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10 July 2009

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-98-32/1-T

Date: 10 July 2009

Original: English

IN TRIAL CHAMBER III

Before: **Judge Patrick Robinson, Presiding**
Judge Christine Van den Wyngaert
Judge Pedro David

Registrar: **Mr. John Hocking**

Decision of: **10 July 2009**

PROSECUTOR

v.

MILAN LUKIĆ
SREDOJE LUKIĆ

PUBLIC

DECISION ON MOTION BY RADOVAN KARADŽIĆ FOR ACCESS TO CONFIDENTIAL MATERIALS IN THE LUKIĆ AND LUKIĆ CASE

The Office of the Prosecutor

Mr. Dermot Groome
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TRIAL CHAMBER III ("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 of the "Motion by Radovan Karadžić for access to confidential materials in the Lukić and Lukić case", dated 9 April 2009 and filed on 14 April 2009 ("Motion"), and hereby renders its Decision thereon.

A. Sumbissions of the parties

1. Motion

1. Radovan Karadžić ("Applicant") seeks disclosure, pursuant to Rule 75(G)(i) of the Rules of Procedure and Evidence ("Rules"), of all confidential material in the present case. In particular, the Applicant seeks access "for the duration of the trial proceedings" to "(i) all confidential closed and private session testimony transcripts; (ii) all closed session hearings transcripts; (iii) all confidential exhibits; and (iv) all confidential *inter partes* filings and submissions and all confidential Trial Chamber decisions."[1] The Trial Chamber notes that the Prosecution, the Defence of Milan Lukić and the Defence of Sredoje Lukić have now closed their respective cases.

2. The Applicant submits that the *Karadžić* case and the *Lukić and Lukić* cases are "intertwined" and that there is "an interrelation between the factual basis for the allegations against himself and Mr. Milan Lukic and Mr. Sredoje Lukić".[2] The Applicant also argues that there is a significant geographical and temporal overlap between the two cases, in particular with respect to the crimes that are alleged to have been committed in Višegrad.[3]

3. The Applicant argues that the material and information sought are of "crucial importance" to the effective investigation and preparation of his case, as they directly impact "on the Prosecution's assertion of Dr. Karadžić having participated in a joint criminal enterprise". He expects that there is likely to be a significant overlap in the witnesses who will testify in both cases.[4]

4. The Applicant submits that the Motion should be granted based on the basis of the principle of equality of arms, so as not to put him at a disadvantage *vis-à-vis* the Prosecution.[5] He states that he will abide by the existing orders regarding witness protection.[6]

[1] Motion, para. 1.
[2] Motion, para. 6.
[3] Motion, paras 7-8.
[4] Motion, para. 10.
[5] Motion, paras 6 and 11.
[6] Motion, para. 5.

2. Response

5. On 28 April 2009, the Prosecution responded, indicating that it does not oppose the Motion insofar as it relates to closed session testimony transcripts and confidential exhibits, referring to material listed in categories (i) and (iii) above.[7] However, it argues that access to theses documents should be limited to material related to the specific charges against the Applicant. The Prosecution has identified which witnesses in the present case, and which parts of their evidence, that relate to the charges against the Applicant.[8] Furthermore, the Prosecution requests that the Trial Chamber "modifies the existing protective measures and establishes clear conditions",[9] which relate mainly to the handling of third party disclosure.[10] However, the Prosecution does not make an actual request for modification of existing protective measures.

6. The Prosecution opposes granting the Applicant "blanket access" to the non-evidentiary confidential material, referring to material listed in categories (ii) and (iv) above. It submits that beyond evidentiary material, the Applicant's broad request constitutes a fishing expedition, and that he has not provided any basis for granting access to non-evidentiary material, which cannot assist him with material factual issues in his own case.[11]

7. The Prosecution indicates it will "identify to the Registrar as soon as practicable the confidential inter partes evidentiary material to which the Applicant should not be granted immediate access, i.e., Rule 70 material" and for which consent of the relevant provider is needed. It also argues that the Applicant should not be granted immediate access, "in accordance with the time frames set out in such orders as may be issued by the *Karadžić* Trial Chamber", to "any protected witnesses in *Lukić & Lukić* case who may be called in the Applicant's case for whom delayed disclosure may be justified".[12] At the Prosecution at the time of the filing of the Motion could not yet identify "witnesses in common to the the two cases".[13]

8. While acknowledging that the Applicant does not specifically mention *ex parte* material, the Prosecution submits that since paragraph 1(d) of the Motion omits to qualify "all confidential Trial Chamber decisions" with the words "*inter partes*", the phrase is susceptible to a reading that the

[7] Prosecution response to motion by Radovan Karadžić for access to all confidential material, 28 April 2009, paras 2, 8 and 9.
[8] Response, paras 4, 7-8. These witnesses are: VG-013, VG-014, VG-018, VG-032, VG-038, VG-063, VG-078, VG-084, VG-089, VG-094, VG-101, VG-104, VG-115, VG-119, VG-131, VG-133, VG-141, and MLD-25.
[9] Response, para. 2.
[10] Response, paras 18-21.
[11] Response, paras 3,15-17.
[12] Response, paras 10, 18 (a) and (b).
[13] Response, para. 10.

