



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-02-60-A
Date: 9 September 2005
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Theodor Meron, President
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andresia Vaz

Registrar: Mr. Hans Holthuis

Decision: 9 September 2005

THE PROSECUTOR

v.

**Vidoje BLAGOJEVIĆ
Dragan JOKIĆ**

**DECISION ON MOTION BY RADIVOJE MILETIĆ FOR ACCESS TO
CONFIDENTIAL INFORMATION**

Counsel for the Prosecutor:

Mr. Norman Farrell
Mr. Peter McCloskey

Counsel for the Appellants:

Mr. Vladimir Domazet for Mr. Vidoje Blagojević
Ms. Cynthia Sinatra for Mr. Dragan Jokić

Case No.: IT-02-60-A

Counsel for the Accused Radivoje Miletić:

Ms. Natacha Fauveau Ivanović

Counsel for the Accused Milan Gvero:

Mr. Dragan Krgović

9 September 2005

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 (“International Tribunal”);

NOTING the Judgement of Trial Chamber I in this case, rendered orally on 17 January 2005 and in writing on 24 January 2005 (“Judgement”);

NOTING that various protective measures have been ordered by the Trial Chamber in the *Blagojević and Jokić* case, and that, pursuant to Rule 75(F) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), protective measures that have been issued in any “first proceedings” shall “continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the ‘second proceedings’) unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule”;

BEING SEISED OF the “Motion for Access to Confidential Information in the *Blagojević and Jokić* case” (“Motion”), filed on 7 July 2005 by Radivoje Miletić (“the Applicant”), an accused in another case before the International Tribunal, in which the Applicant seeks access to all transcripts of sealed proceedings, related confidential exhibits, and confidential decisions filed in the *Blagojević and Jokić* case;

NOTING the Prosecution’s “Response to Radivoje Miletić’s Request for Confidential Material in the *Blagojević and Jokić* Case” (“Response”), filed on 21 July 2005, four days after the deadline pursuant to paragraph 14 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal;¹

CONSIDERING that the Prosecution’s stated reason for its untimely filing—that the Response was filed by Trial Counsel who were unfamiliar with the Appeals Chamber’s requirements, and instead followed the deadline applicable in the Trial Chamber pursuant to Rule 126 *bis* of the Rules—does not constitute “good cause” pursuant to Rule 127 of the Rules, because counsel participating in appeals proceedings are expected to familiarize themselves with the relevant procedural requirements;

¹ IT/155 Rev. 2.

CONSIDERING, however, that in view of the essential objective of ensuring the safety of witnesses and the value to the Appeals Chamber of the Prosecution's views on how to achieve that objective, there is "good cause" to treat the Response as validly filed;

NOTING that no response has been filed by the other parties to the *Blagojević and Jokić* proceedings;

NOTING the "*Modification de la Requête du Général Miletic Déposée le 7 Juillet 2005*" ("Modification"), filed by the Applicant on 29 August 2005, which amends the Motion to request only confidential exhibits and decisions, rescinding the request for transcripts of confidential proceedings because the relevant transcripts, as well as audiotapes, had already been voluntarily provided by the Prosecution after the initial filing of the Motion;

CONSIDERING that although the Motion and Modification have also been cross-filed before the Trial Chamber in the Applicant's own case, *Prosecutor v. Tolimir, Miletic, and Gvero*,² pursuant to Rule 75(G), the decision on this issue is for the Appeals Chamber, because it is the chamber currently seised of the "first proceedings", that is, of the case in which the relevant protective measures were ordered, *Blagojević and Jokić*;

NOTING that the Applicant argues that he should be given access to the confidential material in *Blagojević and Jokić* because the case is closely related to his own, as both concern events that took place in the region of Srebrenica in the period from 11 March to the end of August 1995, and as he and the two defendants in *Blagojević and Jokić*, Vidoje Blagojević and Dragan Jokić, are all accused of being members of the same joint criminal enterprise;

NOTING that the Applicant states that he has reviewed the publicly available documents relating to *Blagojević and Jokić*. and that these documents are directly relevant to his own case, and argues that it is therefore necessary to permit him to review the confidential documents as well so as to prepare his own defence;

NOTING that the Applicant undertakes to maintain the confidentiality of the documents if given access, and to respect the witness protection measures ordered in this case;

NOTING that the Prosecution does not oppose his request as applied to confidential exhibits, but does oppose the release of the Trial Chamber's confidential decisions, for which it argues there is no established legitimate forensic purpose, as many of them have no bearing on the Applicant's case;

CONSIDERING that the Appeals Chamber has held that it is sufficient for an accused applying for access to *inter partes* confidential material in another case to demonstrate that "the material sought is likely to assist the applicant's case materially, or at least that there is a good chance that it would", and that this standard is met "by showing the existence of a nexus between the applicant's case and the case from which such material is sought, for example, if the cases stem from events alleged to have occurred in the same geographical area at the same time";³

CONSIDERING that given the nexus between his own case and *Blagojević and Jokić*, the Applicant has satisfied this standard through his general statements regarding the likely usefulness of confidential materials from *Blagojević and Jokić*, and that this holds true for the decisions in *Blagojević and Jokić* as well as the exhibits, since the Trial Chamber's decisions may help the Applicant to prepare his case by shedding light on the Trial Chamber's treatment of legal and factual issues that may be common to the two cases;

CONSIDERING that although it is true that, as the Prosecution argues, not all the confidential decisions are likely to be relevant to the Applicant's case—just as not every exhibit is likely to be relevant—the Appeals Chamber has not required accused seeking access to *inter partes* confidential materials in other cases to establish a specific reason that each individual item is likely to be useful;

CONSIDERING that the witness protection concerns potentially implicated by the release of the confidential decisions can best be addressed by allowing the Prosecution to file on an *ex*

² Case No. IT-04-80-PT.

