



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-PT
Date: 22 February 2007
Original: English

IN THE TRIAL CHAMBER

Before: **Judge Patrick Robinson, Pre-trial Judge**
Judge Krister Thelin
Judge Frank Höpfel

Registrar: **Mr. Hans Holthuis**

Order: **22 February 2007**

PROSECUTOR

v.

MOMČILO PERIŠIČ

**ORDER ON CONFIDENTIAL MATERIALS AND DEFENCE
REQUESTS FOR ADDITIONAL TIME AND TO EXCEED
WORD LIMIT**

The Office of the Prosecutor:

Mr. Mark B. Harmon
Ms. Susan L. Somers

Counsel for the Accused:

Mr. James Castle

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: (1) the Defence’s “Request for Additional Time to Respond to Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo”, filed 12 February 2007 (“Time Request”); and (2) the Defence’s “Request to Exceed Word Limit”, also filed 12 February 2007 (“Word Request”).

Background

2. On 6 February 2007, the Prosecution filed its Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo (“Prosecution’s Motion”).¹ The Prosecution’s Motion is 2,895 words long, and the annex attached to it containing a table of the proposed adjudicated facts is in excess of 10,000 words in length. The Prosecution’s Motion proposes the taking of judicial notice of certain facts adjudicated in the case of *Prosecutor v. Galić*.²

3. On 12 February 2007, the Defence filed its Time Request and its Word Request. In its Time Request, the Defence seeks leave to file a “report” within ten days of receiving the relevant materials in the *Galić* proceedings,³ which will address the *quantum* of materials received and the amount of time it will need to review the *Galić* Materials and “make appropriate objections.”⁴

4. In its Word Request, the Defence seeks leave to file a brief in response to the Prosecution’s Motion of 6,000 words, twice the length permitted by the applicable Practice Direction.⁵ In explaining the putative exceptional circumstances that necessitate the oversized filing requested, the Defence submits that it “wishes to raise significant objections to the wholesale use of Rule 94(b) [*sic.*] in this case.”⁶ In doing so, the Defence incorporates by reference an earlier memorandum that it submitted on this matter,⁷ which the Prosecution argued was premature and hypothetical and

¹ Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, filed 6 February 2007.

² *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T and *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A.

³ The relevant materials are those confidential materials from the *Galić* case on which the 314 proposed adjudicated facts are based (“*Galić* Materials”).

⁴ Time Request, para. 9.

⁵ Word Request, para. 6. Practice Direction on the Length of Briefs and Motions (IT/184/Rev.2) provides that “[m]otions, responses and replies before a Chamber will not exceed 3,000 words.”

⁶ Word Request, para. 4.

⁷ Defence Memorandum Brief on the Application of Rights Contained in the ICTY Statute and the ICCPR to the presentation of Evidence with Appendix A on 16 May 2006 (“Memorandum”), arguing that the application of Rule 94(B) would violate the accused’s rights, and indicating that it “will be incorporated in many future pleadings and arguments raised by defence counsel throughout the litigation of this case.” In the Memorandum, the Defence submits that the Rules are in violation of the ICCPR (Article 14) and the Statute of the Tribunal (Article 21), and must be interpreted in light of those instruments “to not so violate.”

should be dismissed.⁸ The Trial Chamber subsequently issued an Order noting the filing of the Memorandum and dismissing it without prejudice.⁹

Discussion

5. Before filing his response to the Prosecution's Motion, the Defence is entitled to have access to the confidential *Galić* Materials on which the proposed adjudicated facts are based. This has been explicitly affirmed by the Appeals Chamber.¹⁰ The question regarding access to the *Galić* Materials is therefore settled. The instant decision is concerned, however, with the relationship of the *Galić* Materials to the Prosecution's Motion, and is limited thereto.¹¹

6. In its Time Request, the Defence indicates that it can file a "limited response at this time" which will address its concerns regarding Rule 94(B) of the Rules of Procedure and Evidence ("Rules"), but which will not specifically respond to the 314 adjudicated facts proposed in the Prosecution's Motion.¹² In its Word Request, the Defence seeks a 3,000 word extension to the existing 3,000-word limit in order to file "a thorough brief which addresses these issues".¹³ It is not clear from the Word Request and the Time Request, read together, whether the Defence proposes filing a single response both addressing its concerns regarding Rule 94(B) and its response to the Prosecution's Motion. Given the need for a fair and expeditious trial, recognising the time required by the Prosecution to disclose the confidential *Galić* Materials, and cognisant that the Defence response to the Prosecution's Motion will in any event raise objections to the operation of Rule 94(B) in general, a limited response regarding that issue at this time is warranted. The Defence will therefore be afforded an opportunity to make such a limited submission. However, once the

⁸ Prosecution's Response to Defence Memorandum Brief on the Application of Rights Contained in the ICTY Statute and the ICCPR to the presentation of Evidence, 29 May 2006.

