



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 Nos. IT-98-29/1-A
Date: 27 April 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Decision: 27 April 2009

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

**DECISION ON MOMČILO PERIŠIĆ'S REQUEST FOR
ACCESS TO CONFIDENTIAL MATERIAL IN THE
DRAGOMIR MILOŠEVIĆ CASE**

Office of the Prosecutor:

Mr. Paul Rogers

Counsel for Momčilo Perišić:

Mr. Novak Lukić

Counsel for Dragomir Milošević:

Mr. Branislav Tapušković
Ms. Branislava Isailović

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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of appeals against the Judgement of Trial Chamber III rendered in the present case on 12 December 2007.¹ The Appeals Chamber is also presently seized of the “Addendum to Motion by Momčilo Perišić Seeking Access to Confidential Materials in the *Dragomir Milošević* Case No. IT-98-29/1-T” filed on 4 March 2009 by Counsel for Momčilo Perišić (“Perišić”),² an accused in another case before the Tribunal. Neither the Office of the Prosecutor (“Prosecution”) nor Dragomir Milošević (“Milošević”) responded to the Motion.

I. BACKGROUND

2. On 6 March 2006, Perišić filed a motion seeking access to all confidential material in the *Dragomir Milošević* case “including the indictment supplementing material pursuant to Rule 66A(i) [of the Rules of Procedure and Evidence of the Tribunal (“Rules”)], all Rule 66 and 68 material, transcripts of closed sessions and the filings”.³ On 14 March 2006, the Prosecution filed a response offering no objection to the sought disclosure, provided that (i) the material is disclosed to Perišić precisely as disclosed to Milošević, subject to the same protective measures, including redactions; and (ii) the providers of the Rule 70 material, if any, consent to the disclosure.⁴

3. On 29 March 2006, Trial Chamber II (“Trial Chamber”) granted the Motion of 6 March 2006 in part.⁵ In particular, it allowed Perišić access to (i) “[a]ll confidential supporting material that accompanied the Joint and the Redacted Indictments in the *Dragomir Milošević* case, and which pertains to the charges related to Sarajevo for Counts 2 and 9-14 of the Joint Indictment and Counts 1-7 of the Redacted Indictment”; and (ii) “[a]ll *inter partes* confidential filings pertaining to

¹ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgement, 12 December 2007 (“*Milošević* Trial Judgement”); see also *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Prosecution Notice of Appeal, 31 December 2007; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Defence Notice of Appeal Against the Trial Judgement, 11 January 2008 (confidential).

² *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Addendum to Motion by Momčilo Perišić Seeking Access to Confidential Materials in the *Dragomir Milošević* Case No. IT-98-29/1-T, 4 March 2009 (“Motion”).

³ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Applicant’s Motion Seeking Access to Confidential Material in *Dragomir Milošević* Case, 6 March 2006 (“Motion of 6 March 2006”), p. 7, para. 14.

⁴ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Prosecution’s Response to Request by Momčilo Perišić to Confidential Materials in *Dragomir Milošević* Case, 14 March 2006, paras 4-5.

⁵ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Order on Applicant’s Motion Seeking Access to Confidential Material in *Dragomir Milošević* Case, 29 March 2006 (“Order of 29 March 2006”), p. 4-5.

the charges related to Sarajevo for counts 2 and 9-14 of the Joint Indictment and Counts 1-7 of the Redacted Indictment”.⁶

II. APPLICABLE LAW

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

5. The Appeals Chamber further notes that access to confidential material may be granted when a Chamber is satisfied that the party seeking access has established that such material “is likely to assist the [party’s] case materially, or [...] there is a good chance that it would”.⁸ This standard is met by showing the existence of a factual nexus between the two cases such as a “geographical, temporal or otherwise material overlap”.⁹

III. SUBMISSIONS

6. Perišić seeks to expand the ruling of the Trial Chamber Order to include access to “all exhibits, including those confidential or under seal, and private and closed session transcripts of court proceedings” in the *Dragomir Milošević* case.¹⁰ He does not seek access to any *ex parte* materials.¹¹

7. Perišić points to the Trial Chamber’s finding that the similarities in the facts giving rise to the charges against him and against Milošević, with regard to events in and around Sarajevo between 10 August 1994 and 21 November 1995, constituted a clear geographical and temporal overlap between the two proceedings, sufficient to justify access to confidential material.¹² He notes that since the Order of 29 March 2006, the Prosecution filed an amended indictment in the *Perišić*

⁶ Order of 29 March 2006, p. 4; see also *Prosecutor v. Stanislav Galić and Dragomir Milošević*, Case No. IT-98-29-1, Indictment, 14 April 1998 (“*Milošević* Joint Indictment”), *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29-1, Indictment, 26 March 1999 (“*Milošević* Redacted Indictment”).

