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20 February 2013

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UNITED
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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-05-88-A &
IT-09-92-T
Date: 20 February 2013
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Khalida Rachid Khan

Registrar: Mr. John Hocking

Decision of: 20 February 2013

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON MOTION BY RATKO MLADIĆ FOR ACCESS
TO CONFIDENTIAL MATERIAL**

The Office of the Prosecutor:

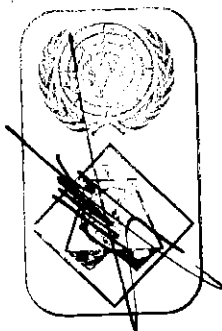
Mr. Peter Kremer QC
Mr. Dermott Groome
Mr. Peter McCloskey

Counsel for Ratko Mladić:

Mr. Branko Lukić
Mr. Miodrag Stojanović

Counsel for the Defence:

Mr. Zoran Živanović and Ms. Mira Tapusković for Mr. Vujadin Popović
Mr. John Ostojčić for Mr. Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Mr. Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Mr. Vinko Pandurević



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 “Defence Request for Access to Confidential Materials from *Popovic [sic] et al.* Case”, filed by Ratko Mladić (“Applicant”) on 18 October 2012 (“Motion”);

NOTING that the Applicant requests access to all *inter partes* confidential material for the duration of the pre-trial and trial proceedings in the *Popović et al.* case, including all: (i) confidential, closed and private session trial transcripts; (ii) confidential exhibits; (iii) confidential filings, submissions, and Trial Chamber decisions; and (iv) documentary evidence submitted by the parties;¹

NOTING the decision of Trial Chamber I of the Tribunal issued on 7 September 2012, which states that the Applicant’s request for access in relation to Vinko Pandurević should be addressed to the Appeals Chamber;²

NOTING the Applicant’s submission that, in light of the significant geographical and temporal overlap and nexus between the *Mladić* case and the *Popović et al.* case, in particular with regard to the events in Srebrenica in 1995, the requested material is of “crucial significance” to his defence and that he therefore has a legitimate forensic purpose to access such material;³

NOTING the “Prosecution’s Response to Mladić’s Request for Access to Confidential Materials from *Popović et al.* Case”, filed by the Office of the Prosecutor (“Prosecution”) on 29 October 2012 (“Response”), in which the Prosecution does not oppose the Motion in general,⁴ except for: (i) confidential documentary material submitted by the parties that has not been admitted into evidence;⁵ (ii) confidential material provided under Rule 70 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) absent the consent of the information provider;⁶ and (iii) confidential material “containing sensitive information of little or no [evidentiary] value” to the Applicant;⁷

¹ Motion, paras 1, 7.

² *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Mladić Motion for Access to Completed Cases, 7 September 2012 (“Mladić Trial Decision”), para. 13(ii).

³ Motion, paras 2, 4-5.

⁴ Response, para. 1.

⁵ Response, paras 1, 6.

⁶ Response, paras 1, 7. The Prosecution submits that these confidential materials should be withheld until it notifies the Registry that the Rule 70 condition has been lifted. See Response, para. 7.

⁷ Response, paras 1, 8. In particular, the Prosecution submits that “[t]he following categories have no forensic purpose and should be excluded from any access granted by the Chamber: material related to remuneration of counsel; provisional release; fitness to stand trial; reports of the Reporting Medical Officer; Registry submission [*sic*] of expert reports on health issues; notices of non-attendance in court; modalities of trial; protective measures; subpoenas; video-conference links; orders to redact transcripts and broadcasts of a hearing; witness scheduling; witness appearance;

NOTING the Prosecution's request that the existing protective measures be modified, and clear conditions established, to require the Applicant to maintain confidentiality and to prevent unnecessary disclosure of confidential information to third parties;⁸

CONSIDERING that "a party is always entitled to seek material from any source, including from another case before the 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";⁹

CONSIDERING that the requesting party may demonstrate the relevance of the material sought "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 geographical area and at the same time";¹⁰

CONSIDERING that "access to confidential material is granted whenever the party seeking access has demonstrated that such material may be of material assistance to [the party's] case";¹¹

CONSIDERING that the Applicant has identified the materials sought with sufficient specificity;

CONSIDERING that there is a geographical, temporal and substantial overlap between the *Mladić* and the *Popović et al.* cases amounting to a factual nexus;¹²

CONSIDERING that, in light of this nexus, having access to the confidential materials from the pre-trial and trial proceedings in the *Popović et al.* case may materially assist in the preparation of the Applicant's defence,¹³ except for the material to which the Prosecution wishes to restrict the Applicant's access,¹⁴ as the Appeals Chamber finds that this material is of little or no evidentiary value to the Applicant;

CONSIDERING THEREFORE that the Applicant has shown a legitimate forensic purpose for disclosure of the *inter partes* confidential material of the pre-trial and trial proceedings in the *Popović et al.* case, subject to the exceptions set out below;

witness attendance; execution of arrest warrant; enforcement of sentences; the health of the accused; and notices of compliance filed in respect of other access decisions." See Response, para. 8.

