



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-05-87-T
IT-05-87/1-PT
Date: 21 November 2007
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 21 November 2007

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

**DECISION ON ĐORĐEVIĆ MOTION FOR ACCESS TO
MATERIALS IN *MILUTINOVIĆ ET AL.* CASE**

Prosecutor v. Milutinović et al.

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

Prosecutor v. Vlastimir Đorđević

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused

Mr. Dragoljub Đorđević and Mr.
Veljko Đurđić for Vlastimir Đorđević

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 “Vlastimir Đorđević’s Motion for Access to Transcripts, Exhibits and Documents,” filed publicly on 26 October 2007 (“Motion”), and hereby renders its decision thereon.

1. In the Motion, Vlastimir Đorđević (“Applicant”) seeks the disclosure of the following materials from the *Milutinović et al.* case: (a) all public and non-public transcripts of the proceedings; (b) all public and non-public exhibits; and (c) all documentary evidence and motions submitted by the parties.¹

2. The Applicant argues that he is one of the seven persons indicted for alleged participation in the joint criminal enterprise together with Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić (collectively “Accused”).² Consequently, the Applicant argues that he has a right to fully access the trial record in the *Milutinović et al.* case based on (a) the fact that he and the Accused are all indicted with the same Indictment and charged for the same alleged crimes; (b) the need to conduct an adequate preparation for his defence case; and (c) the Applicant’s right to a fair and expeditious trial.³

3. In addition, the Applicant assures the Trial Chamber that he will respect all protective measures ordered by the Trial Chamber in the *Milutinović et al.* case.⁴

4. On 12 November 2007, the Prosecution publicly filed its Response, in which it partially objects to the Motion.⁵ The Prosecution objects to the Applicant’s access to materials that were filed *ex parte*, arguing that (a) not all *ex parte* materials are *ipso facto* relevant to the Applicant; (b) the protection that *ex parte* materials enjoy does not discharge the Prosecution from its disclosure obligations pursuant to Rules 66 and 68 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) and therefore the Applicant cannot be prejudiced by restricting his access to it; and, (c) in the instant case, the Applicant did not provide any legitimate forensic purpose for obtaining *ex parte* materials from the *Milutinović et al.* case.⁶

¹ Motion, paras. 1, 9.

² Motion, para. 4.

³ Motion, paras. 4–7.

⁴ Motion, para. 8.

⁵ Prosecution Response to Motion by Vlastimir Đorđević for Access to Transcripts, Exhibits and Documents in the *Milutinović et al.* Case, 12 November 2007 (“Response”).

⁶ Response, paras. 6–7.

5. In respect to the other requested materials, the Prosecution does not oppose their disclosure, provided that (a) where necessary, the consent of any Rule 70 provider is obtained; and (b) information identifying witnesses who have been afforded the protective measure of delayed disclosure is redacted from the material prior to disclosure to the Applicant.⁷ The Prosecution maintains that the latter measure is necessary to protect the identity of certain sensitive witnesses, to whom the Trial Chamber in the *Milutinović et al.* case granted the protective measure of delayed disclosure.⁸

6. In addition, the Prosecution does not object to the Applicant's access to transcripts of open session testimony, public exhibits, filings, and motions in the *Milutinović et al.* case, but notes that all materials from open sessions are available to the public and suggests that the Applicant contact the Registry directly in relation thereto.

7. With regard to the access to *ex parte* materials, the Trial Chamber recalls that, in light of the special considerations related to such materials, applicants must meet a higher standard in order to establish a legitimate forensic purpose.⁹ In this case, the Applicant offers no particular reasons why he should be allowed access to *ex parte* materials in *Milutinović et al.* case, and therefore the Trial Chamber denies the Motion in this respect.

8. In relation to identifying information of witnesses who were granted delayed disclosure, the Trial Chamber recalls that, according to Rule 75(F)(i), “[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal,” such measures “shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ... unless and until they are rescinded, varied or augmented”. The Appeals Chamber has held that “delayed disclosure” orders constitute a form of protective measure that continues to have effect *mutatis mutandis* in subsequent proceedings before the Tribunal pursuant to Rule 75(F).¹⁰ In the *Milutinović et al.* case, the Trial Chamber ordered delayed disclosure for several witnesses, and the Prosecution was thus permitted to delay disclosure of these witnesses' identities and to redact

⁷ Response, para. 4.

⁸ Response, para. 10.

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. 5; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić's Motion for Access to All Confidential Materials in the *Brđanin* Case, 24 January 2007, para. 17; *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 17; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Defence Motion by Franko Simatović for Access to Transcripts, Exhibits, Documentary Evidence and Motions Filed by the Parties in the *Simić et al.* Case, 12 April 2005, p. 3.

