



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: 23 October 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: 23 October 2007

PROSECUTOR

v.

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

PUBLIC

**DECISION ON MOTION FOR ACCESS TO
CONFIDENTIAL MATERIAL IN PROSECUTOR V. MOMIR NIKOLIĆ**

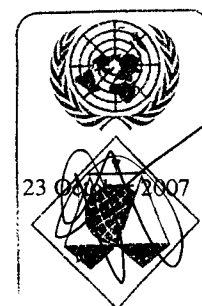
Office of the Prosecutor

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

Case No. IT-05-88-T



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 “Defence Motion on Behalf of Drago Nikolić Seeking Access to Confidential Material in Case No. IT-02-60/1”, filed on 29 June 2007 (“Nikolić Motion”), in which Nikolić seeks access to all confidential material in the case of *Prosecutor v. Momir Nikolić*, including, *inter alia*, “exhibits, filings (including Momir Nikolić’s sentencing brief), all 92 *bis* witness statements and the testimonies of *viva voce* witnesses”;¹

NOTING that Nikolić argues that such access is warranted given the temporal, material, and geographical links between the two cases as well as the respective positions of Momir Nikolić and Nikolić within the VRS;²

NOTING the “Motion of General Miletić Joining the Motion of Drago Nikolić Seeking Access to Confidential Material in the Momir Nikolić Case”, filed in the original French on 3 July 2007 (“Miletić Motion”),³ in which Miletić associates himself with the arguments advanced in the Nikolić Motion and seeks the same relief requested therein;⁴

NOTING that Nikolić and Miletić (collectively, “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;⁵

NOTING the “Prosecution’s Consolidated Response to Defence Motions Seeking Access to Confidential Material in Case No. IT-02-60/1”, filed on 12 July 2007 (“Prosecution Response”), in which the Prosecution partially opposes the two motions (collectively, “Motions”), specifically the disclosure of two confidential exhibits, a confidential motion for protective measures, the confidential portions of Momir Nikolić’s sentencing brief, and the closed-session testimony of two witnesses⁶ (“materials”) – all of which relates exclusively to three character witnesses granted protective measures in the *Momir Nikolić* sentencing proceedings⁷ – on the grounds that:

¹ Nikolić Motion, para. 15.

² *Ibid.*, paras. 12–14.

³ Miletić Motion, (English translation filed 24 August 2007).

⁴ Miletić Motion, paras. 3 and 5.

⁵ Nikolić Motion, paras. 10 and 11; Miletić Motion, para. 4; *see also* Nikolić Reply, para. 10; Miletić Reply, para. 13.

⁶ Prosecution Response, para. 3.

⁷ *Ibid.*, para. 3.

- (1) the materials “pertain solely to the good character of Momir Nikolić”⁸ and not “to his veracity or credibility”⁹ and therefore do not “include information relevant to the events or the Accused charged in this case”;¹⁰
- (2) the materials “raise very serious security concerns for the individuals referenced” therein;¹¹ and
- (3) 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”;¹²

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;¹³

NOTING that the Prosecution concedes previous disclosure to the Defence of (1) a confidential exhibit on 2 March 2006,¹⁴ and (2) the closed-session testimony of one witness on 31 October 2006;¹⁵

NOTING the “Reply of General Miletić to the Prosecution’s Consolidated Response to Defence Motions Seeking Access to Confidential Information in the Momir Nikolić Case”, filed confidentially in the original French on 16 July 2007 (“Miletić Reply”),¹⁶ in which Miletić argues that:

- (1) because “[t]he charges in this case are identical to the charges against Momir Nikolić and there is a temporal, geographic and material link between the two cases[,] [t]herefore, *prima facie*, all exhibits presented in the Momir Nikolić case could prove relevant and useful to the Defence in the present case”;¹⁷

⁸ *Ibid.*, para. 7.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*, para. 8.

¹³ *Ibid.*, para. 14–15.

¹⁴ *Ibid.*, paras. 9, 12.

¹⁵ *Ibid.*, para. 13.

¹⁶ Miletić Reply, (English translation filed 26 July 2007).

¹⁷ *Ibid.*, para. 9.

- (2) because Momir Nikolić is “one of the most important witnesses”¹⁸ for the Prosecution in the instant case, “all information relating to his personality is relevant”¹⁹ and “may help the Defence to evaluate his credibility”;²⁰ and
- (3) “security problems cannot justify the refusal to disclose exhibits to the Defence that are necessary and useful in preparing the defence of an accused”;²¹

NOTING further that Miletić “does not consider it necessary to have access to the confidential motion for protective measures”;²²

NOTING the “Motion Seeking Permission to Reply and Reply to the Prosecution’s Consolidated Response to Defence Motions Seeking Access to Confidential Material in Case No. IT-02-60/1”, filed on 19 July 2007 (“Nikolić Reply”), in which Nikolić argues that:

- (1) “a distinction must be made between the threshold test to be met to gain access to confidential material in another case – i.e. demonstration of a ‘geographical, temporal or otherwise material overlap’ between the proceedings – and the use which the Applicant may make of these documents”;²³
- (2) because Momir Nikolić is a confirmed Prosecution witness in *Popović et al.*²⁴ and Nikolić “has already had the opportunity to express [his] view that Momir Nikolić is neither a credible nor a reliable Witness”,²⁵ material related to Momir Nikolić’s character – including the identities of those who testified on that issue²⁶ – “is very likely to assist the Applicant”;²⁷
- (3) “the Prosecution is not in a position to assess” the importance of the materials “to the Defence strategy”,²⁸ but rather it is the Defence who should make this determination after having been given “an opportunity to see the requested material”;²⁹ and

¹⁸ *Ibid.*, para. 10.