⁹ Order on Defence Memorandum Brief, 31 May 2006.

¹⁰ *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, filed 16 February 2006, para. 6. This Decision notably did not include *ex parte* materials.

¹¹ The Trial Chamber notes that Perišić is in fact requesting "re-disclosure" of the *Galić* Materials (Time Request, para. 7), owing to the unusually complicated disclosure history of this case in pre-trial. *See inter alia* *Prosecutor v. Stanislav Galić*, Case No.: IT-98-29-A, Applicant's Motion Seeking Access to Confidential Material in the *Galić* Case with Appendix A, filed 16 November 2005; *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, filed 16 February 2006; *Prosecutor v. Stanislav Galić*, Case No.: IT-98-29-A, Prosecution's Submission Pursuant to the Appeals Chamber's 'Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the *Galić* Case' with Confidential and *Ex Parte* Annex 1 and Confidential Annex 2, filed on 2 March 2006; *Prosecutor v. Stanislav Galić*, Case No.: IT-98-29-A, Prosecution's Further Submission Pursuant to the Appeals Chamber's 'Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the *Galić* Case', filed on 9 March 2006; *Prosecutor v. Stanislav Galić*, Case No.: IT-98-29-A, Prosecution's Brief Pursuant to the Appeals Chamber Decision, dated 29 August 2006, on Prosecution's Further Submission on Momčilo Perišić's Motion for Access, filed on 11 September 2006.

¹² Time Request, para. 10.

¹³ Word Request, paras 4, 6.

Defence has received the confidential *Galić* Materials from the Prosecution, a response to the Prosecution's Motion will be due.

7. Two further considerations require attention. First, in an agreement between the Defence and the Prosecution, the parties agreed that the provision of certain material relevant to this matter would be postponed. Since that time, the Defence has made no attempt to terminate this agreement.¹⁴ Second, the Defence has already filed its Memorandum, averring that it "will be incorporated in many future pleadings and arguments raised by defence counsel throughout the litigation of this case."¹⁵ The Memorandum has already been noted, the length of which undermines the Defence's request to file an excessively long report at this stage. The Defence's Time Request and Word Request will therefore be granted, but only to the extent that, in so doing, these proceedings can be economised.

8. The primary matter of concern is the adjudicated facts proposed by the Prosecution's Motion. Regardless of any concessions made to the Defence, the Prosecution must still provide it with the confidential *Galić* Materials on which the 314 proposed adjudicated facts were based. This obligation is without prejudice to the Prosecution's continuing obligations pursuant to Rule 68 of the Rules.

Disposition

CONSIDERING that there is good cause to grant the Defence request to extend the time-limit for the filing of its response to the Prosecution's Motion, and **CONSIDERING** that the Defence has explained the exceptional circumstances that necessitate the oversized filing;

PURSUANT to Rules 65ter(B), 66 and 127 of the Rules,

The Defence's requests are **HEREBY GRANTED** in part and it is **ORDERED** that:

- (1) the Prosecution shall, within seven days of this order, disclose to the Defence the confidential *Galić* Materials supporting the proposed adjudicated facts;

¹⁴ Prosecution and Defence Joint Notice requesting the Registry to postpone the transmission to Defence of 31 October 2001 and 15 November 2001 redacted 65ter lists and related materials pursuant to 10 November 2006 Decision on Prosecution's third submission on Momčilo Perišić's motion for access, 1 December 2006. The Defence's assertion that it "has been attempting to gain access to confidential material from the *Galić* case for quite some time and has yet to be given access" (Time Request, para. 3) is therefore not strictly accurate.

¹⁵ Memorandum, p.4. See also Time Request, para. 10.

- (2) the Prosecution shall, upon disclosing the *Galić* Materials to the Defence, file a notice confirming that such disclosure has been made;
- (3) The Defence shall, within seven days of this order, file a response to the Prosecution's Motion setting out its submissions on Rule 94(B) of the Rules, not exceeding 3,000 words;
- (4) The Defence shall, within 14 days of the Prosecution's notice confirming that disclosure of the *Galić* Materials has been made, file a response to the Prosecution's Motion addressing each of the facts proposed in the Prosecution's Motion, not exceeding 3,000 words.

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



Patrick Robinson
Pre-trial Judge

Dated this 22nd day of February 2007
At The Hague
The Netherlands

[Seal of the Tribunal]