⁸ Response, paras 1, 5.

⁹ Decision on Motion by Radovan Karadžić for Access to Confidential Filings, 15 February 2012 ("Karadžić Decision"), p. 2 and references cited therein.

¹⁰ Karadžić Decision, p. 2 and references cited therein.

¹¹ Karadžić Decision, p. 2 and references cited therein.

¹² See *Prosecutor v. Ratko Mladić*, Case Nos. IT-09-92-T & IT-05-88-A, Decision on Motion by Vujadin Popović for Access to Confidential Information in the *Mladić* Case, 11 September 2012 ("*Popović* Access Trial Decision"), para. 4. See also *Mladić* Trial Decision, para. 13(ii).

PURSUANT TO Rules 54 and 107 of the Rules,

HEREBY GRANTS the Motion **IN PART**;

ALLOWS the Applicant, subject to the conditions set forth below, access to *inter partes* confidential material from the pre-trial and trial proceedings in the *Popović et al.* case, with the exception of material: (i) provided under Rule 70 of the Rules; (ii) not forming part of the trial record; (iii) related to personal information about the Defendants in the *Popović et al.* case herein, namely, Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Milan Gvero and Vinko Pandurević ("*Popović et al.* Defence"), and their family members; and (iv) having no forensic purpose, namely material related to: remuneration of counsel, provisional release, fitness to stand trial, reports of the Reporting Medical Officer, Registry submissions of expert reports on health issues, notices of non-attendance in court, modalities of trial, protective measures, subpoenas, video-conference links, orders to redact transcripts and broadcasts of hearing, witness scheduling, witness appearance, witness attendance, execution of arrest warrant, enforcement of sentences, the health of the accused, and notices of compliance filed in respect of other access decisions;¹⁵

ORDERS the Prosecution and the *Popović et al.* Defence teams:

1. to file before the Appeals Chamber and the Registry, within ten working days from the date of this decision, lists identifying material related to personal information about the *Popović et al.* Defence and their family members;
2. to file before the Appeals Chamber and the Registry, within ten working days from the date of this decision, lists identifying any material provided under Rule 70 of the Rules;
3. to seek leave from the Rule 70 providers to disclose this material to the Applicant within fifteen working days from the date of this decision;
4. to notify the Registry, on an ongoing basis, of the consent of providers to the disclosure of Rule 70 material to the Applicant received by the Prosecution or the *Popović et al.* Defence pursuant to Order (3) above;
5. to apply to the Appeals Chamber for additional protective measures or redactions, if required, within ten working days from the date of this decision.

REQUESTS the Registry:

¹⁵ Cf. Karadžić Decision, p. 2.

1. to withhold any material related to personal information about the *Popović et al.* Defence and their family members, as identified by the *Popović et al.* Defence teams;
2. to withhold any material provided pursuant to Rule 70 of the Rules, as identified by the Prosecution or the *Popović et al.* Defence teams, until the responses of the providers have been relayed;
3. where the providers have consented to further disclosure, to provide the Applicant with all such material, in electronic format where possible;
4. where the providers have refused consent to further disclosure, to withhold that material;
5. where no additional protective measures or redactions are requested within ten working days from the date of this decision, and where material has not, within the relevant deadline, been identified by the Prosecution or *Popović et al.* Defence teams as material containing sensitive information that has little or no evidentiary value to the Applicant or having been provided pursuant to Rule 70 of the Rules, to provide the Applicant with all *inter partes* confidential material described above, in electronic format where possible;
6. where additional protective measures or redactions are requested, to withhold that material until the Appeals Chamber has issued a decision on the request;

ORDERS, unless otherwise required by this decision, that the *inter partes* confidential material provided by the Registry shall remain subject to any protective measures in effect;

ORDERS that the Applicant and any persons involved in the preparation of his case who have been instructed or authorised by the Applicant to have access to the *inter partes* confidential material described above, shall not, without the Appeals Chamber expressly finding that third party disclosure is necessary for the preparation of the Applicant's defence and granting the appropriate leave:

1. disclose to any third party the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;
2. disclose to any third party any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony; or

¹⁴ See *supra* fn. 7.

3. contact any witness whose identity was subject to protective measures;

ORDERS that if, for the purposes of the preparation of the Applicant's defence, non-public material is disclosed to third parties¹⁶ – pursuant to authorisation by the Appeals Chamber – any persons 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 non-public 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 Applicant's defence team as soon as the information is no longer needed for the preparation of his defence;

ORDERS that if any persons who are authorised to have access to confidential material should withdraw from the case, any confidential material to which access is granted in this decision and that remains in their possession shall be returned to the Registry;

DENIES the Motion in all other respects.

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



Judge Patrick Robinson
Presiding

Dated this 20th day of February 2013,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

¹⁵ See Mladić Trial Decision, para. 18 and p. 17.

¹⁶ For the purposes of this paragraph, third parties exclude: (i) the Applicant; (ii) his defence counsel; (iii) any other defence team members for the Applicant who have been instructed or authorised by the Applicant to have access to confidential material; and (iv) personnel of the Tribunal, including members of the Prosecution.

