

IT-09-92-T
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05 July 2012

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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 Nos: IT-09-92-T
IT-05-88-A
Date: 5 July 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: 5 July 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON MOTIONS BY RADIVOJE MILETIĆ AND
DRAGO NIKOLIĆ FOR ACCESS TO CONFIDENTIAL
MATERIALS IN THE MLADIĆ CASE**

The Prosecutor v. Popović et al. (IT-05-88-A)

Office of the Prosecutor
Mr Peter Kremer

Counsel for Radivoje Miletić
Ms Natacha Fauveau Ivanović
Mr Nenad Petrušić

Counsel for Ljubiša Beara
Mr John Ostojić
Mr Theodor Scudder

Counsel for Drago Nikolić
Ms Jelena Nikolić
Ms Stéphane Bourgon

Counsel for Milan Gvero
Mr Dragan Krgović
Mr David Josse

Counsel for Vujadin Popović
Mr Zoran Živanović
Ms Mira Tapušковиć

Counsel for Vinko Pandurević
Mr Peter Haynes
Mr Simon Davis

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

Office of the Prosecutor
Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 18 May 2012, the Radivoje Miletić Defence (“*Miletić* Defence”) filed a motion requesting access to confidential *inter partes* materials from the case of *Prosecutor v. Ratko Mladić* (“*Miletić* Motion” and “*Mladić* case” respectively), including confidential transcripts of closed session hearings, confidential exhibits admitted or presented, and confidential decisions and orders regarding evidence.¹ The *Miletić* Motion is restricted to all *inter partes* materials relevant to its case which relate to a) events that occurred in Srebrenica in 1995; b) the organization, structure and hierarchy of the Army of Republika Srpska and, in particular, the relationship and contacts between Ratko Mladić and Radivoje Miletić; c) the drafting of Directives and, in particular, Directives no. 7 and no. 7/1; and d) convoys and transport of humanitarian aid.² The *Miletić* Defence notes that there are numerous factual similarities between the cases against Mr Miletić and Mr Mladić.³ In view of the common charges and alleged collaborations arising from their alleged participation in the same joint criminal enterprise (“JCE”) to displace the Muslim population from the Srebrenica and Žepa enclaves, the *Miletić* Defence submits that the requested confidential information may be relevant and important to its case.⁴

2. On 22 May 2012, the *Mladić* Defence responded that it does not object to the *Miletić* Motion.⁵

3. On 23 May 2012, the Drago Nikolić Defence (“*Nikolić* Defence”, collectively with the *Miletić* Defence, “Applicants”) filed a joinder motion, requesting access to all the confidential materials requested in the *Miletić* Motion, except in relation to category d) confidential materials relating to convoys and transport of humanitarian aid (“*Nikolić* Motion”).⁶ The *Nikolić* Defence submits that there is a nexus between the charges against Mr Nikolić and the case against Mr Mladić and, as such, access to this confidential information will be of assistance to the *Nikolić* Defence in the appellate proceedings.⁷

¹ Requête de Radivoje Miletić aux fins d’Accès a des Informations Confidentielles dans l’Affaire Mladić, 18 May 2012 (English translation filed 24 May 2012), paras 1, 12.

² *Miletić* Motion, para. 2.

³ *Miletić* Motion, paras 5-7.

⁴ Ibid.

⁵ Response to “Requête de Radivoje Miletić aux Fins d’Accès a des Informations Confidentielles dans l’Affaire Mladić”, 22 May 2012, para. 3.

⁶ Motion on Behalf of Drago Nikolić Joining the Miletić Motion for Access to Confidential Material in the Mladić Case, 23 May 2012, paras 1, 5.

⁷ *Nikolić* Motion, paras 6-8.

