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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 |
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| | | Date: | 18 October 2011 |
| | | Original: | English |

**IN TRIAL CHAMBER I**

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

**Registrar:** Mr John Hocking

**Decision of:** 18 October 2011

**PROSECUTOR**

**v.**

**RATKO MLADIĆ**

***PUBLIC***

# DECISION ON MOTION BY RADOVAN KARADŽIĆ FOR ACCESS TO CONFIDENTIAL MATERIALS IN THE MLADIĆ CASE

*Prosecutor v. Ratko Mladić*

**Office of the Prosecutor**
Mr. Dermot Groome
Mr. Peter McCloskey

**Counsel for Ratko Mladić**
Mr. Branko Lukić

*Prosecutor v. Radovan Karadžić*
*Case No.: IT-95-5/18-T*
**Office of the Prosecutor**
Mr. Alan Tieger
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**The Accused**
Mr. Radovan Karadžić

**Appointed Counsel**
Mr. Richard Harvey

# I. PROCEDURAL HISTORY

1. On 31 May 2011, Radovan Karadžić ("Applicant") filed a motion seeking access to all *inter partes* confidential materials from the Mladić case ("Motion").[1]

2. On 14 June 2011, Duty Counsel assigned to Ratko Mladić ("Mladić") requested an extension of time to file a response to the Motion ("Request").[2] On 16 June 2011, the Trial Chamber ("Chamber") granted the Request in part, and ordered that any response to the Motion be filed by 22 June 2011. The Chamber informed the parties accordingly through an informal communication. Duty Counsel responded to the Motion on that day ("Duty Counsel Response"), submitting that the Motion was premature,[3] and requesting the Chamber to suspend the decision on the Motion until Mladić and his yet to be assigned permanent counsel had received the Prosecution's disclosure pursuant to Rules 66 and 68 of the Rules of Procedure and Evidence ("Rules"), or, alternatively, to deny the Motion as premature.[4]

3. On 22 June 2011, the Prosecution filed a response to the Motion ("Prosecution Response").[5] While this filing was not within the prescribed deadline and the Prosecution offered no reasons for the late filing in the Response itself, the Prosecution informally communicated to the Chamber that the Motion was filed prior to the assignment of Prosecution counsel to the *Mladić* case. Considering this, and the fact that no delays were caused by the late response, the Chamber will consider the Prosecution Response.

4. At the Status Conference of 25 August 2011, taking into consideration that the Prosecution's Rule 66 (A) (i) disclosure obligations had been completed and permanent counsel for Mladić had been assigned, the Chamber set 8 September 2011 as the deadline for a response to the Motion.[6] No response was filed by the Defence.

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1 Motion by Radovan Karadžić for Access to Confidential Materials in the *Mladić* Case, 31 May 2011, paras 1, 11.
2 Duty Counsel Request for Extension of Time to File a Response to Radovan Karadžić Motion for Aces (*sic*) to Confidential Materials in the Mladić Case, 14 June 2011.
3 Duty Counsel Response, para. 6. Duty Counsel submits that at the time of the filing of the Motion, Mladić had not yet entered a plea, and in addition, disclosure by the Prosecution pursuant to Rules 66 and 68 of the Rules of Procedure and Evidence had not been fulfilled so that Duty Counsel was not in a position to make any comments with respect to access to the confidential materials (Duty Counsel Response, paras 4-5).
4 Duty Counsel's Response to Radovan Karadžić Motion for Acces (*sic*) to Confidential Material in Mladić Case, 22 June 2011, Relief Sought, p. 2.
5 Prosecution Response to Motion by Radovan Karadžić for Access to Confidential Materials in the Mladić case, 22 June 2011.
6 T. 66 (25 August 2011).