Applicant requests access to *ex parte* decisions as well. The Prosecution opposes granting the Applicant access to such *ex parte* material.[14]

B. Applicable law

9. In accordance with the caselaw of the Tribunal, "a party is always entitled to seek materials from any source, including from another case before the International Tribunal, to assist in the preparation of its case if the materials sought have been identified or described by their general nature and if a legitimate forensic purpose for such access has been shown."[15] In the case law, requests for "all confidential materials" have been considered to be sufficiently specific.[16]

10. To establish the existence of a legitimate forensic purpose, an applicant must show that the requested material "may be of material assistance to his case."[17] It is sufficient that access to the material "is likely to assist the applicant's case materially or that there is at least a good chance that it would".[18] Relevance of the material to the applicant's case "may be determined by showing the existence of a nexus between the applicant's case and the cases from 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."[19]

11. Lastly, it has been established that "material provided under Rule 70 shall not be released to the Accused in another case unless the provider consents to such disclosure."[20] 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.[21]

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[14] Response, paras 11-13.
[15] *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. See also *Prosecutor v. Momčilo 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 ("*Krajišnik* Decision"), p. 4.
[16] *Prosecutor v. Radoslav Brđanin*, Case No. 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. See also *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Radovan Karadžić's motion for access to confidential material in the Dragomir Milošević case, 19 May 2009, para. 9.
[17] *Martić* Decision, para. 9.
[18] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić's motion seeking access to confidential material in Blagojević and Jokić Case, 18 January 2006. See also *Krajišnik* Decision, p. 4, with further references.
[19] *Martić* Decision, para. 9, with further references.
[20] *Krajišnik* Decision, p. 5, quoting *Prosecutor v. Tihomir 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. 8; *Martić* Decision, para. 12.
[21] *Krajišnik* Decision, p. 6.

C. Discussion

12. The Applicant is charged, *inter alia*, with participating in a joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from the territories of Bosnia and Herzegovina claimed as Bosnian Serb territory. As charged in the indictment against the Applicant, the joint criminal enterprise encompasses a number of incidents that allegedly took place in Višegrad and in respect of which evidence has been presented in the present case, namely the killing of approximately 70 civilians Adem Omeragić's house on Pionirska Street on 14 June 1992, the killing of a number of civilians on bridges over the Drina River between May and June 1992, and the detention of civilians in the Vilina Vlas Hotel and in the Hasan Veletovac School between April and July 1992.[22] On this basis, there is a strong nexus between the Applicant's case and the present case and the Trial Chamber considers that the Applicant has shown a legitimate forensic purpose for being granted access to the material in categories (i) and (iii) above, insofar as they relate to the crimes alleged to have been committed in Višegrad that are charged against the Applicant. However, the Trial Chamber considers as too restrictive the Prosecution's proposal to limit the Applicant's access to those portions of the evidence which the Prosecution has deemed to be relevant to the charges against the Applicant. Rather, in determining whether legitimate forensic purpose exists, the Trial Chamber need only be satisfied, more broadly, that the material sought is likely to assist the Applicant's case. The Trial Chamber is satisfied that, irrespective of the specific incidents charged in the indictment against the Applicant, he has established a legitimate forensic purpose in obtaining access to evidence in this case which relates to the events in Višegrad as a whole, including evidence relating to events not specifically charged.

13. With regard to material that falls within categories (ii) and (iv), the Trial Chamber recalls that the principle of equality of arms supports giving the applicant the opportunity, in common with the Prosecution, which has has access to all *inter partes* filings, to understand the proceedings and evidence,in the other case, and to evaluate their relevance to his own case.[23] Accordingly, once an applicant has been granted access to confidential material in another case before the Tribunal, he should not be prevented from accessing filings, submissions, decisions and hearing transcripts which may relate to that confidential material. Furthermore, the Trial Chamber recalls that the applicable standard for access to all confidential material is only that there be a "good chance" that the material in question would materially assist the case of the Applicant and that it does not require

[22] Prosecutor v Radovan Karadžić, Case No. IT-95-5/18-PT, Third amended indictment, 27 February 2009.
[23] *Miletić* Decision, para. 4; *Prosecutor v. Vidoje Blagojević and Dragan Jokić,* Case No. IT-02-60-A, Decision on motions for access to confidential materials, 16 November 2005, para. 11.

that the applicant "seeking access to *inter partes* confidential materials in other cases to establish a specific reason that each individual item is likely to be used".[24]

14. The Trial Chamber considers that the Applicant will be able to better understand and make use of confidential exhibits and testimony transcripts in the *Lukić and Lukić* case if he has access to the filings, submissions, decisions and hearing transcripts related to this material, and that, as such, there is a legitimate forensic purpose in granting him access to this material. The Trial Chamber will therefore grant the Applicant's request for access to all closed session hearing transcripts and all confidential *inter partes* filings and submissions and all confidential Trial Chamber decisions.[25] It notes, however, as it is the practice of the Tribunal,[26] that the Prosecution, Milan Lukić and Sredoje Lukić will have the opportunity to file a request with the Trial Chamber to withhold certain specifically identified material or grant any additional protective measures or redactions, should they deem it necessary.

