



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-95-5/18-PT
Date: 20 May 2009
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 20 May 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON JOVICA STANIŠIĆ'S MOTION FOR ACCESS TO CONFIDENTIAL
MATERIALS IN THE *KARADŽIĆ* CASE**

Prosecutor v. Radovan Karadžić (Case No. IT-95-5/18-PT)

Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

Prosecutor v. Jovica Stanišić and Franko Simatović (Case No. IT-03-69-PT)

Office of the Prosecutor:

Mr. Dermot Groome
Ms. Doris Brehmeier-Metz

Counsel for Jovica Stanišić:

Mr. Geert-Jan Alexander Knoops
Mr. Wayne Jordash

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 the “Defence for Stanišić: ‘Motion for Access to Confidential Materials in the *Radovan Karadžić* Case’”, filed on 17 April 2009 (“Motion”), and hereby renders its decision thereon.

Submissions

1. In the Motion, the Defence for Jovica Stanišić (“Applicant”) requests access to “all confidential materials – that is, closed session transcripts of testimony of Prosecution and Defence witnesses and Prosecution and Defence exhibits tendered under seal – adduced in the [*Karadžić* case].¹ The Applicant argues that there exists a “legitimate forensic purpose” for such access because there is a geographical and material overlap between the *Karadžić* case and the case of the Applicant. This is evidenced by the fact that, among other things, Radovan Karadžić (“Accused”) has been indicted for various crimes through his participation in a joint criminal enterprise which lasted from October 1991 to November 1995, of which Jovica Stanišić was allegedly also a member. The Applicant also points to the fact that there are several overlapping counts in the indictments with respect to crimes that took place in Srebrenica/Trnovo, Bijeljina, Sanski Most, and Zvornik.²

2. In his “Response to Jovica Stanišić Access Motion”, filed on 28 April 2009, the Accused does not oppose the Motion.³ However, the Office of the Prosecutor (“Prosecution”), in the “Prosecution Response to the Request of Jovica Stanišić for Access to Confidential Materials in the *Karadžić* Case”, filed on 1 May 2009 (“Response”), argues that the Motion is premature. The Prosecution agrees with the Applicant that there is “some temporal and geographic overlap that could justify some access to confidential materials” in the *Karadžić* case. However, it also notes that, as of yet, no material that falls within the Applicant’s request has been entered into record as the trial has not yet commenced.⁴ In case the Chamber is minded to grant the Applicant’s Motion on an anticipatory basis, the Prosecution argues that access should be limited to those parts of the *Karadžić* case that materially overlap with the case of Jovica Stanišić, namely, materials relating to crimes and events alleged to have occurred in the municipalities of Bijeljina, Sanski Most, and Zvornik. As for the events relating to Srebrenica, the Prosecution acknowledges that the

¹ Motion, para. 1.

² Motion, paras. 9–12.

³ Response to Jovica Stanišić Access Motion, 28 April 2009, para. 1.

⁴ Response, paras. 1, 4.

indictments overlap but in a footnote states simply that it “does not refer here to crimes alleged in connection with the takeover of the Srebrenica enclave”.⁵ This seems to mean that, even though there is an overlap, the Prosecution does not consider that it is material enough to justify access to confidential materials. The Prosecution also submits that the Applicant should not be granted access to materials dealing with the alleged campaign of shelling and sniping in Sarajevo and the allegations relating to the taking of United Nations personnel as hostages. Should an order for anticipatory access be made, the Prosecution requests an order to ensure the safety of witnesses and the security of sensitive information. The Prosecution also notes that it cannot definitively identify witnesses in common to the two cases before filing its witness list in the *Karadžić* case, which is not due until 18 May 2009.⁶

3. On 11 May 2009, the Applicant filed a “Defence for Stanišić Request for Leave to Reply and Reply to the Prosecution Response to the Request of Jovica Stanišić for Access to Confidential Materials in the *Karadžić* Case” (“Reply”), in which he clarifies that the request for access is “general and ... could be granted on an ongoing basis for the duration of the trial proceedings.”⁷ The Applicant also disputes the Prosecution’s submission that only materials relating to Bijeljina, Sanski Most, and Zvornik municipalities should be disclosed and argues that, given the alleged connections between crimes in different locations, it is critical for him to have access to materials dealing with “related locations in Bosnia.”⁸ With respect to the hostage-taking allegation, the Applicant submits that the Prosecution’s pre-trial brief in the case against Jovica Stanišić refers to him as having a “pivotal role” in relation to this event.⁹

Applicable law

4. The Chamber notes the well-established principle of the Tribunal that proceedings should be conducted in a public manner to the extent possible.¹⁰ Further, the Chamber observes that, in general, “[a] party is always entitled to seek material from any source to assist in the preparation of his case”.¹¹ In exceptional circumstances, however, a Chamber may restrict the access of the

⁵ Response, para. 5, footnote 10.

