



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-05-88/2-T
IT-04-81-A
Date: 26 January 2012
Original: English

IN TRIAL CHAMBER II

Before: Judge Christoph Flüge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Decision of: 26 January 2012

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON MOMČILO PERIŠIĆ'S URGENT MOTION
FOR ACCESS TO CONFIDENTIAL MATERIALS**

The Prosecutor v. Zdravko Tolimir

Office of the Prosecutor
Mr. Peter McCloskey

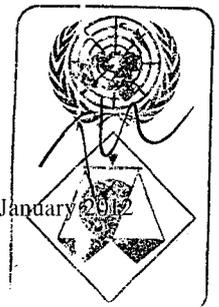
The Accused
Zdravko Tolimir

Case No. IT-05-88/2-T

The Prosecutor v. Momčilo Perišić

Office of the Prosecutor
Ms. Helen Brady

Counsel for Momčilo Perišić
Mr. Novak Lukić
Mr. Gregor Guy-Smith



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”);

BEING SEISED OF the “Urgent Motion by Momčilo Perišić for Access to Confidential Materials in the Zdravko Tolimir Case”, filed on 24 January 2012 (“Motion”), in which the Perišić Defence requests access to the following materials from the *Prosecutor v. Zdravko Tolimir* (“Tolimir case”):

- a. All confidential transcripts from the testimony of Dragomir Pećanac during the week of 16–20 January 2012;
- b. If there are difficulties with (a), Mr. Perišić seeks at a minimum all confidential transcripts of from the testimony of Dragomir Pećanac concerning Mr. Perišić, the Yugoslav Army (VJ), the Federal Republic of Yugoslavia (FRY), Slobodan Milošević, or the entry of 14 July 1995 from the “notebook” of Dragomir Pećanac;
- c. Photocopies of *all* materials handed over to the ICTY by Dragomir Pećanac on 12 January 2012, or at a minimum, the “notebooks” of Dragomir Pećanac and any military documents from July 1995 turned over by Dragomir Pećanac to the ICTY on 12 January 2012.¹

NOTING that the Perišić Defence submits that it is the jurisprudence of the Tribunal that a party is entitled to seek materials from any case before the Tribunal to assist in the preparation of its case if the materials and the purpose for which they are sought have been sufficiently identified,² and that access to confidential materials from another case may be granted where the Chamber is satisfied that the requesting party has established that such material may be of assistance to his case;³

NOTING that the Perišić Defence submits that the Trial Chamber in *Prosecutor v. Momčilo Perišić* (“Perišić case”) has already determined that there is a strong nexus between the *Perišić* case and the *Tolimir* case;⁴

NOTING that the Perišić Defence submits that Perišić’s name was “referred to by the Prosecutor as potentially mentioned in the [*sic*] one of the handwritten ‘notebooks’ brought to the ICTY by Pećanac” and that other documents “appear to the Prosecution to be relevant to the charges against Mr. Tolimir related to Srebrenica”;⁵

NOTING that the Perišić Defence submits that there is a nexus between the materials handed over by Pećanac and the case against Perišić such that a legitimate forensic purpose exists for the access

¹ Motion, para. 13.

² *Ibid.*, para. 3.

³ *Ibid.*, para. 5.

⁴ *Ibid.*, para. 6.

⁵ *Ibid.*, para. 7.

to the listed materials,⁶ the materials have been sufficiently identified so as to allow access,⁷ and the Prosecution does not object to the requested disclosure;⁸

NOTING that the Perišić Defence submits that the Motion is urgent because of the 6 February 2012 deadline for its appeal brief and the materials requested concern the factual predicates of several grounds of appeal;⁹

NOTING that the parties in the *Tolimir* case responded orally to the Motion on 25 January 2012, indicating that neither had an objection to the requested disclosure;¹⁰

NOTING and recalling the applicable law governing party motions for access to confidential materials as set out in detail in this Chamber's "Decision on Defence Requests for Access to Confidential Materials in the *Prosecutor v. Tolimir* Case", filed on 2 June 2010 ("Decision"), which entitles a party to seek material from any source as long as a legitimate forensic purpose for such access has been shown, including access to confidential *inter partes* material where the applicant can demonstrate the existence of a factual nexus between the applicant's case and the case from which the material is sought;¹¹