4. On 1 June 2012, the Prosecution responded to the *Miletić* and *Nikolić* Motions.⁸ While the Prosecution does not object to the Applicants' request for access to confidential materials from the *Mladić* case, it requests that certain materials be excluded from access.⁹ First, material which has been provided pursuant to Rule 70 of the Tribunal's Rules of Procedure and Evidence ("Rules" and "Rule 70 material", respectively) should only be made available to the Applicants upon receipt of the provider's consent.¹⁰ Second, confidential exhibits that have been tendered by the parties, but not admitted into evidence, should be excluded.¹¹ Lastly, the Prosecution submits that the Applicants have not sought, and should therefore be denied, access to certain categories of materials that have little or no forensic purpose to their respective cases, including: confidential *inter partes* material related to remuneration of counsel; provisional release; fitness to stand trial; the health of the Accused; notices of non-attendance in court; modalities of trial; protective measures; notices of compliance filed in respect of other access decisions; subpoenas; witness scheduling, attendance or appearance; video-conference links; orders to redact transcripts or broadcasts of a hearing; execution of arrest warrant; or enforcement of any sentence.¹²

II. APPLICABLE LAW

5. The Chamber recalls and refers to the applicable law governing requests for access to confidential materials in a case by parties in other cases before the Tribunal, as set out in a prior decision.¹³

III. DISCUSSION

6. Radivoje Miletić and Drago Nikolić are charged with various crimes allegedly committed between March 1995 and November 1995 in furtherance of a JCE to eliminate the Bosnian Muslims in Srebrenica.¹⁴ Ratko Mladić is charged with many of the same crimes allegedly committed between July 1995 and November 1995 as part of the same JCE.¹⁵ Therefore, the Chamber is satisfied that there is a geographical, temporal, and substantial overlap between the case against Miletić and Nikolić and the *Mladić* case. The Chamber also considers that granting access is likely to materially assist in the preparation of their respective cases. The Chamber further finds that

⁸ Prosecution Response to Motions by Radivoje Miletić and Drago Nikolić for Access to Confidential *Inter Partes* Materials in the *Mladić* Case, 1 June 2012 ("Response").

⁹ Response, paras 1, 4, 7-10, 14-15.

¹⁰ Response, paras 5, 11.

¹¹ Response, para. 12.

¹² Response, para. 13.

¹³ Decision on Defence Request for Access to Confidential Materials from *Krstić* Case, 21 March 2012 ("*Krstić* Access Decision"), paras 3-9.

¹⁴ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Indictment, 4 August 2006, paras 6, 18, 24-27, 35, 42, 50-60, 97.

the Applicants have met the specificity threshold required in accordance with the Tribunal's jurisprudence.

7. In relation to the Applicants' requested access to "confidential exhibits [...] presented", the Chamber notes that the Tribunal's jurisprudence limits access to materials officially admitted into evidence.¹⁶ Material must have moved from the domain of the tendering party to the body of evidence before it can be accessed by applicants from other cases.¹⁷ The Chamber is therefore of the view that any materials tendered by the parties, but not admitted into evidence, should be excluded from any access granted by this decision.

8. In relation to Rule 70 material, the Chamber considers that the Applicants may only be given access to such material once the provider has consented to its disclosure to the Applicants. It is the responsibility of the relevant party to identify to the Registry any such Rule 70 material and to seek its provider's consent to disclosure.

9. The Chamber further considers that material relating to protected witnesses for whom orders of delayed disclosure have been issued must be excluded from any access granted by this decision. Although it is possible that such material may have forensic value to the Applicants, considering the stage of the proceedings in the *Mladić* case, any such potential value does not outweigh the consideration the Chamber must give to 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.

10. The Chamber notes that in granting access to the requested categories of material, such categories may include evidentiary material containing sensitive information of little or no value to the Applicants. The Chamber considers the following categories as having no forensic purpose: remuneration; provisional release; fitness to stand trial; reports of the Reporting Medical Officer; Registry submission of expert reports on health issues; notice of non-attendance in court; modalities of trial; protective measures; subpoenas; video-conference links; orders to redact public transcripts and public broadcasts of a hearing; witness scheduling; witness appearance, witness attendance; execution of arrest warrant; and enforcement of sentences.¹⁸ The Chamber notes the Prosecution's

¹⁵ Fourth Amended Indictment, 16 December 2011, paras 19-23.

¹⁶ *Krstić* Access Decision, para. 12; *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, 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; *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.

¹⁷ See *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, IT-95-5/18-T, 18 January 2012, p. 3.

¹⁸ See *Krstić* Access Decision para. 18; Addendum to Decision on Defence Request for Access to Confidential Materials from the *Krstić* Case, 24 May 2012; Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the *Mladić* Case, 18 October 2011, paras 16-17.

request that the Chamber also limit access to materials from the categories of the health of the Accused and notices of compliance filed in respect of other access decisions.¹⁹ The Chamber similarly finds that material from such categories has no forensic value to the Applicants and is therefore excluded from any access granted by this decision. While several of the listed categories fall outside the scope of the Applicants' request by definition, the Chamber includes them here in the interests of clarity and consistency with past decisions.

