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**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-09-92-PT
Date: 21 March 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 21 March 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE REQUEST FOR ACCESS TO
CONFIDENTIAL MATERIALS FROM *KRSTIĆ* CASE**

The Prosecutor v. Radislav Krstić (IT-98-33)

Office of the Prosecutor
Mr Norman Farrell

Counsel for Radislav Krstić
Mr Nenad Petrušić
Mr Norman Sepenuk

The Prosecutor v. Ratko Mladić (IT-09-92-PT)

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Mr Branko Lukić
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I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 13 December 2011, the Mladić Defence (“Applicant”) filed a request for access (“Access Request”) to confidential materials from the case of *Prosecutor v. Radislav Krstić* (“Krstić case”)¹ in which it seeks access to all *inter partes* and *ex parte* confidential material from that case in the 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; and d) all documentary evidence submitted by the parties.² The Applicant submits that there is a “significant geographical, temporal overlap as well as significant factual nexus” and that similarities exist in the accusations against the Accused in this case and the *Krstić* case.³ Further, the Applicant submits that the material is necessary for “full and adequate defence preparation” and that it is willing to comply with any order regarding witness protection or a regime of confidentiality for documents.⁴

2. On 27 December 2011, the Prosecution responded not opposing the Applicant’s request for access to “evidentiary confidential *inter partes* material for all categories ((a)-(d))”, provided that the Chamber modifies any existing protective measures and establishes conditions “to preserve the safety and security of witnesses and to guard against improper disclosure to third parties”.⁵ With regard to *ex parte* material, the Prosecution opposes the Access Request in its entirety.⁶

II. APPLICABLE LAW

3. The Chamber is seised of the Applicant’s Access Request pursuant to Rule 75 (G) (ii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) which states:

(G) A party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply:

¹ *Prosecution v. Radislav Krstić*, Case No. IT-98-33.

² Defence Request for Access to Confidential Materials from *Krstić* Case, 13 December 2011, paras 1-2, 11. The Chamber notes that the Defence request relates only to confidential and *ex parte* material from the pre-trial and trial proceedings in the *Krstić* case, but sees no reason to exclude from the scope of this decision the appeals proceedings in the *Krstić* case.

³ Access Request, paras 5-8.

⁴ Access Request, paras 9-10.

⁵ Prosecution Response to Mladić Motion for Access to Confidential Materials in the *Krstić* Case, 27 December 2011 (“Prosecution Response”), paras 2, 9-11, 14-19. The Chamber notes that the Prosecution Response reiterates in para. 1 the categories set out by the Applicant in the Access Request identically save for the omission of the word “confidential” from “including all confidential Trial Chamber decisions” in category (c). The Chamber will proceed on the basis of the categories as set out in the Access Request.

⁶ Prosecution Response, paras 2, 13.

- (ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.

4. Rule 54 of the Rules provides that:

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

5. 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.⁷ The Tribunal's jurisprudence concerning the identification requirement is not particularly onerous, and applicant requests for "all confidential material" are generally considered sufficiently specific to meet this standard.⁸ With regard to *inter partes* confidential material, the applicant party must demonstrate that such material "is likely to assist the [party's] case materially, or at least there is a good chance that it would".⁹ The "good chance" standard may be met by the establishment of a legitimate forensic purpose, demonstrated by the existence of a "geographical, temporal or otherwise material overlap"¹⁰ between the applicant's case and the case from which the material is sought.¹¹ The "good chance" standard, however, does not require that the applicant party "establish a specific reason that each individual item is likely to be useful".¹²

6. The Tribunal's jurisprudence has developed specific criteria which must be met for access requests to *ex parte* confidential material in another case before the Tribunal. The Appeals Chamber has held 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

⁷ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Radovan Karadžić's Motion for Access to Confidential Material in *Dragomir Milošević* Case, 19 May 2009 ("*D. Milošević* Decision"), para. 7; *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, para. 9; *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").