⁷ 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 (“*Martić* Decision”), 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, p. 4.

⁸ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005 (“*Blagojević and Jokić* Decision”), para. 8.

⁹ *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić and Čerkez Case, 23 January 2003, p. 4; see also *Martić* Decision, para. 9.

¹⁰ Motion, paras 1, 13.

¹¹ Motion, para. 12.

¹² Motion, para. 10, referring to the Order of 29 March 2006, p. 3.

case.¹³ However, Perišić argues that “the charges and factual circumstances relating to Sarajevo remain unchanged” and that, consequently, the factual nexus between the *Perišić* and *Dragomir Milošević* cases has not changed.¹⁴ Perišić submits that the *Milošević* Trial Judgement, when read in conjunction with the *Perišić* Amended Indictment, further substantiates the overlap between the cases.¹⁵

8. Perišić further refers to the Appeals Chamber’s decision rendered in the *Galić* case, in which, “upon a substantially similar application”, he was granted access to *inter partes* confidential exhibits submitted in the case of Milošević’s former co-accused, Stanislav Galić.¹⁶

9. Finally, Perišić undertakes to comply with all protected measures imposed on such material in the *Dragomir Milošević* case, as well as with any additional conditions imposed by the present decision.¹⁷

IV. DISCUSSION

10. The Appeals Chamber is satisfied that Perišić has clearly identified the confidential material which he seeks access to, namely, “all exhibits, including those confidential or under seal, and private and closed session transcripts of courts proceedings in the *Dragomir Milošević* Case”.¹⁸ As noted by the Trial Chamber, this material did not exist at the time of the Order of 29 March 2006, as the case was in pre-trial stage.¹⁹

11. Further, the Appeals Chamber acknowledges that the events addressed in the *Milošević* Judgement are closely related to the charges against Perišić. The *Perišić* Amended Indictment identifies Milošević as subordinate to Perišić and, *inter alia*, charges Perišić with command responsibility for Milošević’s acts in relation to crimes that occurred in and around Sarajevo between August 1994 and November 1995.²⁰ In turn, Milošević was found guilty of crimes committed in and around Sarajevo during this period.²¹ In particular, the Appeals Chamber notes that six out of nine shelling incidents and six out of twelve sniping incidents described in the Schedule to the *Perišić* Amended Indictment are identical to those analyzed in the *Milošević*

¹³ Motion, para. 7, referring to *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Prosecution Filing of Revised Second Amended Indictment with Annex A, 5 February 2008 (“*Perišić* Amended Indictment”).

¹⁴ Motion, para. 7.

¹⁵ Motion, paras 8-9.

¹⁶ Motion, para. 11, referring to *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, 16 February 2006 (“*Galić* Decision”).

¹⁷ Motion, para. 12.

¹⁸ Motion, paras 1, 13.

¹⁹ Order of 29 March 2006, p. 4

²⁰ *Perišić* Amended Indictment, para. 45.

²¹ *Milošević* Trial Judgement, para. 1006.

Judgement.²² In light of these factors, the Appeals Chamber considers that there is a sufficient nexus between the *Perišić* and *Dragomir Milošević* cases, and that this nexus warrants granting Perišić access to confidential and under seal *inter partes* exhibits as well as to private and closed session transcripts in the *Dragomir Milošević* case.

12. In light of the foregoing, the Appeals Chamber grants Perišić's request for access to the identified material, subject to the conditions of access described below.

V. CONDITIONS OF ACCESS

A. Rule 70

13. The Appeals Chamber notes that, under Rule 70(B) of the Rules, information "provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence [...] shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information". The same restriction may be applied to information in possession of the Defence under Rule 70(F) of the Rules. In respect of motions seeking access to confidential material in another case, the Appeals Chamber has previously ruled that material provided under Rule 70 of the Rules shall not be released to the accused in another case unless the provider consents to such disclosure.²³ Accordingly, the Appeals Chamber holds that any material that has been provided to the Prosecution under Rule 70(B) of the Rules, in addition to any material that may have been provided to Milošević under Rule 70(F) of the Rules, shall not be released to Perišić unless and before the providers give their consent.

