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 Nos	IT-09-92-T MICT-15-85
		Date:	11 May 2017
		Original:	English

IN TRIAL CHAMBER I

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

Registrar: **Mr John Hocking**

Decision of: **11 May 2017**

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

DECISION ON VUJADIN POPOVIĆ'S DEFENCE REQUEST FOR ACCESS TO CONFIDENTIAL MATERIALS IN THE *MLADIĆ* CASE

Office of the Prosecutor
Mr Peter McCloskey
Mr Mathias Marcussen

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Dragan Ivetić

Counsel for Vujadin Popović
Mr Zoran Živanović

I. PROCEDURAL HISTORY

1. On 23 January 2017, counsel for Vujadin Popović ("Applicant") filed a motion seeking access to confidential and *inter partes* materials ("Materials") from the *Mladić* case ("Request").[1] The Prosecution responded on 25 January 2017 opposing the Request ("Response").[2] The Applicant replied on 30 January 2017 ("Reply").[3]

II. SUBMISSIONS OF THE PARTIES

2. The Applicant requests that the Chamber grant access to the Materials from the *Mladić* case that are related to the charges concerning Srebrenica.[4] The purpose of the Request is to enable the Applicant to assess the probative value of the Materials for envisaged review proceedings pursuant to Rule 146 of the Rules of Procedure and Evidence of the International Residual Mechanism for Criminal Tribunals ("MICT Rules" and "MICT", respectively).[5] The Applicant seeks access to Materials on record after 30 January 2015, the date of the Appeals Judgment in the *Popović et al.* case, when his previous access ended.[6] Accordingly and given the nexus between the *Mladić* and the *Popović et al.* cases, access to the Materials will likely assist the Applicant in the preparation of the review proceedings.[7]

3. The Prosecution submits that the Request should be dismissed because the Applicant has failed to demonstrate a legitimate forensic purpose.[8] Since the proceedings against the Applicant were concluded on 30 January 2015, the only legitimate forensic purpose for a party to gain access to materials in other cases is to establish a "new fact" capable of founding a review application under Rule 146 (A) of the MICT Rules.[9] It asserts that the Applicant fails to make any particularized submissions concerning any "new fact" capable of supporting an access application for the purpose of such a review application and that the Applicant's exclusive focus on the factual

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1 Vujadin Popovic Defence Request for Access to Confidential Materials in the Prosecutor v. Ratko Mladić Case, 23 January 2017.
2 Prosecution Response to Vujadin Popović Defence Request for Access to Confidential Materials in the *Mladić* Case, 25 January 2017.
3 Vujadin Popovic's Defence Reply on the Prosecution's Response to Popovic's Defence Request for Access to Confidential Materials in the Prosecutor v. Ratko Mladić Case, 30 January 2017.
4 Request, paras 1, 18-19.
5 Request, para. 2.
6 Request, paras 11-13.
7 Request, paras 7-9, 17.
8 Response, paras 1, 3.
9 Response, para. 2.

nexus between the *Mladić* and the *Popović et al.* cases is insufficient.[10] Finally, the Prosecution submits that the Request amounts to a fishing expedition.[11]

4. In his Reply, the Applicant reiterates that the only purpose of the Request is the search of "new facts" that meet the criteria set out in Rule 146 (A) of the MICT Rules.[12] He further asserts that precise identification of the Materials and the particularization of "new facts" is both unnecessary and impossible without prior access to the Materials.[13]

III. APPLICABLE LAW

5. The Chamber recalls and refers to the applicable law governing access to confidential materials from other cases before the Tribunal, as set out in a previous decision.[14] It further recalls and refers to the jurisprudence of the MICT that determines that although access to confidential materials in another case may still be requested by an applicant whose case has concluded, the only legitimate forensic purpose for obtaining access to these materials is to establish a "new fact" capable of constituting the basis for a review application of an applicant's convictions.[15] Finally, the Chamber recalls and refers to a decision by the Appeals Chamber of the Tribunal wherein it found that in light of the "residual" nature of the MICT and for concerns of judicial economy and practicality, parties before the MICT shall be considered parties before the Tribunal for the purposes of requesting access to confidential material.[16]

6. Pursuant to Rule 126 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), a reply to a response, if any, shall be filed within seven days of the filing of the response, with leave of the Chamber.

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10 *Ibid.*
11 Response, para. 3.
12 Reply, paras 4-5.
13 Reply, para. 12.
14 Decision on Defence Request for Access to Confidential Materials from *Krstić* Case, 21 March 2012, paras 3-9.
15 *Eliézer Niyitegeka v. Prosecutor*, Case No. MICT-12-16, Decision on Niyitegeka's Urgent Request for Orders Relating to Prosecution Witnesses, 29 January 2016, para. 9; *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33-R86.2, Second Decision on Motion for Access to Confidential Material from the *Nshogoza* Case, 9 November 2015, para. 5. *See also Georges Anderson Nderubumwe Rutaganda v. Prosecutor*, Case No. ICTR-96-3-R, Decision on Georges A.N. Rutaganda's Appeal Against Decision on Request for Closed Session Testimony and Sealed Exhibits, 22 April 2009, para. 16; *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on Stanislav Galić's Motion for Access to Confidential Materials in the *Karadžić* Case, 9 June 2016, para. 10; *Prosecutor v. Zdravko Tolimir*, Case No. MICT-15-95, Decision on Vujadin Popović's Request for Access to Confidential Material in the Prosecutor v. Zdravko Tolimir Case, 8 February 2017, para. 9.
16 *Prosecutor v. Mićo Stanišić & Stojan Župljanin,* Case No. IT-08-91-A, Decision on Karadžić's Motion for Access to Prosecution's Sixth Protective Measures Motion, 28 June 2016, p. 2.

IV. DISCUSSION

7. At the outset, the Chamber notes that the Applicant did not request leave to file its Reply, as required by Rule 126 *bis* of the Rules. Nevertheless, the Chamber finds that it is in the interest of justice to consider the Reply.

8. The Chamber finds that there is a geographical, temporal, and substantive nexus between the *Popović* and the *Mladić* indictments with regard to alleged crimes committed in Srebrenica.[17] However, the Chamber notes that the *Popović et al.* case concluded on 30 January 2015,[18] and that the only legitimate forensic purpose for obtaining access to the Materials in this situation is to establish a new fact capable of constituting the basis for a review application of Popović's conviction. In this respect, the Chamber finds that the Applicant merely refers to the nexus between the *Popović et al.* case and the *Mladić* case and fails to explain how the Materials would be of assistance to establish a new fact. The threshold for access after a case has concluded is higher and a mere nexus between cases is insufficient. Consequently, the Chamber finds that the Applicant has failed to demonstrate a legitimate forensic purpose for receiving access to the Materials.

V. DISPOSITION

9. For the foregoing reasons, pursuant to Articles 20 and 22 of the Tribunal's Statute, and Rules 54, 70, and 75 of the Rules, the Chamber **DENIES** the Request **WITHOUT PREJUDICE**.

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

Judge Alphons Orie
Presiding Judge

Dated this eleventh day of May 2017
At The Hague
The Netherlands

[Seal of the Tribunal]

[17] *Mladić* Indictment, paras 5-7, 19; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Indictment, paras 20, 24-25.

[18] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Judgement, 30 January 2015.