



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-05-87/1-T
Date: 10 June 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking, Registrar

Order: 10 June 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR ACCESS TO
TRANSCRIPTS, EXHIBITS AND DOCUMENTS IN THE
ĐORĐEVIĆ CASE**

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz
Mr Matthias Neuner

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

I. BACKGROUND

1. This decision of Trial Chamber II (“Chamber”) of the International Criminal 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 in respect of the “Motion for Access to Transcripts, Exhibits and Documents” (“Motion”), filed by Nebojša Pavković, on 19 March 2009, seeking access to “all transcripts, exhibits and documents thus far produced and to be produced for the balance of the trial in the case of *Prosecutor v. Vlastimir Đorđević*” (“*Đorđević trial*”) for use in the preparation of his appeal pursuant to Rule 115 of the Rules of Procedure and Evidence (“Rules”).¹ Vladimir Lazarević, Sreten Lukić, Dragoljub Ojdanić, Milan Milutinović, and Nikola Šainović filed individual Motions whereby they moved to join in the Pavković’s Motion, incorporating its reasoning.² Together they will be referred to as the Applicants.

2. On 2 April 2009, the Office of The Prosecutor (“Prosecution”) filed “Prosecution’s Response to Defences Motion for Access to Transcripts, Exhibits and Documents in the *Đorđević Case*” (“Response”). With respect to Nebojša Pavković, Vladimir Lazarević, Sreten Lukić, Dragoljub Ojdanić, and Nikola Šainović, the Prosecution (i) opposes disclosure of confidential *ex parte* information; (ii) does not oppose disclosure of the remaining confidential information provided that, where necessary, the consent of Rule 70 providers is obtained; (iii) requests leave to disclose in redacted form the statements of witness K91 and other witnesses for whom delayed disclosure has been granted³; (iv) does not oppose the Motion in so far as it relates to public information.⁴ Further, the Prosecution opposes disclosure of all confidential information from the *Đorđević trial* to Milan Milutinović.⁵

3. Vlastimir Đorđević did not make any submissions.

¹ Motion, para 1.

² *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Vladimir Lazarević Joinder in Pavković Defence Motion for Access to Transcripts, Exhibits and Documents, 25 March 2009; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Sreten Lukić’s Joinder in Pavković Defence Motion for Access to Transcripts, Exhibits and Documents, 26 March 2009; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, General Ojdanić Joinder in Pavković Defence Motion for Access to Transcripts, Exhibits and Documents, 26 March 2009; *Prosecutor v. Đorđević*, Case No. IT-05—87-1-PT, Milan Milutinović’s Motion to Join the Pavković’s Defence Motion for Access to Transcripts, Exhibits and Documents, 27 March 2009; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Nikola Šainović’s Defence Motion to Join the Pavković Defence Motion for Access to Transcripts, Exhibits and Documents, 30 March 2009.

³ Response, para 2.

⁴ Response, para 2.

⁵ Response, para 3.

4. The Applicants were each co-accused in the *Milutinović et al.* trial. Milan Milutinović was acquitted by the decision of the Trial Chamber. Vladimir Lazarević, Sreten Lukić, Dragoljub Ojdanić, Nikola Šainović and Nebojša Pavković were each convicted. By a decision of the Appeals Chamber all parties wishing to appeal against the Trial Judgment were to file their notice of appeal by 27 May 2009.

5. On 29 April 2009, the Chamber issued an Order reserving its decision on the Motion until a Notice of Appeal was filed by Vladimir Lazarević, Sreten Lukić, Dragoljub Ojdanić, Nikola Šainović or Nebojša Pavković against their individual conviction or by the Prosecution against Milan Milutinović's acquittal or until the expiration of the time for appeal ordered by the Appeals Chamber had expired.⁶

6. On 27 May 2009, Vladimir Lazarević, Sreten Lukić, Dragoljub Ojdanić, Nikola Šainović and Nebojša Pavković filed Notices of Appeal against their individual convictions.⁷ Also on 27 May 2009, the Prosecution filed a Notice of Appeal against Vladimir Lazarević, Sreten Lukić, Dragoljub Ojdanić, Nikola Šainović and Nebojša Pavković.⁸ The Prosecution has not filed a Notice of Appeal against Milan Milutinović's acquittal.

