



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-05-88-T

Date: 19 July 2007

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 19 July 2007

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON PANDUREVIĆ MOTION FOR ACCESS TO
CONFIDENTIAL MATERIAL IN PROSECUTOR V. OBRENOVIĆ**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Julie Condon for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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”);

BEING SEISED OF the “Motion on Behalf of Vinko Pandurević for Access to Confidential Information in the Obrenović Case”, filed on 7 June 2007 (“Pandurević Motion”), in which Vinko Pandurević seeks access to confidential information in the case of *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2, namely: all confidential exhibits; Dragan Obrenović’s sentencing brief; and all 92 *bis* witness statements as well as the statements of the *viva voce* witnesses;¹

NOTING that Pandurević argues that such access is warranted given the temporal, material, and geographical links between the two cases as well as the professional relationship which existed between Obrenović and Pandurević;²

NOTING the “Defence Motion on Behalf of Drago Nikolić Joining the Pandurević Motion Seeking Access to Confidential Material in the Obrenović Case (IT-02-60/2)”, filed on 14 June 2007 (“Nikolić Motion”), in which Drago Nikolić supports the Pandurević Motion;³ similarly argues that the requirements for access to confidential material from other proceedings have been satisfied;⁴ and requests the same relief as the Pandurević Motion;⁵

NOTING the “Defence Motion on Behalf of General Miletić Joining the Vinko Pandurević and Drago Nikolić Motions Seeking Access to Confidential Material in the Obrenović Case”, filed in the original French on 18 June 2007 (“Miletić Motion”),⁶ in which Radivoje Miletić associates himself with the arguments advanced in both the Pandurević and Nikolić Motions and seeks the same relief requested therein;⁷

NOTING that Pandurević, Nikolić, and Miletić (collectively, the “Applicants”) pledge to preserve the confidential nature of the requested materials and to adhere to any further protective measures which may be ordered by the Chamber;⁸

NOTING the “Prosecution’s Consolidated Response to Motion on Behalf of Vinko Pandurević for Access to Confidential Information in the Obrenović Case, with Confidential Appendix A”, filed

¹ Pandurević Motion, para. 1.

² *Ibid.*, paras. 4–6.

³ Nikolić Motion, para. 3.

⁴ *Ibid.*, paras. 11–13.

⁵ *Ibid.*, paras. 1 and 14.

⁶ 11 July 2007 (English translation).

⁷ Miletić Motion, paras. 4 and 6.

confidentially on 21 June 2007 (“Prosecution Response” and “Confidential Appendix A”), in which the Prosecution partially opposes the three motions (collectively, the “Motions”), specifically the disclosure of two confidential exhibits, three 92 *bis* witness statements, and all closed session testimony in the *Obrenović* case as well as certain portions of the sentencing brief⁹ on the grounds that:

- a. such materials “pertain solely to the security issues faced by Obrenović’s family as a result of his plea and the good character of Obrenović”¹⁰ and therefore are not “relevant to the events or the Accused charged in this case”;¹¹
- b. the contested materials “raise very serious security concerns for the individuals referenced” therein;¹² and
- c. because such materials were filed in the context of a sentencing hearing, their disclosure in this case “may have a chilling effect on individuals called upon in the future to participate in sentencing hearings”;¹³

NOTING that the Prosecution requests this Trial Chamber to deny the Motions in relation to these materials or, in the alternative, to conduct an *in camera* review of them in order to determine whether the requested access should be granted;¹⁴

NOTING that the Prosecution does not oppose the disclosure of the body of the *Obrenović* sentencing brief as well as 10 of its 14 attachments and that these uncontested materials are appended, confidentially, to the Prosecution Response;¹⁵

NOTING the “Motion Seeking Leave to Reply and Reply on Behalf of Vinko Pandurević to Prosecution’s Consolidated Response to Motion on Behalf of Vinko Pandurević for Access to Confidential Information in the Obrenović Case”, filed on 28 June 2007 (“Pandurević Reply”), in which Pandurević asserts that:

- a. Obrenović is a witness of “great importance” in the case against Pandurević given: (1) the former’s position as Chief of Staff and Deputy Commander of the Zvornik Brigade, as well as

⁸ Pandurević Motion, para. 7; Nikolić Motion, paras. 9 and 10; and Miletić Motion, para. 5.

⁹ Prosecution Response, paras. 3–4.

¹⁰ *Ibid.*, para. 8.

¹¹ *Ibid.*, para. 8.

¹² *Ibid.*, para. 8.

¹³ *Ibid.*, para. 9.

¹⁴ *Ibid.*, para. 18–19.