⁸ *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. 8; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Motion by Stanišić for Access to All Confidential Materials in the *Brđanin* Case, 24 January 2007 ("*Brđanin* Decision"), para. 11.

⁹ *D. Milošević* Decision, para. 8; *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. 8.

¹⁰ *D. Milošević* Decision, para. 8; *Prosecutor v. Dario Kordić and Mario 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; *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, para. 9.

¹¹ *Prosecutor v. Mile Mrkšić et al.*, 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; *Krajišnik* Decision, pp. 4-5.

¹² *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.

public interests, or privacy interests of a person or institution”¹³ 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”.¹⁴ It follows that an applicant must meet a higher standard when proving a legitimate forensic purpose in order to justify such disclosure.¹⁵

7. With regard to material that has been provided pursuant to Rule 70 of the Rules, the party that introduced the material must obtain the consent of the Rule 70 provider before the material or its source can be disclosed to another accused before the Tribunal. Such consent is necessary even if the Rule 70 provider has in one or more prior cases consented to the disclosure of the material.¹⁶

8. Once an applicant has been granted access to confidential exhibits and confidential closed and private session testimony transcripts from another case before the Tribunal, he or she should not be prevented from accessing filings, submissions, decisions, and hearing transcripts which may relate to such confidential material.¹⁷

9. It is necessary, however, for the Chamber to strike a reasonable balance between the rights of the accused and the protection of witnesses and victims.¹⁸ Further, pursuant to Rule 75 (F) (i) of the Rules, any protective measures ordered for a victim or witness in any proceedings before the Tribunal shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal or another jurisdiction unless they are rescinded, varied, or augmented in accordance with the Rule.¹⁹

III. DISCUSSION

A. Access to Confidential *Inter Partes* Material

10. The Chamber is satisfied that the Applicant has identified with sufficient specificity the material it seeks and, further, the Chamber finds that there is a geographical and temporal nexus

¹³ *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal for Disclosure of Mitigating Material, 30 August 2006 (“*Bralo* Decision”), para. 17; *Prosecutor v. Blagoje 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, 13 April 2005 (“*Simić* Decision”), p. 4.

¹⁴ *Krajišnik* Decision, p. 5; *Bralo* Decision, para. 17; *Simić* Decision, p. 4.

¹⁵ *Karadžić* Decision, para. 12; *Krajišnik* Decision, p. 5; *Brđanin* Decision, para. 14; *Bralo* Decision, para. 17; *Simić* Decision, p. 4.

¹⁶ *Krajišnik* Decision, p. 6.

¹⁷ *D. Milošević* Decision, para. 11.

¹⁸ *D. Milošević* Decision, para. 16; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Prosecution’s Preliminary Response and Motion for Clarification Regarding Decision on Joint Motion of Hadžihasanović, Alagić and Kubura of 24 January 2003, 26 May 2003, para. 26.

¹⁹ Rule 75 (F) (i) of the Rules.

between this case and the *Krstić* case in relation to crimes alleged to have been committed in and around Srebrenica in 1995.²⁰

11. As noted in a previous decision of this Chamber, the general regime for access to confidential materials in other cases is liberal, but is not without exceptions.²¹ One such exception concerns material relating to protected witnesses for whom orders of delayed disclosure have been issued.²² Although it is possible that such material may have forensic value to the Applicant, the Chamber must weigh this against the safety and protection of victims and witnesses, pursuant to Articles 20 (1) and 22 of the Tribunal's Statute and Rule 75 (A) of the Rules. The Chamber is of the opinion that given the current stage of the proceedings, any such potential forensic value to the Applicant does not outweigh the aforementioned considerations and therefore this material will be excluded from any access granted by this decision.

