



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-PT
Date: 23 February 2009
Original: English

TRIAL CHAMBER III

Before:

Judge Iain Bonomy, Presiding, Pre-Trial Judge
Judge Christoph Flügge
Judge Michèle Picard

Acting Registrar:

John Hocking

Submission date:

23 February 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**REGISTRAR'S SUBMISSION PURSUANT TO RULE 33 (B) ON ACCESS BY THE
ACCUSED'S DEFENCE TEAM TO CONFIDENTIAL INFORMATION**

Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark B. Harmon
Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadžić

1. Pursuant to Rule 33(B) of the Rules of Procedure and Evidence ("Rules") of the International Criminal Tribunal for the Former Yugoslavia ("Tribunal"), the Registrar respectfully makes this submission regarding Mr. Radovan Karadžić's ("Accused") Defence team's access to confidential filings.
2. In its *Decision on Protective Measures for Witnesses* dated 30 October 2008 ("Protective Measures Decision"), the Trial Chamber instructed the Accused:

"not [to] disclose to the public any confidential information of the witnesses (including but not limited to the names, identifying information, and whereabouts of any victim, witness, or potential witness), except to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of the case. If the Accused finds it directly and specifically necessary to make disclosures pursuant to this limited purpose, he shall inform each person among the public to whom non-public material or information is shown or disclosed, that such person is not to copy, reproduce, or publicise such material or information, and is not to show, disclose, or convey it to any other person. [...]"¹

3. Furthermore, in the Decision, the Trial Chamber defined the "public" as follows:

"For the purposes of this decision, the "public" means all persons, including corporations; governments and organs/departments thereof; organisations; entities; associations; groups; the Accused's family members, friends, and associates; accused and defence counsel in other proceedings before the Tribunal; and the media. However, for the purposes of this Decision, the "public" does not mean Judges of the Tribunal; staff of the Registry and the Office of the Prosecutor; the *Amici Curiae* (where applicable); or the Accused and his Defence team (if any)."²

4. The notion of "Defence team" in the Accused's case – as in other cases of self-represented accused – is somewhat broader than its usual meaning in the context of other cases before the Tribunal where the accused is represented by counsel. To the extent that the concept of "Defence team" is an integral element of the mechanism for witness protection outlined in the Protective Measures Decision, the Registrar deems it appropriate to bring to the Trial

¹ Protective Measures Decision, paragraph 34, subsection (l).
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Chamber's attention certain elements of the Accused's Defence team that may be of relevance to the implementation of the Trial Chamber's decision.

5. As a self-represented accused before the Tribunal, the Accused is entitled to the assignment of a limited number of assistants in accordance with the *Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused* of 28 September 2007 ("Remuneration Scheme"). Prior to assigning such assistants, the Registrar examines their qualifications and undertakes basic background and conflict-of-interest checks. Furthermore, all assistants assigned by the Registry are required to sign an undertaking in which they agree to be bound by various Tribunal rules and regulations and to respect the confidentiality of all case-related documentation ("Undertaking").³
6. In addition to the support staff assigned by the Registry, the Accused has retained several *pro bono* (legal) assistants and has indicated that others may assist him in the future. Where the Registrar has been informed of the retention of such *pro bono* assistants, he has invited the Accused to ensure that they sign the Undertaking. However, the Registrar does not check such assistants' qualifications nor does he assign them as members of the Accused's defence team. In fact, the Registrar may not even be aware that the Accused receives such *pro bono* assistance.⁴ Irrespective of whether such assistants work for the Accused permanently or provide him with *ad hoc* assistance, they may reasonably claim to be part of the Accused's "Defence team"⁵ with direct access to confidential documents in the case.⁶
7. Of course, *pro bono* staff (e.g. interns) may also be retained by counsel representing an accused before the Tribunal. The Accused's *pro bono* assistants may be said to have a similar status. However, *pro bono* members of a Defence team of a represented accused are selected and supervised by a qualified Defence counsel and it is Counsel who is ultimately responsible for their work and conduct before the Tribunal, including for possible misconduct they may engage in.⁷ Similarly, it is Lead Counsel who decides to what extent, if any, a particular Defence intern should have access to confidential filings in the case.

² Protective Measures Decision, paragraph 34, subsection (p).

³ The Registrar has so far assigned two legal associates and one investigator to the Accused's Defence team; the assignment of an additional legal associate is pending the submission of documentation requested by the Registry.

⁴ The Accused is under no legal obligation to disclose the identity of persons who assist him without receiving remuneration from the Tribunal.

⁵ For example, Vojislav Šešelj, another self-represented accused before the Tribunal, usually lists some 30 people on all his filings whom he calls members of his expert Defence team.