¹⁵ *Ibid.*, para. 4 and Confidential Appendix A.

his *de facto* role as Brigade Commander at various times in July, August, and September 1995¹⁶ and (2) the fact that that Obrenović will directly testify to the alleged responsibility and involvement of Pandurević with regard to the events in and around Srebrenica during the relevant period covered by the indictment;¹⁷

- b. the Prosecution is not aware of the Defence strategy and is therefore not in a position to assess the importance of the material requested by the Defence;¹⁸
- c. pursuant to the case law of the Tribunal, the moving party is only required to establish the likelihood that the requested materials may assist in the preparation of the Defence case;¹⁹ and
- d. evidence of Obrenović's character is (1) within the general category of accessible material and (2) "*a fortiori* relevant" given Obrenović attitude to these proceedings;²⁰

NOTING the "Request for Leave to Reply and Reply of General Miletić to the Prosecution Response to Motion of Vinko Pandurević for Access to Confidential Information in the Obrenović Case", filed confidentially in the original French on 28 June 2007 ("Miletić Reply"),²¹ in which Miletić argues that:

- a. it is not for the Prosecution to assess the importance of the requested material to the Defence case, but rather for the Defence simply to make a *prima facie* showing of relevance which is accomplished by establishing a "temporal, geographic and material link between the two cases";²²
- b. any information related to Obrenović's character will assist the Defence in assessing his credibility which "more than likely [...] will be an issue in this case" due to the particular importance of Obrenović as a witness for the Prosecution;²³ and
- c. security issues cannot be invoked as a justification for restricting access to materials which are necessary and useful to the preparation of the defence case;²⁴

¹⁶ Pandurević Reply, para. 7.

¹⁷ *Ibid.*, para. 8.

¹⁸ *Ibid.*, para. 11.

¹⁹ *Ibid.*, paras. 12-13.

²⁰ *Ibid.*, para. 15.

²¹ 6 July 2007 (English translation).

²² Miletić Reply, para. 9.

²³ *Ibid.*, paras. 10 and 11.

²⁴ *Ibid.*, para. 12.

NOTING the “Defence Motion on Behalf of Drago Nikolić Joining the Pandurević and Miletić Motions Seeking Leave to Reply and Replies to Prosecution’s Consolidated Response to Defence Motions for Access to Confidential Material in the *Obrenović* Case (IT-02-60/2)”, filed confidentially on 29 June 2007 (“Nikolić Reply”), in which Nikolić joins the Pandurević and Miletić Replies²⁵ and emphasises the particular relevance and importance of the requested material given the concerns raised previously and jointly by the Defence regarding the expected testimony of Obrenović in the instant proceedings;²⁶

NOTING the suggestion contained in the Nikolić Reply that, because Obrenović cooperated with the Prosecution pursuant to the terms of a plea agreement, he should be viewed as a potentially interested witness in the instant proceedings;²⁷

NOTING that Rule 75(F) provides:

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 (the “second proceedings”) unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule [...];

NOTING that Rule 75(G) provides:

A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply: (i) to any Chamber, however constituted, remaining seised of the first proceedings; or (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings;

NOTING that, pursuant to Rule 75(H), “[b]efore determining an application under paragraph (G)(ii) above, the Chamber seised of the second proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal”;

CONSIDERING that Trial Chamber I is no longer seised of the proceedings the *Obrenović* case, which were terminated on 10 December 2003, and therefore the Applicants have properly filed their Motions before this Trial Chamber;

CONSIDERING that this Chamber has consulted with Judge Liu who was then a Judge of Trial Chamber I, which ordered the original protective measures in the *Obrenović* case;

²⁵ Nikolić Reply, para. 1.

²⁶ *Ibid.*, para. 2.

CONSIDERING that a party is always entitled to seek material from any source, including another case before the 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;²⁸

CONSIDERING that the requesting party may establish a legitimate forensic purpose for access to confidential material from another case by demonstrating “the existence of a nexus between the applicant’s case and the case from which the material is sought” and that such nexus consists of a “geographical, temporal, or otherwise material overlap” between the two cases;²⁹

CONSIDERING that such access may be granted if the Trial Chamber is satisfied that the requesting party has established that the material in question “is likely to assist the applicant’s case materially, or that there is at least a good chance that it would”³⁰ and further that the credibility of a witness is always a material issue in proceedings before this Tribunal;

CONSIDERING that it is within the Chamber’s discretionary power to strike a balance between the requesting party’s right of access and the protection and integrity of confidential information;³¹

CONSIDERING that the Applicants have sufficiently identified and described by its general nature the materials in the *Obrenović* proceedings to which they seek access;³²

CONSIDERING that the Applicants have established a legitimate forensic purpose for access to the requested material by demonstrating a sufficient nexus between the two cases by virtue of (1) the geographical and temporal similarity of allegations between the two proceedings³³ and (2) the alleged link between *Obrenović* and the Applicants within the VRS command structure;³⁴

CONSIDERING that the Applicants have further demonstrated that there is a good chance that evidence presented regarding *Obrenović*’s character—both *viva voce* testimony and 92 *bis*

²⁷ *Ibid.*, para. 2, citing Confidential Joint Defence Motion Seeking an Order From the Trial Chamber Concerning the Testimony of Witness Dragan Obrenović, 1 June 2007.

