



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-81-T

Date: 1 April 2009

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Pedro David
Judge Michèle Picard

Acting Registrar: Mr. John Hocking

Decision of: 1 April 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON FRANKO SIMATOVIĆ'S MOTION FOR
ACCESS TO CONFIDENTIAL MATERIALS IN
THE *MOMČILO PERIŠIĆ* CASE**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for Momčilo Perišić

Mr. Novak Lukić
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Counsel for Franko Simatović

Mr. Zoran Jovanović
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TRIAL CHAMBER I ("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 seized of "Franko Simatović's Motion for Access to Confidential Materials in Momčilo Perišić case" filed publicly on 10 March 2009 ("Motion") and hereby renders its Decision.

I. SUBMISSIONS

1. In its Motion, the Defence for Franko Simatović ("Applicant") requests access to all *inter partes* and *ex parte* confidential material from the case *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T ("*Perišić* case") for the entire pre-trial and trial proceedings including:

- a) all confidential closed and private session trial transcripts;
- b) all confidential exhibits;
- c) all confidential filings and submissions, including all confidential Trial Chamber decisions;
- d) all documentary evidence submitted by the parties.¹

2. In support of its Motion, the Applicant submits that materials subject to the Motion are necessary for the full and adequate defence preparation² as:

- a) There is a significant geographical and temporal overlap between the *Simatović* and *Perišić* cases as both relate to the Serb-held territories of Croatia and Bosnia and Herzegovina in the same time frame (1991-1995 in case of *Simatović* and 1993-1995 in case of *Perišić*).³
- b) There are clear similarities of the specific accusations between these cases as they both relate to the alleged participation in financing, supplying and supporting of the same structures in Bosnia and Herzegovina and Croatia. Moreover, both *Simatović* and *Perišić* are charged for their alleged participation in Srebrenica-related events.⁴

3. Finally, the Applicant affirms his willingness, if required, to abide by any order regarding witness protection or confidentiality of some documents.⁵

¹ Motion, paras 1, 11.

² Motion, para. 9.

³ Motion, paras 4-7.

⁴ Motion, paras 4-7.

⁵ Motion, para. 10.

4. On 24 March 2009, the "Prosecution Response to Franko Simatović's Motion for Access to Confidential Materials in the Momčilo Perišić Case" was publicly filed ("Response") whereby the Prosecution does not oppose the Applicant's request for access to *inter partes* confidential material, provided that adequate measures are in place to protect the confidentiality of the information. However, the Prosecution qualifies its position in relation to material which was provided pursuant to Rule 70 of the Rules of Procedure and Evidence ("Rules"), in which case the consent of the Rule 70 provider would be required.⁶

5. The Prosecution further objects to the Applicant's request for access to *ex parte* confidential material.⁷ In support of its objection, the Prosecution submits that the jurisprudence of the Tribunal requires that applicants seeking access to *ex parte* material must meet a higher standard to establish a legitimate forensic purpose justifying access to such material than in case when access to *inter partes* material is sought. According to the Prosecution, the Applicant has failed to do so.⁸

II. APPLICABLE LAW

6. It is an accepted principle of the Tribunal that "a party is always entitled to seek material from any source, including from another case before the International 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."⁹

7. The identification requirement is not particularly onerous and requests for "all confidential material" can be considered sufficiently specific to meet this standard.¹⁰

8. Regarding the requirement of a legitimate forensic purpose, the Appeals Chamber has held that "access to confidential material from another case may be granted wherever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case."¹¹ Furthermore, the "relevance of the material sought by a party may be determined by showing the existence of a nexus between the applicant's case and the cases from

⁶ Response, paras 6, 12-13.

⁷ Response, paras 10, 13

⁸ Response, paras 8-10.

⁹ *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.

¹⁰ *Prosecutor v. Radoslav Brđanin*, IT-99-36-A, Decision on Motion by Jovica Stanišić for Access to All Confidential Materials in the Brđanin case, 24 January 2007 ("*Brđanin Decision*"), 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 ("*Karadžić Decision*"), para. 18, with further references.

¹¹ *Martić Decision*, para. 9. The Appeals Chamber further held that "it is sufficient that access to the material sought is likely to assist the applicant's case materially, or that there is at least a good chance that it would", *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-30-A, Decision on Motion of Mićo Stanišić for Access to All Confidential Materials in the *Krajišnik case*, 21 February 2007 ("*Krajišnik Decision*"), p. 4 with further references.

which such material is sought, i.e. if the cases stem from events alleged to have occurred in the same geographic area and at the same time.”¹²

9. Having said that, the Trial Chamber notes that the jurisprudence of the Tribunal has developed specific criteria that must be met when access to *ex parte* confidential material is sought. The Appeals Chamber stressed that “*ex parte* material, 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* material will not be disclosed”.¹³ It follows that the applicant will have to meet a higher standard of proving a legitimate forensic purpose justifying such disclosure.¹⁴

10. The general rules described above are additionally qualified by the requirements of Rule 70 of the Rules. According to the case-law, “material provided under Rule 70 shall not be released to the Accused in another case unless the provider consents to such disclosure.”¹⁵ This limitation applies to all material provided under Rule 70 to either the Prosecution or Defence in a case and does not depend upon whether or not such material was used as evidence in a previous case.¹⁶

11. Rule 75 (F)(i) of the Rules of Procedure and Evidence (“Rules”) provides that

Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures:

- (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (“second proceedings”) or another jurisdiction unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule.

