



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-95-5/18-T

Date: 14 December 2012

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 14 December 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE STATUS OF EXHIBITS PROVISIONALLY UNDER SEAL

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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”) is seised of the Accused’s requests in the “Defence Submission on Exhibits Under Seal”, filed confidentially on 11 September 2012 (“Defence Submission”), and the requests of the Office of the Prosecutor (“Prosecution”) in the “Prosecution Submission Concerning Exhibits Currently Provisionally Under Seal with Confidential Appendix A” filed confidentially on 14 September 2012 (“Prosecution Submission”), and hereby issues its decision thereon.

I. Background and Submissions

1. During the status conference held on 3 September 2012, the Chamber instructed the parties to file submissions by 14 September 2012 providing information relevant to their exhibits which are currently provisionally under seal, including specific recommendations as to whether each exhibit should be placed under seal permanently or may now be made public.¹
2. In the Defence Submission, the Accused provides the Chamber with a detailed table of all of the Defence exhibits which are currently under seal, including exhibits that have been placed permanently under seal, attaching his submissions on whether each exhibit can be made public or shall remain under seal.² The Accused submits that making all exhibits public is of “paramount importance to the fairness of his trial, to the transparency in which a public institution should operate, and to the historical record of the events in Bosnia from 1991 to 1995”.³ In this regard, he argues that “virtually all of the exhibits can be made public by the simple expedient of uploading another copy of the exhibit into e-court with a new 65 *ter* [number] and admitting the copy from the bar table with a new exhibit number”.⁴ The Accused contends that doing so will remove any link between the said documents and protected witnesses, leaving no reason for the documents not to be part of the public record.⁵ Second, the Accused requests that the Chamber contact the providers of all documents admitted under seal for reasons pertaining to Rule 70 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), and request that they consider allowing the documents to be made public as “part of a bar table admission in which the party who provided the document to the Tribunal is not disclosed”.⁶ Third, he requests that with regard to certain documents

¹ Status Conference, T. 28778 (3 September 2012).

² Defence Submission, para. 2, Confidential Annex A.

³ Defence Submission, para. 3.

⁴ Defence Submission, para. 4.

⁵ Defence Submission, paras. 4–7.

⁶ Defence Submission, para. 8.

admitted under seal, public redacted versions be filed so that their contents are public while still protecting the identities of protected witnesses.⁷ Finally, in Confidential Annex A of the Defence Submission, the Accused makes specific submissions on the status of: (i) 12 Defence exhibits admitted provisionally under seal;⁸ (ii) exhibit D48, noting that it is erroneously marked as under seal in e-court;⁹ and (iii) exhibit D2217, requesting that the Chamber reconsider its decision to admit it under seal as a result of the Chamber’s “decision on ICMP documents.”¹⁰

3. In the Prosecution Submission, the Prosecution provides the Chamber with its submissions in relation to 38 Prosecution exhibits and six Defence exhibits which are currently admitted provisionally under seal.¹¹ Moreover, the Prosecution argues that in the Defence Submission, the Accused includes references to “*all* the exhibits under seal, and is not limited to those exhibits currently *provisionally* under seal, as instructed by the Trial Chamber”.¹² The Prosecution contends that by doing so, the Accused seeks reconsideration of the prior decisions of the Chamber on the admission of exhibits under seal—without meeting the test for reconsideration—and attempts to re-litigate matters which have been previously ruled upon by the Chamber.¹³ The Prosecution argues that the Accused’s proposal in the Defence Submission is “unworkable” and the Chamber should not engage in a review of each of its decisions to admit exhibits under seal.¹⁴ However, should the Chamber decide to consider the Accused’s arguments in relation to all Defence exhibits admitted under seal, the Prosecution requests 14 days to file a response addressing the exhibits raised in the Defence Submission.¹⁵

II. Applicable Law

4. Article 20(1) of the Tribunal’s Statute (“Statute”) requires that proceedings be conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Further, Article 21(2) entitles the accused to a fair and public hearing, subject to Article 22, which requires the Tribunal to provide in its Rules for the protection of victims and witnesses. As has been observed in previous Tribunal cases, these Articles reflect the duty of the

⁷ Defence Submission, para. 9.

⁸ Defence Submission, Confidential Annex A, *see* submissions on exhibits D354, D481, D996, D997, D1772, D1793, D1798, D1938, D2195, D2196, D2198, and D2237.

⁹ Defence Submission, Confidential Annex A, *see* submission on exhibit D48.