II. SUBMISSIONS

7. The Applicants argue that (i) Vlastimir Đorđević and the Applicants are alleged to have participated in one Joint Criminal Enterprise ("JCE"); (ii) many of the witnesses that testified in the *Milutinović et al.* trial may provide new or additional information when giving evidence in the *Đorđević* trial, knowledge of which would facilitate and could be of significant value in the preparation of their respective appeal cases; and (iii) the interest of justice and the Applicant's right to a fair trial argue in favour of granting the Motion. The Joined Defences further submits that the requested information be made available to them in a timely fashion given the nature and time limitation of the appeal proceedings and that the disclosure be made on a continuous basis. The Applicants undertake to respect all protective measures ordered by this Chamber in relation to the requested information.

⁶ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, "Order Regarding the Defence Motion for Access to Transcripts, Exhibits, and Documents, in the Đorđević case", 29 April 2009.

⁷ *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković and Sreten Lukić*, Case No. IT-05-87-A, "Vladimir Lazarević's Defence Notice of Appeal", General Ojdanić's Notice of Appeal", "Sreten Lukić's Notice of Appeal from Judgement and Request for Leave to Exceed the page Limit", "Notice of Appeal from the Judgement of 26 February 2009" and "Defence Submission Notice of Appeal", 27 May 2009.

⁸ *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković and Sreten Lukić*, Case No. IT-05-87-A, 27, "Prosecution Notice of Appeal", 27 May 2009.

8. The Prosecution submits that as Vlastimir Đorđević was initially a co-accused in the *Milutinović et al.* trial, it does not contest the existence of a nexus between the *Milutinović et al.* trial and the *Đorđević* trial.⁹

9. The Prosecution does not object to the request for access to all public information noting however, that such information is already available from the Registry.

10. The Prosecution notes that, pursuant to Rule 70, it should seek and request that it be provided with the opportunity to seek, the consent of all providers of confidential information which is subject to that Rule prior to its disclosure.

11. The Prosecution objects to the disclosure of confidential *ex parte* information in the *Đorđević* trial, arguing that (i) “not all *ex parte* information is ipso facto relevant to an applicant” (ii) “the protection that *ex parte* information enjoys does not discharge the Prosecution from its disclosure obligations pursuant to Rule 66 and 68 of the Rules, so an accused cannot be prejudiced by restricting his access to it.”¹⁰

12. The Prosecution submits that it should be granted leave to redact identifying information relating to witness K91 and other witnesses subject to an order for delayed disclosure in *Đorđević* trial because of “exceptionally serious security concerns.”

13. Finally, the Prosecution objects to the disclosure of information to Milan Milutinović. It submits in effect that as Milan Milutinović was acquitted of all charges against him in the *Milutinović et al.* trial and as no notice of appeal has been filed, he does not have “standing or legitimate purpose for access to the information in the *Đorđević* trial.”¹¹

III. LAW

14. The Chamber notes the well-established principle of the Tribunal that, “in general, [a] party is always entitled to seek information from any source, including from another case before the Tribunal, to assist in the preparation of its case”.¹² However, a Chamber may restrict the access

⁹ Response, para 13.

¹⁰ Response, para 8.

¹¹ Response, para 3.

¹² *Prosecutor v. Blaškić*, Case No. IT-95-14-A, “Decision on Appellant’s Dario Kordić and Mario Čerkez Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Trial Pleadings and Hearing Transcripts filed in *Prosecutor v. Blaškić*” 16 May 2002, (“Blaškić Decision”) para 14; *Prosecutor v. Kordić and 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, (Kordić Decision)“, p 3.

of the public and of a party to confidential information which may be categorized in three types: *inter partes*, *ex parte* and Rule 70.¹³ According to the jurisprudence of the Tribunal, the standards for access are different for each type.