15. Insofar as any *inter partes* confidential material was provided to the Prosecution or Defence in the present case under Rule 70, it shall not be disclosed to the Applicant unless the provider of such material has consented to its disclosure. The Prosecution and Defence in the present case shall approach the providers of such material with a view to obtaining such consent.

16. Furthermore, while noting that the Prosecution opposed granting the Applicant access to any *ex parte* material, the Trial Chamber notes that the Applicant did not request access to *ex parte* confidential material present case, and it does not interpret his request to incorporate such material.

17. In light of the foregoing and subject to the conditions detailed below, the Trial Chamber will grant the Motion for access to all *inter partes* confidential material in the present case related to the crimes that were allegedly committed in Višegrad, including all confidential closed and private session testimony transcripts, all closed session hearing transcripts, all confidential exhibits, and all *inter partes* confidential filings and submissions, including all confidential Trial Chamber decisions.

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[24] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on motion by Radivoje Miletić for access to confidential information, 9 September 2005, p. 4 ("*Miletić* Decision").
[25] Motion, para. 1.
[26] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Momčilo Perišić's request for access to confidential material in the *Dragomir Milošević* Case, 27 April 2009, paras 15, 19; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on motions for access to confidential materials, 16 November 2005, paras 16, 19 (c). *See also Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Radovan Karadžić's motion for access to confidential material in the Dragomir Milošević case, 19 May 2009

D. Conditions of access

18. As noted above, the Prosecution argues that the Applicant should not be granted immediate access, "in accordance with the time frames set out in such orders as may be issued by the *Karadžić* Trial Chamber", to "any protected witnesses in *Lukić & Lukić* case who may be called in the Applicant's case for whom delayed disclosure may be justified".[27]

19. The Trial Chamber considers that the approach suggested by the Prosecution is appropriate. Accordingly, the Trial Chamber allows the Prosecution to withhold the material until the Trial Chamber seized of the *Karadžić* case decides on the Prosecution's requests for delayed disclosure of *inter partes* confidential material from the *Lukić and Lukić* case. The Prosecution will have to file any such requests for delayed disclosure before the Trial Chamber seized of the *Karadžić* case within two weeks of this Decision.

E. Disposition

20. For the foregoing reasons and pursuant to Rules 54, 70 and 75 of the Rules, the Trial Chamber:

GRANTS the Motion and **ORDERS** the Prosecution, the Defence of Milan Lukić and the Defence of Sredoje Lukić to identify to the Registry the following *inter partes* material in the present case, which is not subject to Rule 70:

(i) all confidential closed and private session trial transcripts;

(ii) all confidential exhibits;

(iii) all confidential filings, submissions and decisions of the Trial Chamber;

ORDERS the Prosecution and Defence to determine without delay which of the requested material is subject to the provisions of Rule 70, and without undue delay contact the providers of such material to seek their consent for disclosure to the Applicant, and, where such consent is given, to notify the Registry of such consent;

ORDERS the Prosecution, to file before the Trial Chamber seized of the *Karadžić* case, within two weeks of this Decision, its request, if any, for delayed disclosure of any *inter partes* confidential material in the *Lukić and Lukić* case;

[27] Response, para. 18 (a) and (b).

INSTRUCTS the Registry to withhold disclosure of any material subject to Rule 70 until such time as the Prosecution or the Defence has informed it that consent for disclosure has been obtained, even in respect of those providers who may have consented to the use of the relevant material in a prior case;

INSTRUCTS the Registry that where consent has not be obtained from the Rule 70 providers the material shall not be disclosed;

INSTRUCTS the Registry to disclose to the Applicant:

(i) all the confidential *inter partes* material identified by the Prosecution and Defence in accordance with this Decision; and

(ii) any material subject to Rule 70 once the Prosecution or Defence has identified such material and informed the Registry of the consent of the relevant Rule 70 providers in accordance with this Decision;

ORDERS that the Applicant and his Registry-assigned assistants shall not disclose to the public, or to any third party, any confidential or non-public material disclosed from the present 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.

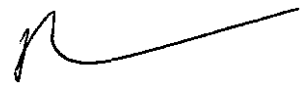
ORDERS the Applicant and his Registry-assigned assistants that if any confidential and non-public material is disclosed to the public where directly and specifically necessary according to the previous order, any person to whom disclosure is made shall be informed that he or she is forbidden to copy, 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 or his Registry-assigned assistants as soon as it is no longer needed for the preparation of the Applicant's case;

INFORMS the Applicant that 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 and his Registry-assigned assistants, including and without limitation, non-Registry assigned members of the Applicant's defence team, families, friends, and associates of the Applicant, accused and defence counsel in other cases or proceedings before the Tribunal, and 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 present case shall continue to have effect *mutatis mutandis* 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 Patrick Robinson
Presiding

Dated this tenth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]