¹⁰ Defence Submission, Confidential Annex A, *see* submission on exhibit D2217. *See* Decision on the Accused’s Motion to Unseal ICMP Exhibits, 25 April 2012 (“ICMP Decision”). “ICMP” refers to the International Commission on Missing Persons.

¹¹ Prosecution Submission, para. 1, Confidential Appendix A.

¹² Prosecution Submission, para. 2 [emphasis in original].

¹³ Prosecution Submission, paras. 3–4.

¹⁴ Prosecution Submission, paras. 5–6.

¹⁵ Prosecution Submission, paras. 5–6.

Trial Chamber to balance the right of the accused to a fair trial, the rights of victims and witnesses to protection, and the right of the public to access information.¹⁶

5. More specifically, Rule 75(A) states that a “Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused”. Under Rule 75(B) of the Rules, these may include measures to prevent disclosure to the public and the media of identifying information about witnesses or victims, including voice and image distortion, and the assignment of a pseudonym, as well as the presentation of testimony in private or closed session pursuant to Rule 79 of the Rules.

6. The Chamber has previously held that documents should only be admitted on a confidential basis in exceptional circumstances when they contain information which, if disclosed, might cause prejudice, concerns about safety, or serious embarrassment to a party or a witness.¹⁷

7. Finally, the Chamber recalls that there is no provision in the Rules for requests for reconsideration and that such requests are the product of the Tribunal’s jurisprudence, permissible only under certain conditions.¹⁸ The standard for reconsideration of a decision set forth by the Appeals Chamber is that “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice’”.¹⁹ Thus, the requesting party is under an obligation to

¹⁶ See Decision on Accused’s Motion to Revoke Protective Measures for KDZ240, Confidential, 28 June 2011, para. 15. See also *Prosecution v. Tadić*, Case No. IT-94-1-T, Decision on Prosecution’s Motion Requesting Protective Measures for Witness I., 14 November 1995, para. 11; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness R, 31 July 1996, p. 4; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 7.

¹⁷ ICMP Decision, para. 6; Decision on Status of Exhibits Admitted Through Witness KDZ492, Confidential, 13 January 2012 (“KDZ492 Decision”), para. 11; Order on Reclassification of Exhibit D737, 12 November 2010 (“Order on D737”), p. 2. See also *Prosecutor v. Stakić*, Case No. IT-92-24-A, Decision on the Defence Motion for Extension of Time, 26 April 2004, para. 6; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-A, Decision on Lahi Brahimaj Application for Provisional Release, 25 May 2009, para. 5; *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-A, Decision on Prosecution Motion to Lift Confidential and *Ex Parte* Status of Appeals Chamber’s Decision of 2 December 2005, 11 July 2007.

¹⁸ See Decision on Accused’s Motion for Reconsideration of Decision on Ninth Suspension of Proceedings: Witness KDZ456, 11 November 2011, para. 6; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009, p. 2.

¹⁹ See Decision on Accused’s Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010, para. 12, citing *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR108bis.3, Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, Confidential, 6 April 2006, para. 25, footnote 40, quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204; see also *Ndindabahizi*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d’une Erreur Matérielle”, 14 June 2006, para. 2.

satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.²⁰

III. Discussion

8. The Chamber recalls that in balancing the importance of conducting a public trial while protecting the identity of witnesses and victims, the Chamber has exercised utmost caution in determining whether to place exhibits under seal throughout the trial and, whenever possible, has ordered the parties to produce public redacted versions of exhibits placed under seal.²¹

A. Prosecution Submission

9. The Chamber will first address the submissions by the Prosecution. In the Prosecution Submission, the Prosecution identifies a total of 44 exhibits which have been admitted provisionally under seal in this case. The Chamber notes that of those 44 exhibits, 38 are Prosecution exhibits, on which the Accused has not made submissions, while the remaining six are Defence exhibits on which the Accused also makes submissions.²²

10. Of the 44 exhibits identified by the Prosecution as provisionally under seal, the Chamber notes that the status of four exhibits—D1772, D1793, D1798, and D1938—has been resolved in the “Decision on Accused’s Motions to Admit Documents Previously Marked for Identification and Public Redacted Version of D1938” issued on 7 December 2012 (“MFI Decision”).²³ Namely, D1772 was admitted under seal,²⁴ D1793 and D1798 were admitted publicly,²⁵ and D1938 was admitted under seal, along with a public redacted version.²⁶ The Chamber therefore will not deal with the status of D1772, D1793, D1798, and D1938 in this decision.