¹⁹ *Ibid.*

²⁰ *Ibid.*, para. 11.

²¹ *Ibid.*, para. 12.

²² *Ibid.*, para. 14.

²³ Nikolić Reply, para. 6.

²⁴ *Ibid.*, para. 7.

²⁵ *Ibid.*

²⁶ *Ibid.*, para. 17.

²⁷ *Ibid.*, para. 7; *see also* Nikolić Reply, paras. 13, 14.

²⁸ Nikolić Reply, para. 8.

²⁹ *Ibid.*, para. 15.

(4) the Prosecution should not be permitted to assert either (1) general security concerns or (2) a fear of a potential chilling effect on future witness participation as a means to “shield” relevant character evidence from the Defence;³⁰

NOTING the “Order to Serve Momir Nikolić with ‘Defence Motion on Behalf of Drago Nikolić Seeking Access to Confidential Material in Case No. IT-02-60/1’”, issued on 11 September 2007, wherein the Chamber pursuant to Rule 75(I) of the Rules, gave Momir Nikolić until 21 September 2007 to respond to the Nikolić Motion;³¹

NOTING that no response was filed by Momir Nikolić;

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 (“second proceedings”) or another jurisdiction 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(I), “[b]efore determining an application under paragraph (G)(ii), (H)(ii), or (H)(iii) above, the Chamber shall endeavour to obtain all relevant information from the first proceedings, including from the parties to those 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 in the *Momir Nikolić* case, and therefore the Applicants have properly filed their Motions before this Trial Chamber;

CONSIDERING that this Chamber has obtained the relevant information from the *Momir Nikolić* case and has consulted with Judge Liu, currently a Judge of the Appeals Chamber and formerly a Judge of Trial Chamber I, and which ordered the original protective measures in that case, as well as the previous Defence counsel of Momir Nikolić;

³⁰ *Ibid.*, paras. 11, 18.

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;³²

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”³³ and that such nexus consists of a “material, geographical and temporal overlap” between the two cases;³⁴

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”;³⁵

CONSIDERING 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,³⁶ and accordingly this Trial Chamber has deemed it necessary to review the contested material *in camera* as suggested by the Prosecution;³⁷

CONSIDERING that the Applicants have sufficiently identified and described by its general nature the material in the *Momir Nikolić* proceedings to which they seek access;³⁸

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)

³¹ Order to Serve Momir Nikolić with ‘Defence Motion on Behalf of Drago Nikolić Seeking Access to Confidential Material in Case No. IT-02-60/1’, 11 September 2001, p. 1.

³² *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).

³³ *Ibid.*

³⁴ *Ibid.*, p. 2.

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 6.

³⁷ Prosecution Response, para. 15.

³⁸ Nikolić Motion, para. 15; Miletić Motion, para. 5.

the geographical and temporal similarity of allegations between the two proceedings³⁹ and (2) the alleged link between Momir Nikolić and the Applicants within the VRS command structure;⁴⁰

CONSIDERING that the Applicants have further demonstrated that there is a good chance that evidence regarding Momir Nikolić's character – as well as the identities of those witnesses who provided such evidence – may be of material assistance to their case for the purpose of assessing Momir Nikolić's credibility as a Prosecution witness in the instant proceedings;⁴¹

CONSIDERING however that, given the content of the documents at issue in this particular instance, material pertaining solely to the personal security concerns of the witnesses as well as the identity of those witnesses, in the Momir Nikolić sentencing proceedings, including the motion for protective measures with respect to Witnesses DA, DB, and DC, could not in any way assist the Applicants in the instant proceedings;

CONSIDERING that because no order lifting the confidentiality of the material previously disclosed by the Prosecution⁴² has been issued to date by Trial Chamber I, such disclosure, 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 *Momir Nikolić* case to the Applicants, to extend this access to all other co-accused in the *Popović et al.* case;⁴³

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, 75, and 126 *bis* of the Rules,

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

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

³⁹ Both cases concern the same criminal acts alleged to have been committed by various officials of the Republika Srpska in and around Srebrenica from July to November 1995.

⁴⁰ See n. 2, *supra*.

⁴¹ Nikolić Reply, para. 7; Miletić Reply, para. 11.

⁴² See nn. 14, 15, *supra*.

⁴³ See *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Pandurević Motion for Access to Confidential Material in *Prosecutor v. Obrenović*, 19 July 2007, p. 6.

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 *Momir Nikolić* case under the condition that any information provided that reveals the identity of Witnesses DA and DB are fully redacted: (a) confidential Tabs B/3, B/4, and B/5 of the sentencing brief; and (b) the closed-session testimony of Witnesses DA and DB.
2. The *Momir Nikolić* confidential motion for protective measures 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 *Momir Nikolić* case.
5. The Accused shall have no contact with the witnesses who provided the statements referenced at paragraphs 1(a) 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 twenty-third day of October 2007
At The Hague, The Netherlands

[Seal of the Tribunal]

