IT-95-5/18-T
D60062 - D60057
15 FEBRUARY 2012

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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 Nos.	IT-05-88-A & IT-95-5/18-T
		Date:	15 February 2012
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz

Registrar: **Mr. John Hocking**

Decision of: **15 February 2012**

PROSECUTOR

v.

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

PUBLIC

DECISION ON MOTION BY RADOVAN KARADŽIĆ FOR ACCESS TO CONFIDENTIAL FILINGS

The Office of the Prosecutor:
Mr. Peter Kremer QC

Applicant:
Mr. Radovan Karadžić *pro se*

Counsel for the Defence:

Mr. Zoran Živanović and Ms. Mira Tapušković for Mr. Vujadin Popović
Mr. John Ostojić and Mr. Theodor Scudder 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 "Motion by Radovan Karadžič [*sic*] for Access to Confidential Filings", filed by Radovan Karadžić ("Karadžić") on 8 December 2011 ("Motion");

NOTING that Karadžić requests "access to all *inter partes* confidential filings in the appeal proceedings in [the *Popović et al.*] case";[1]

NOTING the "Decision on Karadžić's Motion for Access to Confidential Material in the *Popović et al.* Case", issued by Trial Chamber II of the Tribunal ("Trial Chamber") on 30 July 2009 ("Karadžić Trial Decision"), in which Karadžić was granted access, "subject to Rule 70 consent where applicable, and with the exception of material related to personal information about the Accused and their family members [...], to all *inter partes* confidential material in the *Popović* case";[2]

NOTING that Karadžić submits that, in the Karadžić Trial Decision, the Trial Chamber found a sufficient geographical and temporal overlap between the *Karadžić* and the *Popović et al.* cases;[3]

NOTING that Karadžić argues that he has a legitimate forensic purpose for access to confidential information in the appellate proceedings of the *Popović et al.* case, because "[a]llowing him to review the unredacted version of the briefs of the parties will assist him in raising objections and legal issues related to the very same evidence that is now being offered in his trial";[4]

NOTING that Karadžić submits that "he already has access to the confidential material at trial",[5] and that "[t]he parties' filings on appeal are redacted so as to omit public reference to the very same material to which Dr. Karadzic [*sic*] already has access";[6]

NOTING the "Prosecution Response to Radovan Karadžić's Motion for Access to *Inter Partes* Confidential Filings", filed by the Office of the Prosecutor ("Prosecution") on 12 December 2011 ("Response"), in which the Prosecution does not oppose the Motion, subject to the imposition of the

[1] Motion, para. 1. See also Motion, para. 6.
[2] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Karadžić's Motion for Access to Confidential Material in the *Popović et al.* Case, 30 July 2009 ("*Karadžić* Trial Decision") para. 19(1).
[3] Motion, para. 2.
[4] Motion, para. 4.
[5] Motion, para. 5. See also Motion, para. 2.
[6] Motion, para. 5.

same limitations and conditions as those set out by the Trial Chamber in the Karadžić Trial Decision;[7]

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";[8]

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";[9]

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";[10]

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

CONSIDERING that there is a significant factual nexus between the *Karadžić* and the *Popović et al.* cases;[11]

CONSIDERING that, in light of this nexus, having access to the confidential appellate briefs in the *Popović et al.* case may materially assist Karadžić in the preparation of his arguments in relation to the confidential evidence presented in the *Karadžić* case;[12]

CONSIDERING FURTHER that Karadžić may be materially assisted by having access to other confidential *inter partes* filings in the *Popović et al.* appellate proceedings;

PURSUANT TO Rules 54 and 107 of the Tribunal's Rules of Procedure and Evidence ("Rules"),

HEREBY GRANTS the Motion **IN PART**;

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[7] Response, para. 1.
[8] *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Vlastimir Đorđević's Motion for Access to Transcripts, Exhibits and Documents, 16 February 2010 ("*Đorđević* Decision"), para. 9 and references cited therein; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Milan Lukić's Motion for Access to All Confidential Materials in the *Zuhdija Tabaković* Case, 6 May 2010 (confidential) ("*Lukić* Decision"), para. 8; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case Nos. IT-98-32/1-A & IT-98-32/1-R77.2, Decision on Jelena Rašić's Motion for Access to Confidential *Inter Partes* and *Ex Parte* Material from the *Lukić and Lukić* Case, 6 September 2011 (confidential) ("*Rašić* Decision"), p. 2.
[9] *Đorđević* Decision, para. 9; *Lukić* Decision, para. 8.
[10] *Lukić* Decision, para. 8. See also *Đorđević* Decision, para. 9; *Rašić* Decision, p. 2.
[11] See Karadžić Trial Decision, para. 13.

ALLOWS Karadžić, subject to the conditions set forth below, prospective access to *inter partes* confidential material in the present appeals proceedings (Case No. IT-05-88-A), with the exception of material subject to Rule 70 of the Rules and material 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;

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

1. to identify to the Appeals Chamber and the Registry, within ten working days from the date of this decision, any material related to personal information about the Defendants in the *Popović et al.* case and their family members, or to do so within ten working days of its filing in the present case;

2. to identify to the Appeals Chamber and the Registry, within ten working days from the date of this decision, any material subject to Rule 70 of the Rules, or to do so within ten working days of its filing in the present case;

3. to seek leave from the Rule 70 providers to disclose this material to Karadžić within 15 working days from the date of this decision, or within 15 working days of their admission into evidence under Rule 115 of the Rules hereafter;

4. to notify the Registry, on an ongoing basis, of the consent of providers to the disclosure of Rule 70 material to Karadžić 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 or, where appropriate, within ten working days of the admission of additional evidence under Rule 115 of the Rules hereafter;

REQUESTS the Registry:

1. to withhold any material related to personal information about the Defendants and their family members, as identified by the *Popović et al.* Defence;

[12] *Cf. Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Paško Ljubičić's Motion for Access to Confidential Material, Transcripts and Exhibits, 4 December 2002, para. 17.

2. to withhold any material provided pursuant to Rule 70 of the Rules, as identified by the Prosecution or the *Popović et al.* Defence, until the responses of the providers have been relayed;

3. where the providers have consented to further disclosure, to provide Karadžić, his legal associates and any employees who have been instructed or authorized by Karadžić and his legal associates, 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 or within ten working days of the material's admission into evidence hereafter, and where material has not, within the relevant deadline, been identified by the Prosecution or *Popović et al.* Defence as containing personal information about the *Popović et al.* Defence and their family members or having been provided pursuant to Rule 70 of the Rules, to provide Karadžić, his legal associates and any employees who have been instructed or authorized by Karadžić and his legal associates 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 Karadžić, his legal associates and any employees who have been instructed or authorized by Karadžić and his legal associates to have access to the *inter partes* confidential material described above, shall not, without the express leave of the Appeals Chamber through a finding that it has been demonstrated that third party disclosure is necessary for the preparation of Karadžić's defence:

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

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

ORDERS that if, for the purposes of the preparation of Karadžić's defence, non-public material is disclosed to third parties[13] – pursuant to authorization 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 Karadžić defence team as soon as the information is no longer needed for the preparation of his defence;

ORDERS that if any persons who are authorized 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 15th day of February 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

[13] For the purposes of the this paragraph, third parties exclude: (i) Karadžić; (ii) his legal associates; (iii) any employees who have been instructed or authorized by Karadžić and his legal associates to have access to confidential material; and (v) personnel of the Tribunal, including members of the Prosecution.