CONSIDERING that the Trial Chamber in the *Perišić* case has previously found a strong nexus between the *Perišić* case and the *Tolimir* case;¹²

CONSIDERING that the strong nexus between the cases and the likelihood that access to the requested materials would materially assist the applicant's case, the Chamber is satisfied that a legitimate forensic purpose for such access has been shown;

CONSIDERING that the Chamber finds that it is in the interests of justice to grant access to the Perišić Defence to all confidential transcripts from the testimony of Pećanac as well as one confidential Prosecution exhibit admitted into evidence through him;

CONSIDERING that there are two confidential documents that were marked for identification ("MFI") as Chamber exhibits¹³ and they are now in the Chamber's custody;

⁶ *Ibid.*, para. 8.

⁷ *Ibid.*, para. 9.

⁸ *Ibid.*, para. 11.

⁹ *Ibid.*, para. 10.

¹⁰ T. 18402, 18441-18442 (25 January 2012).

¹¹ Decision, paras. 9-11.

¹² *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Zdravko Tolimir's Urgent Request for Disclosure of Confidential Material from the *Perišić* Case, 30 September 2010, para. 10.

¹³ T. 18259 (private session) (23 January 2012). These documents are Exs. C00001 (confidential) and C00002 (confidential).

CONSIDERING that, taking into account the fact that the parties in this case do not oppose the requested disclosure, the Chamber finds it appropriate to order *proprio motu* the Registry to provide the two confidential MFI Chamber exhibits to the Perišić Defence;¹⁴

PURSUANT TO Rules 54 and 75 of the Rules of Procedure and Evidence,

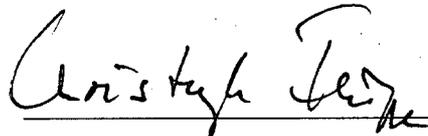
HEREBY GRANTS the Motion and **ORDERS** as follows:

1. The Registry shall provide the following materials to the Perišić Defence by Friday, 27 January 2012:
 - a. All confidential transcripts from the testimony of Dragomir Pećanac in the *Tolimir* case;
 - b. One confidential Prosecution exhibit admitted into evidence through Dragomir Pećanac in the *Tolimir* case (Ex. P02808);
 - c. Two confidential MFI Chamber exhibits in the *Tolimir* case (Exs. C00001 and C00002);
2. Except where directly and specifically necessary for the preparation of the case, and only upon leave granted by the Trial Chamber, the accused in the *Perišić* case shall not disclose to the public, to the media, or to their family members and associates the above-mentioned confidential material.
3. The accused in the *Perišić* case shall not disclose to the public the above-mentioned confidential material disclosed from the *Tolimir* case except to the limited extent that such disclosure is directly and specifically necessary for the preparation of the case, and only after obtaining leave of the Trial Chamber. If any confidential or non-public material is disclosed to the public, the accused in the *Perišić* case shall inform any person to whom disclosure is made that he or she is forbidden to copy, reproduce, or publicise the material or to disclose it to any other person, and that he or she must return the material to the accused in the *Perišić* case as soon as the material is no longer needed for the preparation of the case.
4. If any member of the Defence in the *Perišić* case withdraws from the case, all material in his or her possession shall be returned to the Registry.

¹⁴ The Registry has confirmed to the Chamber that other than one confidential Prosecution exhibit and the two confidential MFI Chamber exhibits, no additional materials are in the custody of the Tribunal.

5. Subject to the modifications prescribed above, any other protective measures already in place in relation to the confidential material shall remain in place.
6. For the purpose of this Decision:
 - a. the “accused in the *Perišić* case” means Momčilo Perišić, his defence counsel and immediate legal assistants and staff and any others specifically to be assigned by the Registry to their defence teams;
 - b. the “public” means all persons, governments, organisations, entities, clients, associations and groups, other than Judges of the Tribunal and the staff of the Registry, the Prosecution, or the accused in the *Perišić* case and their Defence Teams; the “public” includes, without limitation, family, friends, and associates of the accused in the *Perišić* case, and those accused and their defence counsel in other cases or proceedings before the Tribunal; and
 - c. the “media” means all video, audio, and print media personnel including journalists, authors, television, and radio personnel and their agents and representatives.

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



Judge Christoph Flügge

Presiding Judge

Dated this twenty-sixth day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

