



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-05-87-A
Date: 23 August 2012
Original: English

4-05-87-A
A 12526-A 12523
23 August 2012

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4B.

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Arlette Ramaroson
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. John Hocking

Decision: 23 August 2012

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION TO DISCLOSE
CONFIDENTIAL FILINGS TO THE ACCUSED IN THE
KARADŽIĆ CASE**

The Office of the Prosecutor:

Mr. Peter Kremer, QC

Counsel for the Defence:

Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

THE APPEALS 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 (“Appeals Chamber” and “Tribunal”, respectively),

BEING SEISED OF the “Prosecution’s Motion to Disclose Confidential Filings to the Accused in the *Karadžić* Case” filed confidentially by the Office of the Prosecutor (“Prosecution”) on 26 July 2012 (“Motion”)¹ in which the Prosecution seeks permission to disclose four confidential filings in the *Milutinović et al.* case (“Filings”)² relating to the use of material from the International Commission for Missing Persons (“ICMP”) to Radovan Karadžić (“Karadžić”);³

NOTING that, in compliance with a decision of the *Karadžić* Trial Chamber,⁴ the Prosecution referred to the Filings in an *ex parte* submission in the *Karadžić* case⁵ and now seeks to disclose them to Karadžić so that the *ex parte* submission can be made *inter partes*;⁶

NOTING that the Prosecution submits that there are no confidentiality concerns in providing the Filings to Karadžić and that the Filings contain no confidential information concerning any individuals and no detailed information about the contents of the ICMP material at issue;⁷

NOTING that Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić have not responded to the Motion;

RECALLING that a party before the Tribunal is always entitled to seek material from another case before the Tribunal to assist in the preparation of its case if the material sought has been identified

¹ The Appeals Chamber notes that although the filing was confidential, the present decision does not contain any information to warrant giving it a confidential status.

² Motion, fn. 2. The Filings comprise the following: (i) *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Prosecution’s Motion for Order of Non-Disclosure of Confidential Material, 9 November 2006 (confidential and partially *ex parte*) (“Motion of 9 November 2006”); (ii) *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Preliminary Order on Prosecution Motion for Order of Non-Disclosure of Confidential Material, 15 November 2006 (confidential) (“Order of 15 November 2006”); (iii) *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Prosecution’s Submissions Regarding Preliminary Order on Prosecution’s Motion for Order of Non-Disclosure of Confidential Material, 17 November 2006 (confidential) (“Submission of 17 November 2006”); (iv) *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Order of Non-Disclosure of Confidential Material, 30 November 2006 (confidential) (“Decision of 30 November 2006”). The Appeals Chamber notes that the *ex parte* Annex A to the Motion of 9 November 2006 does not comprise part of the Filings to be disclosed to Karadžić. See Motion, fn. 2.

³ Motion, paras 1, 3.

⁴ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Interim Decision on Prosecution’s Motion for Partial Reconsideration or Clarification of the Chamber’s Decision on the Accused’s Motion to Unseal ICMP Exhibits, 11 July 2012.

⁵ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Prosecution’s Further Submission Regarding ICMP Exhibits, 23 July 2012, Annex G (confidential and *ex parte*). See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Response to Motion for Reconsideration of Decision Making ICMP Documents Public, 18 May 2012 (“Karadžić Response of 18 May 2012”), challenging the Rule 70 status of the ICMP.

⁶ Motion, para. 1.

⁷ Motion, para. 2. The Prosecution notes that the Submission of 17 November 2006 identifies Jon Sterenberg as an ICMP representative to be called at trial but that he ultimately testified publicly. See Motion, fn. 6.

or described by its general nature and if a legitimate forensic purpose for such access has been shown;⁸

RECALLING that, with regard to *inter partes* confidential material, the party seeking access must demonstrate a legitimate forensic purpose by establishing that such material is likely to assist the party's case materially, or at least there is a good chance that it would;⁹

NOTING that the Prosecution is not seeking access to the confidential material for itself but on behalf of Karadžić, a third party, and that the Prosecution therefore lacks standing to make the request;¹⁰

CONSIDERING, however, that reference to the Filings was made in an *ex parte* submission by the Prosecution and that Karadžić, the party for whom access is sought, is therefore not aware of the Filings or their relevance to his case and thus is not in a position to seek access for himself;¹¹

CONSIDERING that the information sought to be disclosed pertains to a live issue in Karadžić's case and that it is in the interests of justice to disclose this information which is likely to be of material assistance to his case;¹²

FINDING that, in these circumstances, it is appropriate to permit the Prosecution to seek access to the Filings on behalf of Karadžić on an exceptional basis;

CONSIDERING that the Filings do not disclose the content of confidential material provided to the Prosecution under Rule 70(B) of the Tribunal's Rules of Procedure and Evidence ("Rules"), but essentially refer to the ICMP material in general terms to explain why such material satisfies the requirements of Rule 70 of the Rules;¹³

CONSIDERING, therefore, that disclosing the Filings to Karadžić does not reveal any material subject to Rule 70 of the Rules and that there are no confidentiality concerns in providing the Filings to Karadžić;

⁸ *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. Milošević* Decision"), para. 7, and the references cited therein.

⁹ *D. Milošević* Decision, para. 8, and the references cited therein.

¹⁰ *Cf. Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Prosecution Request for Access to Confidential Information in the *Prosecutor v. Popović et al.* Case, 5 October 2010 (confidential) ("*Popović et al.* Decision"), para. 9.

¹¹ *Cf. Popović et al.* Decision, para. 11.

¹² See Karadžić Response of 18 May 2012.

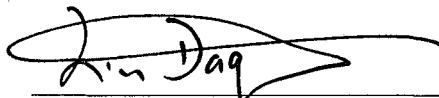
¹³ See Motion of 9 November 2006; Order of 15 November 2006; Submission of 17 November 2006; Decision of 30 November 2006. In this regard, the Appeals Chamber notes that the information pertaining to the Rule 70 material contained in the Submission of 17 November 2006 and the Decision of 30 November 2006 is in the public domain.

FOR THE FOREGOING REASONS

GRANTS the Motion and **AUTHORIZES** the Prosecution to disclose the Filings to Karadžić.

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

Dated this 23rd day of August 2012,
At The Hague, The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]

See Jon Sterenberg, 11 Dec 2006, T. 8202-8233. The Appeals Chamber also notes that the exhibits provided by the ICMP pursuant to Rule 70 of the Rules remain confidential.