12. The Chamber notes the Prosecution's concerns with respect to the Applicant accessing non-evidentiary material which "may contain sensitive information of little or no value" to the Applicant.²³ The Chamber is of the opinion that a limitation should be placed on access to such material. A recent decision of the Trial Chamber in *Prosecutor v. Stanišić and Simatović* identified categories of material having no forensic purpose and, therefore, such categories were excluded from the grant of access.²⁴ These categories included: remuneration; provisional release; fitness to stand trial; weekly reports of the Reporting Medical Officer; Registry submission of expert reports on health issues; notices of non-attendance in court; modalities of trial; protective measures; subpoenas; video-conference links; and orders to redact the public transcript and public broadcast of a hearing.²⁵ The Chamber similarly finds that the aforementioned categories of materials – except with medical reports not being limited to weekly reports – have no forensic purpose and, therefore, such material should be excluded from any access to confidential *inter partes* materials granted by this decision. Further, category (d) of the Access Request refers to "all documentary evidence submitted by the parties".²⁶ The Chamber interprets this category to mean material which has not been admitted into evidence. The Tribunal's jurisprudence establishes that grants for

²⁰ Fourth Amended Indictment and Schedules of Incidents, paras 19-23; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, Amended Indictment, 27 October 1999, para. 21.

²¹ Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the *Mladić* Case, 18 October 2011 ("Karadžić Access Request Decision"), para. 15.

²² *Karadžić* Access Request Decision, para. 15.

²³ Prosecution Response, para. 9.

²⁴ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Motions of Mićo Stanišić and Stojan Župljanin for Access to All Confidential Materials in the *Stanišić* and *Simatović* Case, 10 March 2011 ("Stanišić and Simatović Access Decision"), para. 40.

²⁵ *Stanišić* and *Simatović* Access Decision, para. 40.

²⁶ Access Request paras 1-2, 11.

requests for disclosure have been limited to material officially admitted into evidence.²⁷ For example, the Trial Chamber in *Prosecutor v. Momčilo Perišić* noted that “confidential materials used during interviews but not tendered into evidence” could not be considered as “confidential exhibits” and, thus, found that it could only grant the request for disclosure in relation to exhibits whose admission was final.²⁸ Further, the Trial Chamber in *Prosecutor v. Vlastimir Đorđević*, found that in considering the motion for access to materials before it, it would be inappropriate to consider “material which it was merely anticipated might later be received in evidence”.²⁹ Therefore, insofar as this category is taken to relate to material not admitted into evidence, such material not forming part of the body of evidence and, thus, remaining in the domain of the tendering party,³⁰ the Chamber excludes such material from any access to confidential *inter partes* materials granted by this decision.

13. In relation to materials in the *Krstić* case provided pursuant to Rule 70 of the Rules, the Chamber considers that they must be excluded from any access granted through this decision, unless the provider of this material has consented to the disclosure of this material to the Applicant. It will be for the relevant party to identify to the Registry any such Rule 70 material and to seek any Rule 70 provider’s consent to disclosure in this respect.

B. Access to *Ex Parte* Confidential Material

14. The Applicant requests access not only to all *inter partes* confidential material but also to all *ex parte* confidential material from the *Krstić* case.³¹ In this respect the Chamber recalls the jurisprudence of the Tribunal, requiring the applicant party to meet a higher threshold for access to *ex parte* material.³² The Chamber considers that in this context the Applicant has failed to advance any argument which demonstrates a legitimate forensic purpose. Thus, the Applicant’s request for access to all *ex parte* confidential material is to be denied.

IV. DISPOSITION

15. For the foregoing reasons and pursuant to Rules 54 and 75 of the Rules, the Chamber
GRANTS the Access Request in part;

²⁷ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Mićo Stanišić Motion for Disclosure of Exhibit List and “MFI” Materials from *Šešelj* Case (IT-03-67), 1 August 2011 (“*Šešelj* Motion”), para. 15.

²⁸ *Šešelj* Motion, para. 15; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Zdravko Tolimir’s Urgent Request for Disclosure of Confidential Material from the *Perišić* Case, 30 September 2010, para. 11.

²⁹ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Decision on Defence Motion for Access to Transcripts, Exhibits and Documents in the *Đorđević* Case, 10 June 2009, para. 21.