³ *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Decision on "Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Naletilić and Martinović*" and "Jadranko Prlić's Notice of Joinder to Slobodan Praljak's Motion for Access", 13 June 2005, p. 6 ("*Naletilić* Decision").

parte basis an application for new protective measures identifying the specific decisions to the release of which it objects;⁴

NOTING that in his Motion, the Applicant stated that he seeks access to all confidential materials and that, in response, the Prosecution asserted that the Applicant does not specifically seek access to *ex parte* material, and the Applicant neither filed a Reply contesting this assertion nor addressed this issue in his subsequent Modification;

CONSIDERING that, on the basis of the foregoing, the Appeals Chamber will assume that the Applicant does not seek access to *ex parte* materials;

RECALLING that “once an Appeals Chamber determines that confidential material filed in another case may materially assist an applicant, the Appeals Chamber shall determine which protective measures shall apply to the said material as it is within the Appeals Chamber’s discretionary power to strike a balance between the rights of a party to have access to material to prepare its case and guaranteeing the protection and integrity of confidential information”;⁵

PURSUANT to Rule 75 of the Rules;

GRANTS the Motion, as amended by the Modification, and allows the Applicant access, subject to the conditions set forth below, to all exhibits and decisions classified as *inter partes* and confidential in the *Blagojević and Jokić* case;

ORDERS that:

(a) the Prosecution, Vidoje Blagojević and Dragan Jokić apply to the Appeals Chamber for additional protective measures or redactions, if required, within fifteen working days from this decision;

(b) where no additional protective measures or redactions are requested either by the Prosecution, Vidoje Blagojević or Dragan Jokić within fifteen working days, the Registry

⁴ The Prosecution suggests that the “Appeals Chamber may wish to review similar examples of such confidential decisions”, i.e. those not materially assisting the defence, and lists certain page ranges of the Registry records. Response, p. 4 fn. 10. However, its reference to “examples” suggests that this list is not comprehensive.

⁵ *Naletilić* Decision, p. 7.

shall provide the Applicant, his Counsel and any employees who have been instructed or authorized by his Counsel, with all *inter partes* confidential material described above, in electronic format where possible;

(c) where additional protective measures or redactions are requested for any of the *inter partes* confidential material described above, either by the Prosecution, Vidoje Blagojević or Dragan Jokić within fifteen working days, the Registry shall withhold that material until the Appeals Chamber has issued a decision on the request(s):

(i) if the Appeals Chamber denies the request(s), the Registry shall be ordered to provide the Applicant, his Counsel, and any employees who have been instructed or authorized by his Counsel, with the *inter partes* confidential material to which the Appeals Chamber grants access, in electronic format where possible;

(ii) if the Appeals Chamber grants the request(s), the party or parties applying for redactions shall be ordered to proceed with the authorized redactions and, thereafter, shall provide the redacted *inter partes* confidential material to the Registry for provision to the Applicant, his Counsel and any employees who have been instructed or authorized by his Counsel in electronic format where possible.

(d) save as otherwise required by this decision, the *inter partes* confidential material provided by the Registry shall remain subject to any protective measures previously imposed by the Trial Chamber.

The Applicant, his Counsel and any employees who have been instructed or authorized by his Counsel to have access to the *inter partes* confidential material described above shall not, without express leave of the Appeals Chamber finding that it has been sufficiently demonstrated that third-party disclosure is absolutely necessary for the preparation of the defence of the Applicant:

(a) disclose to any third party, the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;

(b) disclose to any third party, any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony; or

(c) contact any witness whose identity was subject to protective measures.

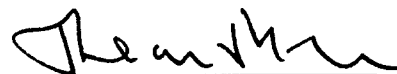
If, for the purposes of preparing the defence of the Applicant, non-public material is disclosed to third parties – pursuant to authorization by the Appeals Chamber – any person to whom disclosure of the confidential material in this case is made shall be informed that he or she is forbidden to copy, reproduce or publicize, in whole or in part, any non-public information or to disclose it to any other person, and further that, if any such person has been provided with such information, he or she must return it to the Applicant or his Counsel or any authorized employees of his Counsel as soon as it is no longer needed for the preparation of his defence.

For the purposes of the above paragraphs, third parties exclude: (i) the Applicant; (ii) his Counsel; (iii) any employees who have been instructed or authorized by his Counsel to have access to confidential material; and (iv) personnel from the International Tribunal, including members of the Prosecution.

If Counsel for the Applicant or any members of the Defence team who are authorized to have access to confidential material should withdraw from the Applicant's case, any confidential material to which access is granted in this decision that is in their possession shall be returned to the Registry of the International Tribunal.

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

Dated 9 September 2005
At The Hague
The Netherlands



Judge Theodor Meron
Presiding

[Seal of the Tribunal]