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 Applicant:

- (i) all confidential closed and private session trial transcripts, which are not subject to Rule 70;
- (ii) all confidential exhibits, which are not subject to Rule 70;
- (iii) all confidential filings and submissions (including all confidential Trial Chamber decisions), which are not subject to Rule 70;

ORDERS the Prosecution and 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 Applicant, 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 the 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 provider(s) of any material subject to Rule 70, the material shall not be disclosed;

REQUESTS the Registry to disclose to the Applicant:

- (i) the confidential, *inter partes* and non-Rule 70 material once it has been identified by the Prosecution and Defence in accordance with this Decision; and
- (ii) the Rule 70 material once the Prosecution and Defence has identified such material and informed the Registry of the consent of the Rule 70 provider(s) in accordance with this Decision;

ORDERS that no confidential and *ex parte* material from the case of *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, shall be disclosed to the Applicant;

ORDERS that the Applicant, his Registry-assigned assistants, which thus far, include four legal associates, one investigator and two case managers, 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

³⁰ Response, p. 7, paras (a) and (b).

of the public is directly and specifically necessary for the preparation and presentation of the Applicant's 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 the Applicant as soon as it is no longer needed for the preparation of the Applicant's 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 Applicant and his Registry-assigned assistants. "The public" also includes, without limitation, non-Registry assigned members of the Applicant's defence team, families, friends, and associates of the Applicant, accused and defence counsel in other cases or proceedings before the Tribunal, the media and journalists;

ORDERS that nothing in 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 Applicant, 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 twenty-sixth day of May 2009

At The Hague

The Netherlands

[Seal of the Tribunal]

³¹ Response, p. 7, paras (a) and (b).