UNITED NATIONS

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-T
IT-02-54-T

Date: 28 February 2011

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **28 February 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION FOR ACCESS TO *EX PARTE* FILINGS IN THE SLOBODAN MILOŠEVIĆ CASE (SREBRENICA INTERCEPTS)

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 Accused's "Motion for Access to Ex Parte Filings in the *Slobodan Milošević* Case Relating to Srebrenica Intercepted Conversations", filed on 19 January 2011 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, which was filed in this as well as in the *Slobodan Milošević* case, the Accused seeks access to *ex parte* filings in the *Slobodan Milošević* case "dealing with the requests of the prosecution for a binding order against the United States to obtain intercepted conversations relating to Srebrenica."[1] In support, he cites to a recent book review article, written by Geoffrey Nice, a former member of the Office of the Prosecutor's ("Prosecution") team in the *Milošević* case, wherein it is said that the United States ("U.S.") had control over intercepted telephone conversations between Slobodan Milošević and Ratko Mladić relating to events in Srebrenica July 1995 ("Srebrenica Intercepts"), and that the Prosecution had made efforts to obtain them but eventually abandoned those efforts.[2] The Accused submits that he intends to make a motion for a binding order directing the U.S. to provide him with the Srebrenica Intercepts and thus, "in order to frame that request with as much specificity as possible", it is necessary for him to have access to the *ex parte* filings made by the Prosecution in relation to those Intercepts in the *Milošević* case.[3] The Accused also notes that he has already searched for all confidential *inter partes* documents from the *Milošević* case but found no information relating to the Prosecution efforts to obtain the Srebrenica Intercepts.[4] He further notes that, already in 2 June 2009, he requested from the U.S. intercepted conversations relating to his own communications during the events in Srebrenica but that the U.S. produced no such documents to him.[5]

2. On 28 January 2011, the Prosecution filed the "Prosecution's Response to Motion for Access to *Ex Parte* Filings in the Slobodan Milošević Case Relating to Srebrenica Intercepted Conversations" ("Response"). The Response is filed publicly but has attached to it a confidential and *ex parte* appendix. In the Response, the Prosecution argues that the Motion should be dismissed because (i) the Prosecution has never made a request for a binding order

[1] Motion, para. 1.
[2] Motion, paras. 2–3, Annex A.
[3] Motion, paras. 4–5.
[4] Motion, para. 6.
[5] Motion, para. 4.

against the U.S. in order to obtain the Srebrenica Intercepts, and (ii) the Accused has failed to show a legitimate forensic purpose in relation to the alleged *ex parte* filings.[6] Expanding on (ii), the Prosecution argues that the Accused has failed to demonstrate "why his interest in obtaining this information outweighs the privacy, the public interest or security interests of the party on whose behalf *ex parte* status would have been granted."[7] It also submits that a "more obvious and proportionate means of obtaining the specific factual information" the Accused seeks would have been to ask Prosecution directly for "the sources cited by the Prosecution in any such applications related to the [U.S.]" or for access to "only those sections of the Prosecution's *ex parte* filings which contained its factual representations."[8]

3. The Prosecution has made additional arguments in its confidential and *ex parte* appendix to the Response but the Chamber will not summarise those here.

4. On 31 January 2011, the Accused sent a letter to the Prosecution ("Letter"), on notice to the Chamber, stating that "rather than seeking leave to reply and speculating about the situation", he has decided to request, pursuant to Rule 66(B): (i) all pleadings from the *Milošević* case which relate to the Prosecution's efforts to obtain the relevant intercepted conversations or other information that might reveal the existence of those intercepts; (ii) the pleadings referred to by Geoffrey Nice in his article; and (iii) any information in the possession of the Prosecution that tends to show the existence of the said intercepts.[9]

II. Applicable Law

5. 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 public, as well as the access of a party, to certain material under the provisions of

[6] Response, para. 1.

[7] Response, para. 4.

[8] Response, para. 5.

[9] Letter from the Accused, 31 January 2010.