¹⁰ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić's Motion for Access to All Confidential Materials in the *Brđanin* Case, 24 January 2007, para. 17.

information indicating their current whereabouts from their statements.¹¹ The Trial Chamber therefore considers that the Prosecution's request to delay disclosure in respect of these witnesses is appropriate and provided for in the Rules and jurisprudence of the Tribunal.

9. The Trial Chamber wishes to stress that the “**Order Regarding Protective Measures**”, issued 14 December 2006—which is a public decision available to the Applicant on the Tribunal's Judicial Database—comprehensively sets out the protective measures for the witnesses called by the Prosecution in *Milutinović et al.* The Trial Chamber subsequently ordered protective measures for additional witnesses in the following decisions:¹²

- *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Protective Measures for Witness K90, 23 January 2007;
- *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Protective Measures for Witness K79, 1 February 2007; and
- *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lazarević Motion for Protective Measures for Witness SD1, 3 August 2007.

The parties are directed to these decisions for the protective measures that were ordered for witnesses in this case; and, the Trial Chamber, for the avoidance of doubt, reminds the Applicant of his obligation to respect all these orders.

10. Accordingly, the Trial Chamber, pursuant to Rules 54, 70, and 75 of the Rules, hereby **GRANTS** the Motions, in part, and:

- a. **ORDERS** the Prosecution, due to its familiarity with the material concerned, to identify for the Registry the following *inter partes* material in the case of *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, for disclosure to the Applicant:
 - (i) all closed and private session transcripts produced in the pre-trial and trial proceedings up to and including the date of this Decision and not subject to Rule 70;
 - (ii) all confidential and under seal trial exhibits not subject to Rule 70; and

¹¹ *Prosecutor v. Vladimir Lazarević and Sreten Lukić*, Case. No. IT-03-70-PT, Decision on Prosecution's Motion for Protective Measures and Request for Joint Decision on Protective Measures, 19 May 2005.

¹² The Chamber is also currently seised of a motion from the Lazarević Defence for protective measures for another witness. See partly confidential Vladimir Lazarević's Motion for Protective Measures with Confidential Annex, 12 November 2007.

- (iii) all confidential and under seal filings by the parties during the proceedings, not subject to Rule 70.
- b. **ORDERS** the Prosecution to determine without delay which of the material requested is subject to the provisions of Rule 70, immediately thereafter to contact the providers of such material to seek their consent for its disclosure, and immediately after that to inform the Registry whether consent for the disclosure of that material has been obtained or not, whichever is the case. The Registry shall withhold disclosure of any material subject to Rule 70 until such time as the Prosecution 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. This order shall apply to materials in the case up to and including the date of this Decision.
- c. **ORDERS** that no *ex parte* material be disclosed from the case of *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T.
- d. **ORDERS** that the Applicant, his Defence team, and any employees who have been instructed or authorised by the Applicant, shall not:
 - (i) disclose to the public, or to any third party, any confidential or non-public material disclosed from the *Milutinović et al.* case, including witness identities, statements, or transcripts, except to the limited extent that disclosure to members of the public is directly and specifically necessary for the preparation and presentation his defence. If any confidential or 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 cases. 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 her representatives, and the Applicant, his counsel, and any employees who have been instructed or authorised by the Applicant's counsel to have access to the confidential material. "The public" also includes, without limitation, families,

friends, and associates of the Applicant; accused and defence counsel in other cases or proceedings before the Tribunal; the media; and journalists;

- e. **ORDERS** that nothing in this Order shall affect the disclosure obligations of the Prosecution under Rules 66 and 68; and **RECALLS** that it is the responsibility of the Prosecution to determine whether there is additional material related to the *Milutinović et al.* proceedings that should be disclosed to the Applicant but which is not covered by the terms of this Decision.
- f. **RECALLS** that, pursuant to Rule 75(F)(i) of the Rules, any protective measures that have been ordered in respect of a witness in the *Milutinović et al.* case shall continue to have effect in the case against the Applicant, except insofar as they have been varied in accordance with this Decision. The Prosecution is therefore entitled to redact the identifying information, at this point in the proceedings, in relation to witnesses for whom delayed disclosure has been ordered.
- g. **REQUESTS** the Registry to provide access to the Applicant to the non-Rule 70 *inter partes* confidential material, once it has been identified by the Prosecution in accordance with paragraphs (a) through (b).
- h. **REQUESTS** the Registry to facilitate the Applicant's access to public material in the *Milutinović et al.* case.

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

Judge Iain Bomy
Presiding

Dated this twenty-first day of November 2007
At The Hague
The Netherlands

[Seal of the Tribunal]