III. DISCUSSION

12. The Trial Chamber notes the existence of a substantial geographical and temporal overlap between the *Simatović* and *Perišić* cases. Both cases relate to events taking place on the territory of Croatia and Bosnia and Herzegovina between 1991-1995 in the case of *Simatović*, and 1993-1995 in the case of *Perišić*.¹⁷ Moreover, the Trial Chamber notes that one can also find significant overlap between the material scope of the charges against *Simatović* and *Perišić* as both Accused are alleged to have participated in the financing, supplying and supporting of Serbian forces in

¹² *Martić* Decision, para. 9 with further references.

¹³ *Krajišnik* Decision, p. 5.

¹⁴ *See Brđanin* Decision, para. 14. *See also Karadžić* Decision, para. 12.

¹⁵ *Martić* Decision, para. 12 with further references.

¹⁶ *Krajišnik* Decision, p. 6.

¹⁷ *See Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Second Amended Indictment, 5 February 2008 (“*Perišić* Indictment”), paras 24-28, 40, 47, 53-54, 57-58; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Third Amended Indictment, 9 July 2008 (“*Simatović* Indictment”), paras 21-22, 58-61.

Bosnia and Herzegovina and Croatia.¹⁸ For these reasons, and also taking into account the fact that the Prosecution did not raise any objections to the granting of access to *inter partes* confidential material in the *Perišić* case, the Trial Chamber finds that the Applicant has shown a legitimate forensic purpose for being granted access to the requested material.

13. In relation to *ex parte* confidential material, the Trial Chamber recalls that the jurisprudence of the Tribunal requires a party seeking access to such material to meet a higher threshold. The Trial Chamber notes that the Applicant has failed to advance any arguments demonstrating a legitimate forensic purpose in this regard. Consequently, the Applicant's request for access to *ex parte* confidential material in the *Perišić* case must be denied.

14. Finally, the Trial Chamber finds that all *inter partes* confidential material provided to the Prosecution or Defence in the *Perišić* case under Rule 70 can be disclosed to the Applicant only after obtaining consent of the provider of such information. Consequently, the Prosecution and Defence in the *Perišić* case shall approach the providers of such material seeking such consent.

IV. DISPOSITION

15. For the foregoing reasons and pursuant to Rule 54, 70 and 75 of the Rules, **GRANTS** the Motion as to *inter partes* confidential material, subject to the conditions set forth below, and **DENIES** the Motion in all other respects;

ORDERS the Prosecution and Defence, on an ongoing basis, to identify for the Registry the following *inter partes* material in the case of *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, for disclosure to the Applicant:

- (i) all confidential closed and private session trial transcripts, which are not subject to Rule 70;
- (ii) all confidential exhibits, which are not subject to Rule 70;
- (iii) all confidential filings and submissions (including all confidential Trial Chamber decisions), which are not subject to Rule 70;

ORDERS the Prosecution and Defence to determine without delay which of the material requested 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 regular/ongoing basis of such consent;

¹⁸ See *Perišić* Indictment, paras 10-12, 20, 24; *Simatović* Indictment, paras 3, 6, 15.

REQUESTS the Registry to withhold disclosure of any material subject to Rule 70 until such time as the Prosecution or the Defence 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;

REQUESTS the Registry to disclose to the Applicant:

- (i) the confidential, *inter partes* and non-Rule 70 material once it has been identified by the Prosecution and Defence in accordance with this Decision; and
- (ii) the Rule 70 material once the Prosecution and Defence has identified such material and informed the Registry of the consent of the Rule 70 provider(s) in accordance with this Decision;

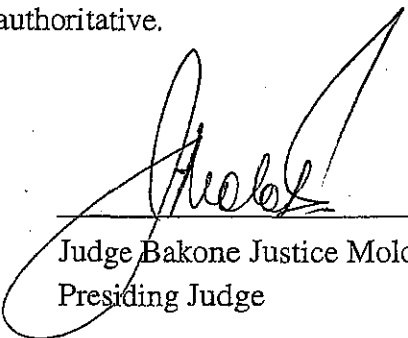
ORDERS that no confidential and *ex parte* material from the case of *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, shall be disclosed to the Applicant.

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 *Perišić* case, including witness 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 and 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. 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, the Applicant, his counsel and defence team, 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;

ORDERS that nothing in this Decision shall affect the disclosure obligations of the Prosecution under Rules 66 and 68; and

AFFIRMS that, pursuant to Rule 75(F)(i), any protective measures that have been ordered in respect of a witness in the *Perišić* 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 version being authoritative.



Judge Bakone Justice Moloto
Presiding Judge

Dated this first day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