⁶ Response, paras. 5–6.

⁷ Reply, para. 3.

⁸ Reply, para. 4.

⁹ Reply, para. 5.

¹⁰ Rule 78 provides, “All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.”

¹¹ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*, 16 May 2002 (“*Blaškić* Decision”), para. 14; *Prosecutor v. 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 (“*Brđanin* Decision”), para. 10.

public, as well as the access of a party, to certain material under the provisions of the Rules.¹² Such confidential material can be categorised into three types: *inter partes*, *ex parte*, and subject to Rule 70.

5. In determining access to such material, the Tribunal must “find a balance between the right of a party to have access to material to prepare its case and the need to guarantee the protection of witnesses”.¹³ It is established that a party may obtain confidential material from another case to assist it in the preparation of its case, if (a) the material sought has been “identified or described by its general nature”, and (b) a “legitimate forensic purpose” exists for such access.¹⁴

6. The first requirement is not a particularly onerous one. The Applicant correctly asserts that the Appeals Chamber has held that requests for access to “all confidential material” can be sufficiently specific to meet the identification standard.¹⁵

7. With respect to the second requirement, the standards for access differ for each category of confidential material. In respect of confidential *inter partes* material, a “legitimate forensic purpose” for disclosure in subsequent proceedings will be shown if the applicant can demonstrate that the material is relevant and essential.¹⁶ The relevance of such material may be determined “by showing the existence of a nexus between the applicant’s case and the original case from which the material is sought”.¹⁷ To establish a nexus, the applicant is required to demonstrate a “geographical, temporal or otherwise material overlap” between the two proceedings.¹⁸ The essential nature of the material, in turn, means that the party seeking it must demonstrate “a good chance that access to this evidence will materially assist the applicant in preparing his case.”¹⁹ The

¹² *Prosecutor v. Đorđević*, Case No. IT-05-87/1-PT, 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 Decision*”), para. 6.

¹³ *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal From Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 2.

¹⁴ *Blaškić Decision*, para. 14; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Material, 16 November 2005 (“*First Blagojević and Jokić Decision*”), para. 11; *see also Prosecutor v. Delić*, Case No. IT-04-83-PT, Order on Defence Motions for Access to All Confidential Material in *Prosecutor v. Blaškić* and *Prosecutor v. Kordić and Čerkez*, 7 December 2005 (“*Delić Order*”), p. 6.

¹⁵ *Brđanin Decision*, para. 11; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Materials in the *Blagojević and Jokić* Case, 18 January 2006, para. 8; *Prosecutor v. Blaškić*, Case No. IT-95-14-R, Decision on Defence Motion on behalf of Rasim Delić Seeking Access to All Confidential Material in the *Blaškić* Case, 1 June 2006, p. 12.

¹⁶ *See Blaškić Decision*, para. 14; *First Blagojević and Jokić Decision*, para. 11; *see also Delić Order*, p. 6; *Đorđević Decision*, para. 7.

¹⁷ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision on Haradinaj Motion for Access, Balaj Motion for Joinder, and Balaj Motion for Access to Materials in the *Limaj* case, 31 October 2006, para. 7; *Đorđević Decision*, para. 7.

¹⁸ *See Blaškić Decision*, para. 15; *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; *Đorđević Decision*, para. 7.

¹⁹ *First Blagojević and Jokić Decision*, para. 11; *Đorđević Decision*, para. 7; *Blaškić Decision*, para. 14.

standard does not require the applicant to go so far as to establish that the material sought would likely be admissible evidence.²⁰

8. Material may also be filed as *ex parte* and confidential because the opposing party is not supposed to be informed of the submission or afforded access to it. This is done for a specific purpose, such as where a submission pertains to the ill-health of an accused. Due to the “special considerations of confidentiality” relating to confidential *ex parte* material,²¹ and the “protected degree of trust” that the material will not be disclosed which is enjoyed by the party on whose behalf the *ex parte* status has been granted,²² the Appeals Chamber has required an applicant to meet a higher standard in establishing a legitimate forensic purpose for its disclosure.²³