11. Finally, out of consideration for judicial economy, and taking into account that the hearing of evidence in the *Mladić* case is yet to start, the Applicants' access to confidential materials in the *Mladić* case should be granted on an ongoing basis, pursuant to the restrictions set out in this decision.²⁰

IV. DISPOSITION

12. For the foregoing reasons and pursuant to Rules 54 and 75 of the Rules, the Chamber

GRANTS the *Miletić* and *Nikolić* Motions in part;

ORDERS the Prosecution and the *Mladić* Defence, on an ongoing basis, to identify to the Registry for disclosure to the Applicants *inter partes* confidential materials in the *Mladić* case, including confidential transcripts of closed session hearings, confidential exhibits admitted, and confidential decisions and orders regarding evidence, which relate to the following matters, subject to the restrictions set out in paragraphs 8-10 of this decision:

- (i) events that occurred in Srebrenica in 1995;
- (ii) the organization, structure and hierarchy of the Army of Republika Srpska;
- (iii) the drafting of Directives and, in particular, Directives no. 7 and no. 7/1;

ORDERS the Prosecution and the *Mladić* Defence, on an ongoing basis, to identify to the Registry for disclosure to the *Miletić* Defence, subject to the restrictions set out in this decision, all *inter partes* confidential materials in the *Mladić* case relating to:

- (iv) convoys and transport of humanitarian aid;

¹⁹ Response, para. 13.

²⁰ In relation to the Applicants' request that the Registry ensure that the Applicants have access to public materials, the Chamber notes that public transcripts, decisions, and orders are available through the Tribunal's public website, and that instructions for accessing public exhibits can be found at T. 329-330.

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; notice of non-attendance in court; modalities of trial; protective measures; subpoenas; video-conference links; orders to redact public transcripts and public broadcasts of a hearing; witness scheduling; witness appearance, witness attendance; execution of arrest warrant; the health of the Accused; the enforcement of sentences; and notices of compliance filed in respect of other access decisions;

ORDERS the Prosecution and the *Mladić* Defence to determine without undue delay which of the requested material used as evidence in the *Mladić* case is subject to the provisions of Rule 70 of the Rules, and to seek the consent of the material's providers for its disclosure to the Applicants, and, where such consent is given, to identify that material to the Registry;

REQUESTS the Registry to disclose to the Applicants, the following material:

- (i) the *inter partes* confidential, non-Rule 70 material once it has been identified by the Prosecution and *Mladić* Defence in accordance with this decision; and
- (ii) the Rule 70 material once the Prosecution and *Mladić* Defence have identified such material upon receiving consent from the Rule 70 providers;

ORDERS the Applicants, if disclosure to specified members of the public is directly and specifically necessary for the preparation and presentation of their cases, 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 Applicants, including counsel and any persons involved in the preparation of the case who have been instructed or authorised by the Applicants to have access to the confidential material from this case. "The public" also includes, without limitation, family members, and friends of the Applicants, accused 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 Applicants' respective cases, 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 any such person has been provided with such information, he or she must return it to the Applicants or their counsel as soon as the information is no longer needed for the preparation of the Applicants' respective cases;

ORDERS that the Applicants, and any persons involved in the preparation of their respective cases who have been instructed or authorised by the Applicants to have access to the confidential material from this 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;

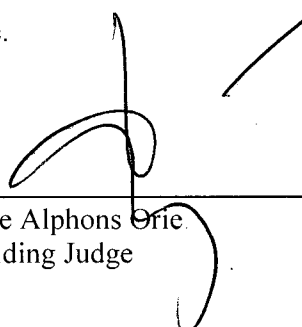
ORDERS that the Applicants and any persons who have been instructed or authorised by the Applicants to have access to the confidential material from this case shall return to the Registry the confidential material which remains in their possession as soon as it is no longer needed for the preparation of the Applicants' respective cases;

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 *Mladić* case shall continue to have effect in the case against the Applicants; and

DENIES the remainder of the Applicants' motions.

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



Judge Alphons Orie
Presiding Judge

Dated this the Fifth day of July 2012
At The Hague
The Netherlands

[Seal of the Tribunal]