11. Of the remaining 40 exhibits, the Prosecution submits that 26 exhibits previously placed provisionally under seal may be reclassified as public at this time, namely P4564, P4565, P4566, P4567, P4568, P4569, P4570, P4571, P4572, P4574, P4577, P4578, P4579, P4582, P4583, P4585,

²⁰ *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2; see also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić’s Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2.

²¹ See Oral Ruling, T. 28226–28227 (26 April 2012).

²² See Defence Submission, Confidential Annex A, submissions on exhibits D1772, D1793, D1798, D1938, D2196, and D2237.

²³ MFI Decision, para. 28.

²⁴ MFI Decision, paras. 21, 28(d).

²⁵ MFI Decision, paras. 15, 28(a).

²⁶ MFI Decision, paras. 27, 28(c), (e).

P4586, P4587, P4588, P4589, P4590, P4592, P4593, P4773, P4774, and D2196.²⁷ Upon its review of these 26 exhibits and the relevant transcripts, the Chamber is satisfied that making them public would not reveal the identity of a protected witness or confidential information and therefore they should now be made public.

12. With regard to P3830 and P3848, the Chamber refers to the Prosecution's oral submission made in private session during the hearing of 16 November 2011.²⁸ The Chamber recalls its order of the same day that P3830 and P3848 be placed provisionally under seal until the Prosecution produced redacted versions of these documents.²⁹ In the Prosecution Submission, the Prosecution submits that the redacted versions of P3830 and P3848 are now available and requests that they replace the versions admitted provisionally under seal and that both exhibits then be made public.³⁰ The Chamber is satisfied that the Prosecution's submissions with respect to P3830 and P3848 are in accordance with its order on 16 November 2011 and therefore instructs it to upload the redacted versions of P3830 and P3848 into e-court to replace the provisionally under seal versions of these exhibits and orders that so redacted, P3830 and P3848 may be made public.

13. Of the remaining 12 exhibits, the Prosecution submits that four exhibits—P1047, P4561, P4562, and P4563—should remain permanently under seal because if made public, they could reveal the identities of protected witnesses.³¹ The Chamber has reviewed these documents and notes that P1047 and P4561 are pseudonym sheets for protected witnesses, while P4562 and P4563 contain extensive information about protected witnesses. As such, the Chamber is satisfied that there is a risk that the identities of protected witnesses may be revealed if the contents of these exhibits are made public and therefore is of the view that P1047, P4561, P4562, and P4563 shall be placed permanently under seal.

14. With respect to the remaining eight exhibits—P1048, P1049, P4573, P4575, P4576, P4580, P4591, and D2237—the Prosecution submits that if made public, the contents of these exhibits could reveal the identity of protected witnesses and should therefore remain under seal. However, the Prosecution informs the Chamber that it has uploaded into e-court public redacted versions for P1048, P4573, P4575, P4576, P4580, P4591, and D2237³² under Rule 65 *ter* numbers 10029A, 30960D, 30936C, 30956D, 31022A, 31580E, and 31023D, respectively, and requests that they be

²⁷ See Prosecution Submission, Confidential Appendix A, pp. 4–6. In the Defence Submission, the Accused also requests that D2196 be made public. See Defence Submission, Confidential Annex A, submission on exhibit D2196.

²⁸ T. 21389–21390 (16 November 2011) (private session).

²⁹ T. 21391 (16 November 2011) (private session).

³⁰ See Prosecution Submission, Confidential Appendix A, p. 4.

³¹ See Prosecution Submission, Confidential Appendix A, p. 4.

³² In the Defence Submission, the Accused also submits that a public redacted version of D2237 will be provided. Defence Submission, Confidential Annex A, see submission on exhibit D2237.

admitted into evidence.³³ The Prosecution notes that a public redacted version for P1049 has already been admitted into evidence as P5908.³⁴ The Chamber has reviewed these eight exhibits and is satisfied that if made public, they could reveal the identities of protected witnesses and therefore is of the view that P1048, P1049, P4573, P4575, P4576, P4580, P4591, and D2237 shall be placed permanently under seal. The Chamber has also reviewed the public redacted versions of P1048, P4573, P4575, P4576, P4580, P4591, and D2237³⁵ and will admit them into evidence.