9. Finally, material can be deemed confidential by virtue of the fact that it has been provided by a state or person subject to restrictions on its use pursuant to Rule 70.²⁴ In such cases, where an applicant has satisfied the legal standard for access to *inter partes* material, the entity that has provided the material must still be consulted before the material can be given to another accused before the Tribunal, and the material must remain confidential.²⁵ This is the case even where the Rule 70 provider(s) consented to the use of the material in one or more prior cases.²⁶

Discussion

A. Leave to reply

10. The Chamber has found the Applicant’s Reply helpful in that it addresses the Prosecution’s Response with respect to the possibility of access being granted on an ongoing basis. Indeed, it is the Reply that clarifies the Motion by explicitly stating the Applicant’s desire to have ongoing

²⁰ *Dorđević* Decision, para. 7.

²¹ *Brđanin* Decision, para. 14.

²² *Prosecutor v. 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 (“*Bralo* Decision”), para. 17; *Prosecutor v. 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 (“*Simić* Decision”), p. 4.

²³ *Prosecutor v. 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 (“Second *Krajišnik* Decision”) p. 5; *Brđanin* Decision, para. 14; *Bralo* Decision, para. 17; *Simić* Decision, p. 4.

²⁴ Material produced pursuant to an order under Rule 54 *bis* may also require similar procedures before they can be disclosed to an accused in another case.

²⁵ See *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 Ljubičić’s Motion for Access to Confidential Material, Transcripts and Exhibits in the *Blaškić* Case, 8 March 2004, paras. 11–12; *Dorđević* Decision, para. 15; *Delić* Order, p. 6.

²⁶ *Prosecutor v. Delić*, 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.

access to confidential materials in the *Karadžić* case. In these circumstances, leave to reply is granted.

B. Nature of access requested: prospective basis

11. This Trial Chamber has already dealt with one “ongoing request” for access to confidential materials in the *Karadžić* case, namely that of the accused Momčilo Perišić.²⁷ As stated in that decision, it has been the preferred approach of Trial Chambers to limit access to materials to the date of the request (or decision upon that request). However, as a matter of judicial economy, and based upon the particular circumstances of both of the proceedings involved, including the fact that the case against Jovica Stanišić is about to commence, the Chamber considers that the Applicant’s access to the material in the *Karadžić* case should be accomplished in as streamlined a manner as possible and that access on an ongoing basis is warranted.

12. The parties are always free to object to the Applicant’s access to specific materials, if and when such issues arise in the case over particular material.

C. Access to confidential *inter partes* material

13. Applying the legal standards for access to the present Motion, the Chamber finds that, in respect of the confidential *inter partes* material requested, there is a clear and material overlap between the two cases with respect to the events that took place in the municipalities of Bijeljina, Sanski Most, and Zvornik. Both Jovica Stanišić and the Accused are alleged to have been members of a joint criminal enterprise which lasted from 1991 until the second half of 1995, and which had as its objective the permanent removal of Bosnian Muslim and Bosnian Croat inhabitants from large areas of Bosnia and Herzegovina.²⁸ As a result of their participation in this joint criminal enterprise they have both been accused of crimes committed in Bijeljina, Sanski Most, and Zvornik. Accordingly, the materials in the *Karadžić* case relating to these municipalities will materially assist the Applicant in the preparation of his case.

14. The Chamber notes that it is unclear from the Prosecution’s Response whether it is opposing the Applicant’s access to confidential materials relating to events in the Srebrenica municipality and the related killings in Trnovo village.²⁹ The Prosecution appears to be arguing that there is a certain overlap but that it is not significant enough to justify access to confidential

²⁷ Decision on Momčilo Perišić’s Motion for Access to Confidential Materials in the *Radovan Karadžić* Case, 14 October 2008.

²⁸ Third Amended Indictment, para. 9. *See also Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Third Amended Indictment (“Stanišić Indictment”), para. 13.

²⁹ *See* Response, footnote 10.

materials dealing with these killings. However, the indictment against Jovica Stanišić refers explicitly to the Accused and his involvement in the Srebrenica-related events, including the killings in Trnovo village.³⁰ By the same token, the indictment against the Accused charges him for the killings of Srebrenica men in Trnovo.³¹ Accordingly, the Chamber is of the view that materials in the *Karadžić* case relating to events in Srebrenica will materially assist the Applicant in the preparation of his case.