## II. SUBMISSIONS

5. The Applicant requests that the Chamber grant access to all *inter partes* confidential material from the Mladić case on an ongoing basis and for the duration of the pre-trial and trial proceedings.[7] This request includes: (i) all confidential closed and private session transcripts of testimony; (ii) all closed session hearing transcripts; (iii) all confidential exhibits; and (iv) all confidential *inter partes* filings and submissions including confidential Chamber decisions.[8]

6. The Applicant asserts that his request for access meets all the requirements set out in Rule 75 of the Rules and the jurisprudence of the Tribunal.[9] The Applicant submits that there is a significant geographical and temporal overlap between his case and that of the Accused, that the charges in the two operative indictments against the Applicant and the Accused, respectively, are "virtually identical", and that as such, the factual bases for the allegations against the Applicant and the Accused are interrelated.[10] The Applicant further submits that a significant overlap of witnesses who will testify in both cases is to be expected.[11] The Applicant contends that access of the requested material should be granted on the basis that they are crucial to the effective investigation and preparation of his defence at both trial and appeal, and that access of these materials would be in accordance with the principle of equality of arms.[12]

7. Finally, the Applicant requests that this access be timely so that he may "move to strike" a specific scheduled incident from the indictment against him.[13] The Applicant submits that this identical incident from the earlier *Mladić* indictment was removed from that indictment following a review of the supporting material by the confirming Judge in the *Mladić* case.[14] The Applicant submits, further, that he inquired of the Prosecution as to whether the supporting material that formed the basis of this specific scheduled incident in the *Mladić* indictment was the same material which had been submitted in his own case for that same incident.[15] Finally, the Applicant submits that he was told by the Prosecution that it could not answer this question because the supporting material in the *Mladić* case was confidential.[16]

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7 Motion, paras 1, 11-12.
8 Motion, para. 1.
9 Motion, paras 4-7, 11.
10 Motion, para. 8.
11 Motion, para. 9.
12 Motion, paras 8-10.
13 Motion, para. 3.
14 Motion, para. 2; Decision on Amendment of Indictment, 27 May 2011, para. 17.
15 Motion, para. 2.
16 Ibid.

8. The Prosecution does not object to the Applicant's request for access, but requests that certain materials be excluded from access,[17] namely (i) confidential material provided under Rule 70 of the Rules;[18] (ii) confidential material subject to the protective measure of delayed disclosure;[19] and (iii) confidential material related to other protective measures, enforcement of sentences, remuneration of counsel, fitness to stand trial, subpoenas, applications for video-conference links, provisional release, orders to redact transcripts/broadcasts of a hearing, the Accused's health, internal memoranda assessing state cooperation, notices of non-attendance in court, and modalities of trial.[20] With respect to the categories of materials listed in (iii), the Prosecution submits that they may contain sensitive information that is of little or no evidentiary value to the Applicant and no showing has been made as to why access to these categories would be warranted.[21]

## III. APPLICABLE LAW

9. Tribunal jurisprudence prescribes that "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".[22] Present jurisprudence concerning access requests reveals that the requirement of identification of the materials sought is not particularly onerous and Defence requests for "all confidential material" are generally considered sufficiently specific to meet this standard.[23]

10. With regard to *inter partes* confidential material, a legitimate forensic purpose may be established by demonstrating the existence of a geographical and/or temporal nexus between the applicant's case and the case from which the material is sought.[24] The Chamber must also be satisfied that access to the material is likely to materially assist the applicant's case, or that there is at least a good chance that it would.[25] While the applicant may not engage in a "fishing

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17 Prosecution Response, paras 1, 6.
18 Prosecution Response, paras 1, 4.
19 Prosecution Response, paras 1, 5.
20 Prosecution Response, paras 1, 6.
21 Prosecution Response, para. 6.
22 *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* 19 May Decision"), para. 7; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Momčilo Perišić's Request for Access to Confidential Material in the *Dragomir Milošević* Case, 27 April 2009, para. 4.
23 *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.
24 *D. Miloševic* 19 May Decision, para. 8.
25 *D. Miloševic* 19 May Decision, para. 8.

expedition",[26] the "good chance" standard does not, on the other hand, require an accused seeking access to confidential materials "to establish a specific reason that each individual item is likely to be useful".[27]

11. With respect to material that has been provided pursuant to Rule 70 of the Rules, the Prosecutor must obtain the consent of the provider before the material or its source can be disclosed to another accused before the Tribunal.[28] This applies to all material provided under Rule 70, even when the Rule 70 provider has consented to the disclosure of the material in one or more prior cases.[29]

12. Pursuant to Rule 75 (F) (i) of the Rules, protective measures that have been ordered for a witness or victim in any proceeding before the Tribunal shall continue to have effect *mutatis mutandis* in any other proceedings, unless and until they are rescinded, varied, or augmented.