15. With regard to confidential *inter partes* information, the legal standard is that a party is entitled to seek information from any source to assist in the preparation of its case, if the information sought has been identified or described by its general nature, and if a legitimate forensic purpose for access to such information has been shown, *i.e.* if it is relevant and essential.¹⁴ The identification requirement is not particularly onerous and numerous Appeals Chamber decisions have accepted requests for access to “all confidential information” as sufficiently specific to meet this standard.¹⁵ The requirement of relevance of confidential *inter partes* information may be determined by showing “the existence of a nexus between the applicant’s case and the original case from which the information is sought and the applicant is therefore required to demonstrate a “geographical, temporal or otherwise information overlap” between the two proceedings”.¹⁶ The essential nature of the information, in turn, means that the party seeking access to confidential information must show that “the material sought is likely to assist the applicant’s case materially, or at least, there is a good chance that it would.”¹⁷

16 With regard to *ex parte* information, a “higher standard” for establishing a “legitimate forensic purpose” is required. The Appeals Chamber has stressed that “*ex parte* information, being of a higher degree of confidentiality, by nature contains information which has not been disclosed *inter partes* because of security interests of a State, other public interests, or privacy interests of a person or institution” and that “consequently, the party on whose behalf *ex parte* status has been granted enjoys a protected degree of trust that the *ex parte* information will not be disclosed.”¹⁸ It

¹³ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, “Decision on Vlastimir Đorđević’s Motion for Access to All Material in Prosecutor v. Limaj et al.”, Case No. IT-03-66, 6 February 2008, (“*Đorđević* First Decision”) p 6;

¹⁴ *Blaškić* Decision para 14; *Kordić* Decision, p 3.

¹⁵ *Prosecutor v. Radoslav Brdanin*, IT-99-36-A, “Decision on Motion by Jovica Stanišić for Access to All Confidential Materials in the Brdanin case”, 24 January 2007, para 11, as referred to by *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, “Decision on Momčilo Perišić’s Motion for Access to Confidential Materials in the Radovan Karadžić Case”, 14 October 2008, para 18, with further references.

¹⁶ See *Đorđević* First Decision, p 3.

¹⁷ *Prosecutor v. Prosecutor v. Blaškić*, Case No. IT-95-14-A, “Decision on Appellant’s Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits From the Aleksoski Case”, 8 March 2002, p 3; *Prosecutor v. Kordić* and 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.

¹⁸ See also *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, “Decision on Motion by Mićo Stanišić for Access to All Confidential Material in the Krajišnik Case”, 21 February 2007, p 5. *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, “Decision on Mićo Stanišić’s Motion for Access to All Confidential Material in the Brdanin Case”, 24 January 2007, para 14; *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

has been held in the jurisprudence of the Tribunal, that a party seeking access to such information must establish that (a) “access to the material, which was formerly filed *ex parte* for the purpose of concealing it from the opposing Party, is now *required* to ensure the fundamental right to a fair trial [...], (b) the reasons for which the material was kept *ex parte* in the original proceedings are no longer applicable to the subsequent moving Party’s request in the second proceedings [...], and (c) the *ex parte* status of the material in the original proceedings has been or could be lifted without prejudice to the parties in those (first) proceedings.”¹⁹

17. Where information has been provided by an entity or person on a confidential basis within the meaning of Rule 70, and where an applicant has satisfied the legal standard for access to confidential *inter partes* information, the entity or person that has provided the information must also consent to the information in question being disclosed by the Prosecution to the applicant and the information must remain confidential.²⁰

18. Rule 75(F)(i) of the Rules provides that once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (“the first proceeding”), such protective measures 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.

IV. DISCUSSION

19. The Chamber notes that the trial proceedings against Milan Milutinović have concluded with his acquittal on all charges. The Prosecution did not file a notice of appeal. No proceedings against Milan Milutinović are currently pending before the Tribunal. Milan Milutinović does not have standing, therefore, to seek access to confidential information in another case before the Tribunal.

Transcripts, Exhibits, Documentary Evidence and Motions Filed by the Parties in the *Simić et al.* Case”, 12 April 2005, p 4.