B. Defence Submission

15. The Chamber will now address the Defence Submission. In his submission, the Accused requests that the Chamber reconsider its decisions to place a large number of Defence exhibits under seal and that (i) a copy of each exhibit under seal be uploaded with a new Rule 65 *ter* number and admitted from the bar table with a new exhibit number; (ii) the Chamber contact the Rule 70 provider of documents and request that they consider allowing the documents to be made public in a similar manner through admission from the bar table; and (iii) public redacted versions for certain exhibits placed permanently under seal be admitted into evidence.

16. As a preliminary matter, the Chamber recalls that it instructed the parties to file submissions on exhibits *provisionally* under seal,³⁶ and in this regard it considers the Accused's requests regarding exhibits placed permanently under seal to be inappropriate. The Chamber considers the Accused's requests in this regard to be similar to those made in the Accused's "Motion for Public Admission of Exhibits Under Seal", and recalls its oral ruling on this motion on 26 April 2012, denying the Accused's requests as vague, unsubstantiated, and bordering on frivolous, and finding that the Chamber would not engage in a review of each of its decisions to admit exhibits under seal in this case.³⁷ The Chamber considers that in the Defence Submission, the Accused is essentially again requesting that the Chamber reconsider all of its prior decisions to place certain Defence exhibits permanently under seal, but notes that the Accused has made no effort to address the proper test for reconsideration. Based on the requests made in the Defence Submission and upon its own review of the specific exhibits raised therein, the Chamber is not satisfied of the existence of a clear error in reasoning in its decisions to place them under seal. The Accused has also failed to satisfy the Chamber of the existence of particular circumstances justifying reconsideration in

³³ See Prosecution Submission, Confidential Appendix A, pp. 4–7.

³⁴ See Prosecution Submission, Confidential Appendix A, p. 4.

³⁵ The Chamber is satisfied with the public redacted version of D2237 as prepared by the Prosecution and therefore will admit Rule 65 *ter* number 31023D into evidence. Accordingly, the Chamber finds that there is no need for the Accused to provide a public redacted version of this exhibit.

³⁶ Status Conference, T. 28778 (3 September 2012).

³⁷ Oral Ruling, T. 28226–28227 (26 April 2012). See also Motion for Public Admission of Exhibits Under Seal, 10 April 2012.

order to prevent an injustice. As a result, the Chamber refuses to reconsider its decisions to place exhibits permanently under seal and warns the Accused to refrain from making similar unsupported requests in the future.

17. With regard to the Accused's request for the Chamber to admit public redacted versions of certain exhibits placed permanently under seal,³⁸ the Chamber finds that the Accused's submission is premature at this time. Namely, the Accused does not provide the Chamber with public redacted versions of these exhibits for its review. The Chamber therefore will not consider the Accused's general request to admit public redacted versions of these Defence exhibits at this time.

18. The Chamber now turns to the Accused's specific submissions on the status of 12 Defence exhibits admitted provisionally under seal. The Chamber first notes that six of the 12 exhibits have already been discussed above in this decision, namely D1772, D1793, D1798, D1938, D2196, and D2237.³⁹ Therefore, the Chamber will now consider the remaining six exhibits admitted provisionally under seal, namely D354, D481, D996, D997, D2195, and D2198.

19. The Chamber first notes that D2195 and D2198 have already been admitted publicly in the MFI Decision.⁴⁰ Accordingly, the Chamber will not deal with the status of D2195 and D2198 in this decision. Second, with regard to D354, the Accused submits that it was admitted provisionally under seal and that it should be readmitted publicly with a new exhibit number.⁴¹ The Chamber recalls that D354 was admitted under seal on 30 June 2010 out of precaution for the protected witness through whom it was tendered.⁴² However, after both parties agreed that the exhibit should be public, the Chamber lifted the confidential status of D354 and reclassified it as public on 7 July 2010.⁴³ As such, the status of this exhibit has already been resolved.

20. With regard to the status of D481 raised in the Defence Submission,⁴⁴ the Chamber notes that a public redacted version of this exhibit has already been admitted as D2269 on 15 October 2012,⁴⁵ and therefore the status of this exhibit has been resolved.

21. With regard to the final two exhibits which the Accused notes are provisionally under seal—D996 and D997—the Accused submits that they were admitted provisionally under seal

³⁸ See, *inter alia*, exhibits D1929, D1930, D1931 D1988, and D2255. Defence Submission, Confidential Annex A.

³⁹ See *supra* paras. 10, 11, 14.

⁴⁰ MFI Decision, para. 28(a).

⁴¹ Defence Submission, Confidential Annex A, *see* submission on exhibit D354.

⁴² T. 4362–4363 (30 June 2010) (private session).