13. 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.[30] The Chamber must, however, "strike a reasonable balance between the rights of the accused [...] and the protection of witnesses and victims".[31] As such, the parties in the proceedings from which requests are made are urged to "responsibly micro-manage the material covered by the access regime, and to apply for its partial non-disclosure if considerations of victim and witness protection outweigh the forensic value of evidence".[32]

## IV. DISCUSSION

14. The indictments against Karadžić and Mladić allege that both were members of a total of four separate joint criminal enterprises ("JCE") in the period between 1991 and 1995 on the

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[26] *D. Milošević* 19 May Decision, para. 11; *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Materials in Another Case, 23 April 2002 (*"Hadžihasanović and Kubura* Decision"), p. 3.

[27] *D. Milošević* 19 May Decision, para. 8; *Hadžihasanović and Kubura* Decision, p. 3.

[28] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Motion of Mićo Stanišić for Access to All Confidential Materials in the *Krajišnik* Case, 21 February 2007 ("*Krajišnik* Decision"), p. 5.

[29] *Krajišnik* Decision, p. 6; *Stanišić and Simatović* Decision, para. 17; *Tolimir* Decision, para. 10.

[30] *D. Milošević* 19 May Decision, para. 11.

[31] *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 (in the context of a discussion regarding concerns about a more elaborative regime of access). See also *D. Milošević* 19 May Decision, para. 16.

territory of Bosnia and Herzegovina ("BiH"), namely 1) an overarching JCE to permanently remove Bosnian Muslim and Bosnian Croat inhabitants from the territories of BiH claimed as Bosnian Serb territory;[33] 2) a JCE to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, the primary purpose of which was to spread terror among the civilian population;[34] 3) a JCE to eliminate the Bosnian Muslims in Srebrenica by killing boys and men and forcibly removing the women, young children and some elderly men from the area;[35] and 4) a JCE to compel NATO to abstain from conducting air strikes against Bosnian Serb military targets by taking hostage UN personnel.[36] Karadžić, as the Supreme Commander of the armed forces throughout the time relevant to the Indictment, is alleged to have had effective control over the Bosnian Serb forces from at least March of 1992 until 19 July 1996.[37] In this capacity, Karadžić was the superior of the Accused, who was appointed Commander of the Main Staff of the Bosnian Serb Army in May of 1992.[38] The underlying crimes forming the basis of the charges set out in the two indictments are, with a number of exceptions, identical. The Chamber is satisfied, therefore, that there is a geographical and temporal nexus between the Karadžić case and the Mladić case. The Applicant has also met the threshold of specificity required under the Tribunal's access regime.

15. While it is clear that the regime for access to confidential materials in other cases is liberal, it is, however, not without exceptions. One such exception concerns material relating to protected witnesses for whom orders of delayed disclosure have been issued. The Chamber is of the view that while it is possible that such material may have forensic value to the Applicant, at this stage of the proceedings against the Accused, any such potential value does not outweigh the considerations the Chamber must give to the safety and protection of victims and witnesses, pursuant to Articles 20 (1) and 22 of the Statute and Rule 75 (A) of the Rules. This material must therefore be excluded.

16. With respect to the request by the Prosecution for the limitation of access to certain categories of materials which may contain sensitive information and have very little or no evidentiary value to the Applicant, the Chamber is of the view that a limitation of such type of material is warranted. The Chamber notes that in a recent decision by the Trial Chamber in *Stanišić and Simatović*, the majority of the categories specified by the Prosecution in the Prosecution's

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32 *Stanišić and Simatović* Decision, para. 36.

33 *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-I, Prosecution's Second Amended Indictment, 1 June 2011 ("*Mladić Indictment*"), paras 5, 8-13 (it is alleged that Mladić became a member only on 12 May 1992, see Indictment, para. 5); *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Prosecution's Marked-Up Indictment, 19 October 2009 ("*Karadžić Indictment*"), paras 6, 9-14.

34 *Mladić Indictment*, paras 7, 14-18; *Karadžić Indictment*, paras 8, 15-19.

35 *Mladić Indictment*, paras 7, 19-23; *Karadžić Indictment*, paras 8, 20-24.

36 *Mladić Indictment*, paras 7, 24-28; *Karadžić Indictment*, paras 8, 25-29.

37 *Karadžić Indictment*, para. 33.

38 *Mladić Indictment*, para. 3.