¹⁹ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87-1-PT & IT-02-54, “Decision on Vlastimir Đorđević’s Motion for Access to Transcripts, Exhibits and Documents in *Prosecutor v. Slobodan Milošević*”, Case No. IT-02-54, (“*Đorđević* Second Decision”) p 5.

²⁰ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, “Decision on Prosecution’s Preliminary Response and Motion for Clarification Regarding the Appeal Chamber’s Decision Dated 4 December 2002 on Paško Lubičić’s Motion for Access to Confidential Material, Transcripts and Exhibits in the *Blaškić* Case”, 8 March 2004, paras.11-12; *Đorđević* First Decision, p 6; *Prosecutor v. Delić*, Case, Case No. IT-04-83-PT, “Order on Jadranko Prlić’s Motion for Access to All Confidential Material in *Prosecutor v. Rasim Delić*”, 2 December 2005, p 4.

20. The other Applicants seek, by their respective Motions, disclosure of all public and confidential material produced to this point in, and to be produced during the remainder of the *Dordević* trial.

21. The intended scope of the Motion is not precisely described. In so far as it appears to include all public filings, transcripts and exhibits, the Chamber notes that an order is not necessary for access to material which is publicly available from the Registry. In so far as the Motion seeks access, not only to all transcripts, exhibits and documents produced in the *Dordević* trial, but also to such material “to be produced for the balance of the trial”, the Chamber perceives this to be properly directed only to evidence as and when it is given orally or is received in written form, and to exhibits as and when they are received in evidence. In the view of the Chamber, it would not be appropriate, having regard to the legal criteria applicable and the practicalities, to contemplate an order which sought to deal with material which it was merely anticipated might later be received in evidence. Further, in so far as the Motion also extends to filings, the Chamber is not persuaded that motions and the like could be likely to assist materially the Defences in the preparation of their cases on appeal, or that there is a good chance that they would. The position may be different, however, with respect to decisions of the Chamber and, out of caution, the Defences ought to have access to these.

22. Subject to the Chamber’s comments about the scope of the Motion, the Applicants have sufficiently identified the confidential information to which they seek access.²¹ In assessing whether a legitimate forensic purpose has been shown the Chamber observes that the Prosecution does not contest the existence of a nexus between the *Milutinović et al.* trial and the *Dordević* trial. The indictment in the *Dordević* trial and the indictment in the *Milutinović et al.* trial concern the same events, namely crimes against humanity (deportation, other inhumane acts, murder and persecutions on political, racial and religious grounds), and violations of the laws or customs of war (murder), that allegedly took place during the same time period in the same municipalities in Kosovo.²² Further, the indictments in both cases allege that the crimes charged against the Applicants and *Vlastimir Dordević* were committed in the course of the same transaction, in that *Vlastimir Dordević* and the Applicants are alleged to have participated in one JCE the purpose of which was, *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over

²¹ Motion, paras 1-2, 5.

²² *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Third Amended Joinder Indictment, 21 June 2006; (“Milutinović Indictment”) *Prosecutor v. Vlastimir Dordević*, Case No. IT-05-87-1-PT, Fourth Amended Indictment, 9 July 2008 (“Dordević Indictment”)

the province.²³ The Chamber also notes that many of the witnesses that testified in the *Milutinović et al.* trial already have testified with regard to the same events in the *Dordević* trial, and it is anticipated that others will do so in the *Dordević* trial.²⁴

23. The Chamber is satisfied that the Applicants, other than Milan Milutinović, have demonstrated that a nexus exists between their cases and the *Dordević* trial and that transcripts of private or closed proceedings, exhibits admitted under seal, and confidential *inter partes* Chamber decisions and orders issued by the Chamber in the *Dordević* trial may be of material assistance in the preparation of their respective appeal cases. This also extends to any confidential information provided to the Prosecution under Rule 70, which is included in the material just identified, subject to the Prosecution obtaining the necessary consent of the provider before it is disclosed to the Applicants.