³⁰ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, IT-95-5/18-T, 18 January 2012, p. 3.

ORDERS the Prosecution and the Krstić Defence to identify to the Registry all *inter partes* confidential material from the *Krstić* case, including all confidential closed and private session transcripts; all confidential exhibits; and all confidential filings and submissions, including all confidential Chamber decisions;

ORDERS that material including audio and video files and/or transcripts which fall into the following list of categories be excluded from the scope of the present decision: remuneration; provisional release; fitness to stand trial; reports of the Reporting Medical Officer; Registry submission of expert reports on health issues; notices of non-attendance in court; modalities of trial; protective measures; subpoenas; video-conference links; and orders to redact the public transcript and public broadcast of a hearing;

ORDERS that material covered by delayed disclosure orders be excluded from the scope of this decision;

ORDERS the Prosecution and the Krstić Defence to determine without undue delay which of the requested material used as evidence in the *Krstić* case is subject to the provisions of Rule 70 of the Rules and seek the requisite consent from the relevant providers for disclosure to the Applicant, and where such consent is given, to identify that material to the Registry;

REQUESTS the Registry:

- (i) to disclose to the Applicant, the following material:
 - (a) the *inter partes* confidential, non-Rule 70 material from the *Krstić* case once it has been identified by the Prosecution and the Krstić Defence in accordance with this decision;
 - (b) the Rule 70 material once the Prosecution and the Krstić Defence have identified such material upon receiving consent from the relevant Rule 70 provider;

ORDERS the Applicant, if disclosure to specified members of the public is directly and specifically necessary for the preparation and presentation of his case, to file a motion to the Chamber seeking such disclosure. 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, including counsel, and any persons involved in the preparation of the case who have

³¹ Access Request, para. 1.

been instructed or authorised by the Applicant to have access to the confidential material from the *Krstić* case. The “public” also includes, without limitation, family members, and friends of the Applicant and defence counsel in other cases or proceedings before the Tribunal; the media; and journalists;

ORDERS that if, for the purposes of the preparation of the Applicant’s case, confidential material is disclosed to the public – pursuant to prior authorisation by the Chamber – any person to whom disclosure of the confidential material is made shall be informed that he or she is forbidden to copy, reproduce or publicise, in whole or in part, any confidential information or to disclose it to any other person, and further that, if such person has been provided with such information, he or she must return it to the Applicant as soon as the information is no longer needed for the preparation of the Applicant’s case;

ORDERS that the Applicant, and any persons involved in the preparation of the case who have been instructed or authorised by the Applicant to have access to confidential material from the *Krstić* case, and any other persons for whom prior authorisation by the Chamber has been granted by a separate decision shall not disclose to any members of the public: the names of witnesses; their whereabouts; transcripts of witness testimonies; exhibits; or any information which would enable witnesses to be identified and would breach the confidentiality of the protective measures already in place;

ORDERS that the Applicant, and any persons who have been instructed or authorised by the Applicant to have access to the confidential material from the *Krstić* case shall return to the Registry the confidential material which remains in their possession as soon as it is no longer needed for the preparation of the Applicant’s case;

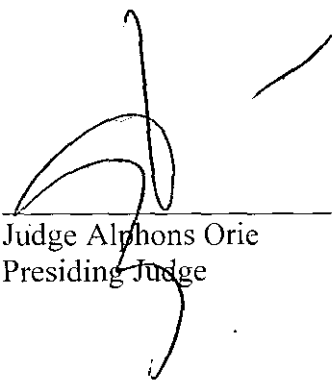
ORDERS that nothing in this decision shall affect the disclosure obligations of the Prosecution under Rules 66 and 68 of the Rules;

AFFIRMS that, pursuant to Rule 75 (F) (i) of the Rules, any protective measures that have been ordered in respect of any witness in the *Krstić* case shall continue to have effect *mutatis mutandis* in the case against the Applicant; and

³² See *supra* Applicable Law section, para. 6.

DENIES the remainder of the Access Request.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-first of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]