⁶ The Registrar notes that in accordance with the Protective Measures Decision, paragraph 34, subsection (b)(iii), "[...] the Prosecution shall provide the Defence, after a period of no more than 30 days from the date of this Decision, the identity and confidential unredacted statements of witness KDZ32."

⁷ Article 34 of the Code of Professional Conduct for Counsel Appearing before the International Tribunal ("Code of Conduct"), IT-125 REV.2.

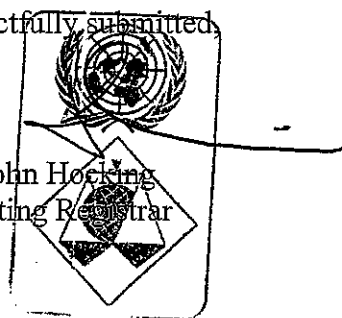
8. Because the Accused is a self-represented accused, many of the systemic safeguards integrated in various provisions of the Rules, the Code of Conduct, the Directive on the Assignment of Defence Counsel, and other policies, that place the responsibility for Defence support staff on Lead Counsel, do not apply automatically as there is no Lead Counsel to take responsibility for the Defence team members' conduct. Whilst it is true that the Protective Measures Decision places the responsibility for protecting the confidentiality of documents directly on the individuals who obtain access to such confidential documents, the additional, systemic safeguards do not necessarily exist to ensure full protection.
9. The Registrar emphasises that he has no reason to believe that the Accused or any of his current or future assistants have disclosed or will disclose confidential information in breach of the Protective Measures Decision. The Registrar is raising with the Trial Chamber differences between the Accused's Defence team and a Defence team led by Defence Counsel, in order for the Trial Chamber to determine whether additional regulation is necessary to protect the confidentiality of court records in this case, such as orders on protective measures for witnesses. A determination by the Trial Chamber on this matter will also assist the Registrar in deciding whether and to what extent confidential court documents should be made available to members of the Accused's Defence team, for example through the Judicial Database, in addition to being provided to the Accused.
10. If the Trial Chamber determines that further regulation of the Accused's Defence team's access to confidential documents is necessary, the Registrar respectfully suggests that a possible measure the Trial Chamber may consider is to require the Accused and/or the those of his legal associates who have direct access to confidential documents,⁸ to arrange for the signing of written non-disclosure agreements by individuals whom they disclose information to. An example of such an agreement is annexed to this submission. In that case, a record of disclosure, containing information such as what document has been disclosed, to whom, when, and for what purpose, will be kept and filed periodically with the Registry on an *ex parte* and confidential basis. The record could be made available to the Trial Chamber should an issue of improper disclosure of confidential information arise. The record will also assist the Tribunal's Victims and Witnesses Section in its efforts to assess and undertake measures for the safety and security of protected witnesses.

⁸ At present, up to three of the Accused's assigned legal associates will be allowed access to the Accused in a confidential setting at the United Nations Detention Unit with direct access to confidential documents.

11. The Trial Chamber may also consider, as an alternative or additional measure, to limit the number of Defence team members, other than the three legal associates with confidential access to the Accused at the UNDU, who should be granted access to confidential information.
12. The Registry remains at the Trial Chamber's disposal for any further questions that may arise.

Respectfully submitted,

John Hocking
Acting Registrar



Dated this 23rd day of February 2009

At The Hague,

The Netherlands.

ANNEX A
Sample Non-Disclosure Undertaking

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case No. IT-95-05/18-PT

PROSECUTOR**v.****RADOVAN KARADŽIĆ****Sample Non-Disclosure Undertaking**

- (1) I, _____, acknowledge that I have received the following documents listed on the annexed page.
- (2) I understand that the listed documents contain confidential information in the above case.
- (3) I agree not to copy, reproduce or publicise such documents and/or information provided to me and not to show or disclose the same to any other person not authorised by the Trial Chamber to have access to the information.
- (4) I agree to return the material provided to me pursuant to this Undertaking to the Registry-recognised legal associates of the accused or to the accused himself when such material is no longer necessary for the preparation and presentation of this case or upon the termination of my involvement in the case, whichever is sooner.
- (5) I specifically agree not to disclose to members of the public, including the media, the name, address or any other identifying information, including the whereabouts of any witness as identified by the Prosecutor in the said documents; or any evidence (including physical and documentary) or any written statement given by a witness or a potential witness, or the substance, in whole or part, of non-public evidence, statement or prior testimony.
- (6) I understand that I am under the jurisdiction of the Tribunal in matters arising from this Undertaking, and agree to be bound by the Tribunal's rulings and orders as may be issued regarding the materials I have received. I acknowledge that any breach of this undertaking may lead to the instigation of contempt proceedings against me under Rule 77 of the Rules of Procedure and Evidence.

Date and signature of the person to whom the information has been disclosed.