24. The Chamber notes that the limited *ex parte* information in the *Dordević* trial is of a nature that does not concern evidentiary matters and it is not apparent that it could be relevant to the Applicants in the preparation of their appeal cases. There is no reason to anticipate that there will be *ex parte* information in the *Dordević* trial that will be so relevant. The Applicants have advanced no particular or persuasive arguments demonstrating a legitimate forensic purpose in respect of such information. The standard for access to *ex parte* information has not been met. Therefore, the Motion in this respect is denied.

25. Hence, the Chamber is persuaded that, having regard to the particular circumstances of both proceedings, it is appropriate for the Applicants, other than Milan Milutinović, to have access to transcripts of private and closed session proceedings, exhibits admitted under seal and confidential *inter partes* decisions and orders issued by the Chamber in the *Dordević* trial, progressively until the completion of the hearing of evidence in the *Dordević* trial. This is subject to the observations earlier in this decision concerning confidential Rule 70 information.

26. Where witnesses in the *Dordević* trial are covered by the additional protective measure of delayed disclosure, such as in the case of K91, and the witness statements of, or documents relating to, such protected witnesses have been admitted into evidence as exhibits, such exhibits shall *not* be disclosed to the Applicants without first allowing redaction by the Prosecution of identifying information relating to witnesses for whom delayed disclosure is granted by the Chamber.

For the reasons stated above and pursuant to Rule 75(F)(i) and Rule 54 of the Rules,

²³ *Milutinović* Indictment; *Dordević* Indictment.

²⁴ Motion, para 2.

The Chamber, **HEREBY GRANTS** the Motion **IN PART** and:

I. ORDERS the Prosecution

- i) to identify all confidential information admitted in evidence in the *Dorđević* trial which is subject to Rule 70 and to notify the Registry of such information within 14 days of the issuance of this Decision, and progressively every 14 days of its admission into evidence hereinafter in the *Dorđević* trial;
- ii) to contact the provider of such confidential Rule 70 information within 21 days of this decision or within 21 days of its admission into evidence hereinafter in the *Dorđević* trial to request permission to disclose it to the Applicants other than Milan Milutinović;
- iii) to notify the Registry, on an ongoing basis, of consents of providers to the disclosure of Rule 70 information to the Applicants other than Milan Milutinović received by the Prosecution pursuant to Order I (ii) above;

II. REQUESTS the Registry to allow access by the Applicants other than Milan Milutinović, within 21 days of the issuance of this decision and progressively until the completion of the hearing of evidence in the *Dorđević* trial, to transcripts of closed and private session proceedings, exhibits admitted into evidence under seal, and confidential *inter partes* Decisions and Orders issued by the Chamber in the *Dorđević* trial, all of which is hereinafter described as “confidential information”, subject, in the case of information subject to notice to the Registry pursuant to Order I(i), to the Registry having been first notified pursuant to Order I(iii) of the consent of the provider to that disclosure;

III. ORDERS the Applicants, other than Milan Milutinović, and the members of their Defence teams not to disclose to the public as defined hereinafter, any confidential information as identified the preceding paragraphs, and not to contact any witness in the *Dorđević* trial without first obtaining the express leave of the Chamber;

For the purposes of this decision:


“Defence teams” means and includes each Applicant, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić, Dragoljub Ojdanić, and Nikola Sainović, their defence counsel, their immediate legal assistants and other persons assigned by or listed with the Registry as part of their Defence;

“The public” means and includes all persons, governments, organisations, entities, clients, associations, groups and media, other than the judges and staff of the Tribunal Chambers and Registry, the Prosecution and the Applicants’ Defence teams as defined above. “The public” specifically includes, without limitation, family, friends and associates of each Applicant, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić, Dragoljub Ojdanić, and Nikola Sainović, the accused in other cases or proceedings before the Tribunal and/or national courts, and defence counsel in other cases or proceedings before the Tribunal and/or national courts;

“The media” as mentioned above, means and includes all video, audio, electronic, and print media personnel, including journalists, reporters, authors, television and radio personnel, as well as their agents and representatives;

IV. DENIES the Motion in all other respects.

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



Judge Kevin Parker
Presiding

Done this tenth day of June 2009
At The Hague
The Netherlands

[Seal of the Tribunal]