²⁸ *Prosecutor v. 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. 4 (internal citations omitted).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*, p. 6.

³² Pandurević Motion, para. 8; Nikolić Motion, para. 14(b); Miletić Motion, para. 6.

³³ Both cases concern the same criminal acts alleged to have been committed by various officials of the Republic Srpska in and around Srebrenica from July to November 1995. See, e.g., Nikolić Motion, para. 12.

³⁴ *Obrenović* was a Deputy Commander of the Zvornik Brigade and as such was an immediate subordinate of the commander of the Brigade, Applicant Pandurević. Miletić was a superior to both Pandurević and *Obrenović* in his capacity as the Chief of Operations and Training and was Standing in for the Chief of Staff of the Main Staff at the time of the events described in both the *Obrenović* case and the present one. See, e.g., Pandurević Motion, para. 5 and Nikolić Motion, para. 13.

statements—may be of material assistance to the Applicants' case for the purpose of assessing Obrenović's credibility;³⁵

CONSIDERING that this Trial Chamber deemed it necessary to review the contested material *in camera* as suggested by the Prosecution;³⁶

CONSIDERING further that material:

- a. limited strictly to "the security issues faced by Obrenović's family as a result of his decision to plead guilty",³⁷ such as confidential *Obrenović* Exhibit DS16a; and
- b. merely "identifying additional individuals who may be called upon as witnesses to testify to Obrenović's good character",³⁸ such as attachment No. 14 of the *Obrenović* sentencing brief

could not in any way assist the Applicants in the instant proceedings, and therefore access to these materials is not warranted;

CONSIDERING that because no order lifting the confidentiality of the *Obrenović* sentencing brief has been issued to date by Trial Chamber I, the Prosecution's disclosure of the uncontested portions of the brief, although no doubt undertaken in good faith, was technically premature given the nature of the Motions and the Prosecution's lack of authority to lift the confidentiality of the requested materials;

CONSIDERING that it is in the interests of justice, when granting access to confidential material in the *Obrenović* case to the Applicants, to extend this access to all other co-accused in the *Popović et al.* case given the concerns raised previously and jointly by the Defence;³⁹

CONSIDERING that, because the Prosecution's security concerns will be allayed by this Trial Chamber's application of Rule 75, the Prosecution's anxiety regarding any potential chilling effect on future witness participation at sentencing hearings is unfounded;

PURSUANT TO Rules 54 and 75 of the Rules,

HEREBY GRANTS the Pandurević, Nikolić, and Miletić applications for leave to reply to the Prosecution Response.

³⁵ Pandurević Reply, para. 4; Miletić Reply, para. 11; Nikolić Reply, para. 2.

³⁶ Prosecution Response, para 19.

³⁷ *Ibid.*, para. 11.

³⁸ *Ibid.*, para. 13.

³⁹ See n. 27, *supra*.

GRANTS the Motions in part and **ORDERS** as follows:

1. In consultation with the Prosecution in order to identify the material, the Registry shall, make available to the Applicants as well as the other co-accused in the *Popović et al* case (collectively, the “Accused”) the following *inter partes* confidential material from the *Obrenović* case:
 - a. the body of the sentencing brief as well as its attachments Nos. 1–13, which include confidential *Obrenović* Exhibits DS5 and DS11a;
 - b. confidential Exhibits PS1*bis* and PS4*bis*; and
 - c. the transcripts of all closed-session, *viva voce* testimony.
2. Confidential *Obrenović* Exhibit DS16a and attachment No. 14 of the sentencing brief shall not be disclosed.
3. *Ex parte* material shall not be disclosed.
4. Except where directly and specifically necessary for the preparation and presentation of the case, and only upon leave granted by this Trial Chamber, the Accused shall not disclose to the public, to the media, or to the family members or associates of the Accused the above-mentioned *inter partes* confidential material from the *Obrenović* case.
5. The Accused shall have no contact with the witnesses who provided the statements referenced at paragraphs 1(a) and (b) of this Disposition or with the witnesses whose testimony is described at paragraph 1(c) of this Disposition.
6. Subject to the modifications prescribed above, any other protective measures already in place in relation to the material disclosed shall remain in place.
7. For the purpose of this Decision:
 - a. the “Accused” means Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević, their Defence counsel and immediate legal assistants and staff, and others specifically assigned by the Tribunal to their Defence teams;
 - b. the “public” means all persons, governments, organisations, entities, clients, associations and groups, other than Judges of the Tribunal and the staff of the Registry, the Prosecution, or the Accused; the “public” includes, without limitation, family, friends, and associates of the Accused, and those accused and their defence counsel in other cases or proceedings before the Tribunal;

- c. the "media" means all video, audio, and print media personnel including journalists, authors, television, and radio personnel and their agents and representatives.

DISMISSES the Motions in all other respects.

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



Carmel Agius
Presiding

Dated this nineteenth day of July 2007
At The Hague
The Netherlands

[Seal of the Tribunal]