15. The Chamber recalls that the Prosecution opposes the Applicant's access to confidential materials dealing with the alleged hostage-taking of United Nations personnel. However, as noted by the Applicant, the Prosecution's pre-trial brief alleges that Jovica Stanišić was a close confidante of Slobodan Milošević, and, in support, refers to, *inter alia*, Stanišić's participation in the successful negotiation of the release of these hostages, and his close dealings with the Bosnian Serb leadership, including the Accused.³² Accordingly, the Chamber considers that the confidential materials relating to the taking of the United Nations personnel as hostages will materially assist the Applicant in the preparation of his case.

16. As far as the alleged events in Sarajevo and other municipalities are concerned, the Chamber can see no significant overlap between the two cases.

D. Access to confidential *ex parte* material

17. The Chamber notes that the Motion does not specifically refer to *ex parte* materials, nor is this issue addressed by the Prosecution. Accordingly, the Chamber will not make any findings with respect to the same.

E. Access to confidential Rule 70 Material

18. The Chamber is minded of the fact that some of the confidential *inter partes* material might fall into the category of Rule 70 material, this being most probably the case in relation to the hostage-taking allegations. Thus, in respect of such material, if any, the Chamber will order that the Prosecution and/or the Accused seek the consent of the Rule 70 provider(s) before it can be disclosed to the Applicant.

³⁰ *Stanišić* Indictment, paras. 58–61.

³¹ Third Amended Indictment, paras. 22–23, Schedule E.

³² *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Pre-Trial Brief, para. 59.

Disposition

19. Accordingly, for all the reasons outlined above, the Trial Chamber, pursuant to Rules 54, 70, and 75 of the Rules of Procedure and Evidence of the Tribunal hereby **GRANTS** the Applicant's leave to Reply, **GRANTS** the Applicant's Motion, in part, and:

(a) **ORDERS** the parties, on an ongoing basis, to identify for the Registry the following *inter partes* material in the case of *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, for disclosure to the Applicant:

- (i) closed and private session testimony transcripts which are not subject to Rule 70 and which are produced in the pre-trial and trial proceedings in so far as they are concerned with the events in Bijeljina, Sanski Most, Zvornik, and Srebrenica, as well as the allegations of hostage-taking;
- (ii) confidential and under seal trial exhibits, which are not subject to Rule 70, and which are concerned with the events in Bijeljina, Sanski Most, Zvornik, and Srebrenica, as well as the allegations of hostage-taking.

(b) **ORDERS** the parties to determine, without delay and before disclosure, which of the material outlined in (a) above is subject to the provisions of Rule 70, and immediately thereafter to contact the providers of such material to seek their consent for its disclosure to the Applicant, and, where Rule 70 providers consent to such disclosure, to notify the Registry on a periodic basis of such consent.

(c) **REQUESTS** the Registry to withhold disclosure of any material subject to Rule 70 until such time as the parties inform 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 the provider(s) of any material subject to Rule 70, the material shall not be disclosed.

(d) **REQUESTS** the Registry to disclose to the Applicant:

- (i) the confidential and *inter partes* and non-Rule 70 material once it has been identified by the parties in accordance with paragraph (a); and
- (ii) the Rule 70 material once the parties have identified such material and informed the Registry of the consent of the Rule 70 provider(s) in accordance with paragraphs (a), (b), and (c).

(e) **ORDERS** that no confidential and *ex parte* material from the case of *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT be disclosed to the Applicant.

(f) **ORDERS** that the Applicant, his Defence team, and any employees who have been instructed or authorised by the Applicant shall not disclose to the public, or to any third party, any confidential or non-public material disclosed from the *Karadžić* case, including witness identities, whereabouts, statements, or transcripts, except to the limited extent that such disclosure to members of the public is directly and specifically necessary for the preparation and presentation of the Applicant's case. 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 case.

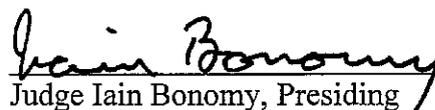
(g) For the purpose of this Decision, "the public" means and includes all persons, governments, organisations, entities, clients, associations, and groups, other than the Judges of the Tribunal, the staff of the Registry, the Prosecutor and his representatives, and the Applicant, his counsel, and any 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.

(f) **ORDERS** that nothing in this Decision 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 *Karadžić* case that should be disclosed to the Applicant but which is not covered by the terms of this Decision.

(g) **RECALLS** that, pursuant to Rule 75(F)(i), any protective measures that have been ordered in respect of a witness in the *Karadžić* case shall continue to have effect in the case against the Applicant, except insofar as they have been varied in accordance with this Decision.

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


Judge Iain Bonomy, Presiding

Dated this twentieth day of May 2009
At The Hague
The Netherlands

[Seal of the Tribunal]