B. Protective Measures

14. The Appeal Chamber notes that protective measures ordered in one proceeding "shall continue to have effect *mutatis mutandis* in any other proceeding before the Tribunal".²⁴ It further recognises that once the Appeals Chamber has granted access to confidential materials from another case, it then determines if and what additional protective measures are necessary in order to "strike

²² Compare *Perišić* Amended Indictment, Schedule A: Nos 4-9 with *Milošević* Judgement, Part II(6)(b)(ii), (iv), (v), (x), (xii) and (xv); compare also *Perišić* Amended Indictment, Schedule B: Nos 7-12 with *Milošević* Judgement, Part II(4)(b)(i)(a)-(e), (ii)(b) and (iii)(b)-(c).

²³ *Galić* Decision, para. 12, referring to *Prosecutor v. Mladen Naletilić, aka "Tuta" and Vinko Martinović, aka "Štela"*, 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 ("*Naletilić* Decision") p. 8.

²⁴ Rule 75(F)(i) of the Rules; see also *Galić* Decision, para. 11.

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”.²⁵

15. The Appeals Chamber finds that existing protective measures should continue to apply to any material released to Perišić. It will further give the opportunity to the parties to the *Dragomir Milošević* case to request additional protective measures, if they so choose.

VI. DISPOSITION

16. For the foregoing reasons, the Appeals Chamber **GRANTS** the Motion and allows Perišić, subject to the conditions set forth below, access to all *inter partes* exhibits and all private and closed session transcripts of court proceedings in the *Dragomir Milošević* case.

17. The Appeals Chamber **ORDERS** the Prosecution and Milošević:

- a. to identify to the Appeals Chamber and the Registry of the Tribunal (“Registry”), within 10 working days from the date of this decision, what, if any, exhibits contain material that has been provided to them subject to Rule 70 of the Rules;
- b. within 15 working days from the date of this decision, to seek leave from the Rule 70 providers to disclose this material to Perišić.

18. The Appeals Chamber **REQUESTS** the Registry:

- a. to withhold any material provided pursuant to Rule 70 of the Rules, as identified by the Prosecution or Milošević, until the responses of the providers have been relayed;
- b. where the providers have consented to further disclosure, to provide Perišić, all of his Counsel and any employees who have been instructed or authorised by Counsel, with all such material, in electronic format where possible;
- c. where the providers have refused consent to further disclosure, to withhold that material.

19. The Appeals Chamber **ORDERS** the Prosecution and Milošević to apply to the Appeals Chamber for additional protective measures or redactions, if required, within 15 working days from the date of this decision.

20. The Appeals Chamber **REQUESTS** the Registry:

²⁵ *Blagojević and Jokić* Decision, para. 16, referring to *Naletilić* Decision, p. 7.

- a. where no additional protective measures or redactions are requested within 15 working days from the date of this decision, and where exhibits have not, within 10 working days from the date of this decision, been identified by the Prosecution or Milošević as having been provided pursuant to Rule 70 of the Rules, to provide Perišić, all of his Counsel and any employees who have been instructed or authorised by Counsel with all *inter partes* confidential and under seal material described above, in electronic format where possible;
- b. where additional protective measures or redactions are requested, to withhold that material until the Appeals Chamber has issued a decision on the request.

21. The Appeals Chamber, unless otherwise required by this decision, **ORDERS** that the *inter partes* confidential and under seal material provided by the Registry shall remain subject to any protective measures imposed by the Trial Chamber.

22. The Appeals Chamber **ORDERS** that Perišić, all of his Counsel and any employees who have been instructed or authorised by Counsel to have access to the *inter partes* confidential and under seal material described above shall not, without the express leave of the Appeals Chamber, through a finding that it has been sufficiently demonstrated that third party disclosure is necessary for the preparation of Perišić's defence:

- 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 of prior testimony; or
- c. contact any witness whose identity was subject to protective measures;

23. The Appeals Chamber **ORDERS** that if, for the purposes of the preparation of Perišić's defence, non-public material is disclosed to third parties – pursuant to authorisation by the Appeals Chamber – any person to whom disclosure of the confidential material is made shall be informed that he or she is forbidden to copy, reproduce or publicise, 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 Perišić defence team as soon as the information is no longer needed for the preparation of his defence.

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

25. The Appeals Chamber **ORDERS** that if Counsel for Perišić or any members of the Defence team who are authorised to have access to confidential material should withdraw from the case, any confidential material to which access is granted in this decision and that remains in their possession shall be returned to the Registry.

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



Judge Fausto Pocar
Presiding

Dated this 27th day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]