Response were identified by that Chamber as having no forensic purpose and were therefore excluded from the access request.[39] These categories were found to include materials relating to 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 the public broadcast of a hearing.[40] The Chamber similarly finds that these categories of materials have no forensic purpose and should therefore be excluded.

17. In addition to the categories identified by the *Stanišić and Simatović* decision as having no forensic purpose to the applicant, the Prosecution requests the exclusion of materials relating to the enforcement of sentences, as well as the exclusion of internal memoranda assessing state cooperation.[41] The Chamber is of the view that material relating to the enforcement of sentences falls within the category of material which does not have a forensic purpose for the Applicant's case. With respect to internal memoranda assessing state cooperation, the Chamber considers that to the extent that these memoranda qualify as internal work product, this material is excluded pursuant to Rule 70 (A). To the extent that these memoranda do not fall within the ambit of Rule 70 (A), the Chamber considers that subject to a request by the Prosecution pursuant to Rule 66 (C) and a subsequent approval by the Chamber, this information shall be provided to the Applicant.

18. With respect to the request for access to *inter partes* filings and confidential decisions by the Chamber, the Chamber considers that access by the Applicant is only appropriate in so far as such filings do not contain the categories discussed in the paragraphs above.

19. In relation to materials provided to the Prosecution or Defence in the *Mladić* case pursuant to Rule 70 (B), the Chamber considers that they must be excluded from access by the Applicant, unless the provider of this material has consented to disclosure of this material to the Applicant.

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

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[39] *Stanišić and Simatović* Decision, para. 40.
[40] Ibid.
[41] Prosecution Response, paras 1, 6.

## V. DISPOSITION

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

**GRANTS** the Motion in part;

**ORDERS** the Prosecution and the Defence, on an ongoing basis, to identify to the Registry the following *inter partes* confidential material in the case of *Prosecutor v. Ratko Mladić* for disclosure to the Applicant, subject to the restrictions set out in paragraphs 15-19 of this decision;

(i) all closed and private session testimony transcripts;

(ii) all confidential exhibits;

(iii) all confidential filings and submissions (including all confidential Chamber decisions);

(iv) all closed session hearing transcripts other than testimonies;

**ORDERS** the Prosecution and the Defence to determine without undue delay which of the requested material used as evidence in the present case is subject to the provisions of Rule 70 (B) of the Rules, and to contact the providers of such material to seek their consent for disclosure to the Applicant, and, where such consent is given, to notify the Registry thereof;

**INVITES** the Prosecution and the Defence, if deemed necessary and without undue delay, to file a request to the Chamber for non-disclosure of specified material, additional protective measures, or redactions before identifying the above material to the Registry;

**REQUESTS** the Registry:

(i) to disclose to the Applicant and his standby counsel, the following material:

  (a) the *inter partes* confidential, non-Rule 70 material once it has been identified by the Prosecution and Defence in accordance with this decision; and

  (b) the Rule 70 material once the Prosecution and Defence have identified such material upon receiving consent from the Rule 70 providers;

(ii) to withhold from disclosure to the Applicant and his standby counsel, specified material for which non-disclosure, additional protective measures, or redactions are requested, until the Chamber has issued a decision on the request;

**ORDERS** the Applicant and his standby counsel, 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, his standby counsel and any persons involved in the preparation of the case who have been instructed or authorised by the Applicant and/or his standby counsel to have access to the confidential material from this case. "The public" also includes, without limitation, family members, and friends of the Applicant; 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 Applicant's defence, 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 Applicant or his standby counsel as soon as the information is no longer needed for the preparation of his defence;

**ORDERS** that the Applicant, his standby counsel and any persons involved in the preparation of the case who have been instructed or authorised by the Applicant and/or his standby counsel to have access to the confidential material from this case, and any other persons for whom disclosure of the sought material is granted by a separate decision shall not:

(i) 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;

(ii) disclose to any members of the public any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any confidential evidence, statement of prior testimony;

**ORDERS** that any persons for whom disclosure of the confidential material from this case is granted by a separate decision shall return to the Applicant or his standby counsel 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 the Applicant, his standby counsel and any persons who have been instructed or authorised by the Applicant and/or his standby counsel 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 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 *Mladić* case shall continue to have effect in the case against the Applicant; and

**DENIES** the Motion in all other respects.

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

Judge Alphons Orie

Dated this Eighteenth day of October 2011
At The Hague
The Netherlands

**[Seal of the Tribunal]**