⁴³ T. 4764 (7 July 2010).

⁴⁴ Defence Submission, Confidential Annex A, *see* submission on D481.

⁴⁵ Oral Ruling, Pre-Defence Conference, T. 28846–28847 (15 October 2012).

pending the confirmation of the identity of an individual who appears in both exhibits and requests that they now be made public.⁴⁶ Upon its review of the transcript, the Chamber is satisfied that D996 and D997 were placed provisionally under seal pending the Prosecution's confirmation of the identity of this individual.⁴⁷ The Chamber notes that it has not received submissions from the Prosecution regarding these two exhibits. The Chamber is of the view that it cannot adequately analyse the status of D996 and D997 without further submissions from the Prosecution in this regard and therefore instructs the Prosecution to make submissions regarding these exhibits by Friday, 21 December 2012.

22. The Chamber will now address the Accused's submission regarding exhibit D48, which he argues is erroneously reflected in e-court as under seal after it was admitted publicly in court.⁴⁸ The Chamber notes that the transcript reflects that D48 was marked for identification pending English translation on 22 April 2010 without a reference to its confidential status.⁴⁹ On 30 September 2010, the Chamber fully admitted D48 as a public exhibit.⁵⁰ As such, the Chamber is satisfied that the status of D48 was erroneously noted in e-court as under seal and should be reclassified as a public document.

23. Finally, the Chamber will consider the Accused's request on D2217. The Chamber is of the view that while D2217 was not among the exhibits considered by the Chamber in its ICMP Decision, it was admitted in court through witness Dušan Janc five days after the Accused filed the "Motion to Unseal ICMP Exhibits" on 23 March 2012. Therefore the Chamber is satisfied that it is in the interests of justice to consider the Accused's request on D2217 in order to ensure that the status of this exhibit is consistent with its findings in the ICMP Decision. The Chamber recalls that in the ICMP Decision, it found that "any information relating to the genetic material of any individuals be kept under seal",⁵¹ including genetic information of alleged victims and out of an abundance of caution, of the victims' family members.⁵² As a result of its review of D2217, the Chamber is satisfied that it does not contain such information. The Chamber is therefore satisfied that D2217 may be reclassified as a public exhibit.

⁴⁶ Defence Submission, Confidential Annex A, *see* submissions on D996 and D997.

⁴⁷ T. 11264–11266 (3 February 2011).

⁴⁸ *See* Defence Submission, Confidential Annex A, *see* submission on D48.

⁴⁹ T. 1410 (22 April 2010).

⁵⁰ Decision on Accused's Motion to Admit Documents Previously Marked for Identification, 30 September 2010, paras. 9, 12.

⁵¹ ICMP Decision, para. 9.

⁵² ICMP Decision, para. 9.

IV. Disposition

24. Accordingly, the Chamber hereby **GRANTS** in part the requests in the Defence Submission and **GRANTS** the requests in the Prosecution Submission, and:

- a) **ORDERS** that the status of P4564, P4565, P4566, P4567, P4568, P4569, P4570, P4571, P4572, P4574, P4577, P4578, P4579, P4582, P4583, P4585, P4586, P4587, P4588, P4589, P4590, P4592, P4593, P4773, P4774, D48, D2196, and D2217 shall be changed from confidential to public;
- b) **INSTRUCTS** the Prosecution to upload redacted versions of P3830 and P3848 into e-court to replace the current exhibits admitted provisionally under seal and thereafter **INSTRUCTS** the Registry to change the status of P3830 and P3848 from confidential to public;
- c) **ORDERS** that P1047, P1048, P1049, P4561, P4562, P4563, P4573, P4575, P4576, P4580, P4591, and D2237 shall be placed permanently under seal;
- d) **REQUESTS** the Registry to record that the documents bearing Rule 65 *ter* numbers 10029A, 30960D, 30936C, 30956D, 31022A, 31580E, and 31023D are admitted into evidence, and to assign them exhibit numbers;
- e) **STAYS** its decision on the confidential status of D996 and D997 and **INSTRUCTS** the Prosecution to make submissions regarding exhibits D996 and D997 by Friday, 21 December 2012, as set out in paragraph 21 above;
- f) **DENIES** the remainder of the requests in the Defence Submission; and
- g) **INSTRUCTS** the Registry to take all necessary measures to implement this decision.

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



Judge O-Gon Kwon
Presiding

Dated this fourteenth day of December 2012
At The Hague
The Netherlands

[Seal of the Tribunal]