[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.

the Rules of Procedure and Evidence ("Rules").[12] Such confidential material can be categorised into three types: *inter partes*, *ex parte*, and subject to Rule 70.

6. In determining access to confidential 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]

7. The first requirement is not a particularly onerous one. The Appeals Chamber has held that requests for access to "all confidential material" can be sufficiently specific to meet the identification standard.[15]

8. 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] Relevance 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] With respect to the requirement that the material be essential, the party seeking it must demonstrate "a good chance that access to this evidence will materially assist the applicant in preparing his

[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 and Kubura*, 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; *Prosecutor v. Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, Decision on Veselin Šljivančanin's Motion Seeking Access to Confidential Material in the *Kordić and Čerkez* Case, 22 April 2008, para. 7; *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] Motion, para. 3; *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.

case."[19] The standard does not require the applicant to go so far as to establish that the material sought would likely be admissible evidence.[20]

9. The Appeals Chamber has held that confidential *ex parte* material is of a "higher degree of confidentiality", as it contains information that has not been disclosed to the other party in that case "because of security interests of a State, other public interests, or privacy interests of a person or institution" and that, therefore, "the party on whose behalf the *ex parte* status has been granted enjoys a protected degree of trust that the *ex parte* material will not be disclosed."[21]

III. Discussion

10. As noted above, the Accused has filed the Motion before both this Chamber *and* the Chamber seised of the *Slobodan Milošević* case. Since the *Milošević* case was terminated on 14 March 2006,[22] there is no Chamber currently seised of the *Milošević* case, and thus, according to Rule 75(G)(ii), the Chamber properly seised of the Motion is this Chamber.

11. Turning now to the substance of the Motion and whether the Accused has met the test for access to the requested *ex parte* filings, the Chamber considers that the Motion could be dismissed on the ground that the Prosecution assures the Chamber that the filings as they are specified by the Accused do not exist. However, in light of the Accused's Letter to the Prosecution, the Chamber is cognisant of the fact that this would simply lead to him filing another motion, with a reformulated request, in line with that made in the Letter, namely seeking all *ex parte* filings which relate to the Prosecution's efforts to obtain Srebrenica Intercepts. Thus, the Chamber will consider, bearing in mind both the Motion and the Letter, whether the Accused has met the standard for access to these *ex parte* filings.

12. The Chamber is satisfied that the Accused has identified the material sought with sufficient specificity. Looking at the legitimate forensic purpose of the need for access, it is of the view that there is a substantial geographical and temporal overlap between this case and the

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[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.

[20] *Đorđević* Decision, para. 7.

[21] *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, 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, p. 4; *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, p. 5; *Brđanin* Decision, para. 14.

[22] *See Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Terminating the Proceedings, 14 March 2006.

Milošević case with respect to the events in Srebrenica, and thus a sufficient nexus between the two cases has been established.[23]

13. Turning to the final part of the test for access to confidential and *ex parte* materials, the Chamber recalls the Prosecution's suggestion that the Accused ask for the specific factual information in its possession tending to show the existence of Srebrenica Intercepts, or for portions of *ex parte* filings which may be in its possession and which are connected to the Srebrenica Intercepts. There would, therefore, seem to be no need for the Accused to have access to any *ex parte* filings possessed by the Prosecution in their entirety in order to frame his request to the U.S. In addition, the Accused has failed to demonstrate why his interest in obtaining *ex parte* filings outweighs the interests of the party on whose behalf the *ex parte* status was afforded. All of the above leads the Chamber to conclude that the Accused should not be granted access to the filings sought.

IV. Disposition

14. Accordingly, the Trial Chamber, pursuant to Rules 54 and 75 of the Rules, hereby **DENIES** the Motion.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-eighth day of February 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

[23] Indeed, the Chamber has already held this to be the case in relation to the Accused's request for access to confidential *inter partes* materials in the *Milošević* case. The Chamber also held that this access should include access to confidential *inter partes* filings in that case. *See* Decision on Motion for Access to Confidential Materials in Completed Cases, 5 June 2009, paras. 14, 20–22, 32(bb).