



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-05-88-T
Date: 30 July 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. John Hocking

Decision of: 30 July 2009

PROSECUTOR

v.

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

PUBLIC

**DECISION ON KARADŽIĆ'S MOTION FOR ACCESS TO
CONFIDENTIAL MATERIAL IN THE *POPOVIĆ ET AL.* CASE**

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Radovan Karadžić

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušević for Vujadin Popović
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Vinko Pandurević

THIS TRIAL 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 (“Tribunal”) is seised of the “Motion by Radovan Karadžić for Access to Confidential Materials in the Popović et al. case”, filed by the Accused Radovan Karadžić on 14 April 2009 (“Motion”), and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

1. In his Motion, Karadžić seeks access to the confidential material from the trial proceedings in case *Prosecutor v. Popović et al.* (“Popović case”),¹ namely, (a) all closed and private session testimony transcripts; (b) all closed session hearing transcripts; (c) all confidential exhibits; and (d) all *inter partes* confidential filings and submissions and all confidential Trial Chamber decisions.² He argues that the Motion is submitted to this Trial Chamber in accordance with Rule 75(G)(i) of the Rules of Procedure and Evidence (“Rules”).³

2. Karadžić avers that there is a significant geographical and temporal overlap between his case and the *Popović* case and that the indictments in both cases relate to crimes that allegedly occurred in Srebrenica in 1995.⁴ He also argues that the material sought is crucial to the effective investigation and preparation of his defence case as it directly impacts on the Prosecution’s assertion that he participated in a joint criminal enterprise (“JCE”) and “it is expected that there will be significant overlap” between the witnesses who gave evidence in the *Popović* case and those who will give evidence in his case.⁵ It is further submitted that the principle of equality of arms requires that he be granted access to the materials requested.⁶

3. Finally, Karadžić requests that since the *Popović* case is ongoing, the Trial Chamber grant the access on an on-going basis for the duration of the proceedings.⁷ It is also submitted that he will comply with all protective measures already in place for material sought from the *Popović* case.⁸

4. On 20 April 2009, Popović filed “Vujadin Popović’s Response to Karadžić’s Motion for Disclosure” (“Popović Response”) and Miletić filed the “Response to Radovan Karadžić’s Motion for Access to Confidential Material” (“Miletić Response”).⁹ The “Prosecution’s Response to the

¹ Motion, para. 1.

² *Ibid.*, paras. 1, 12.

³ *Ibid.*, para. 10.

⁴ *Ibid.*, paras. 6–7.

⁵ *Ibid.*, para. 8.

⁶ *Ibid.*, para. 9.

⁷ *Ibid.*, para. 12.

⁸ *Ibid.*, para. 5.

⁹ The original French version was filed on 20 April 2009 and the English version was filed on 11 May 2009.

Motion by Radovan Karadžić for Access to All Confidential Material” was filed on 28 April 2009 (“Prosecution Response”).

5. Popović submits that he does not oppose the Motion.¹⁰ Miletić argues that he does not object to the Motion, with the exception of the following documents: (a) the submissions and documents related to Miletić’s personal and family situation, which have no bearing on the substance of the *Karadžić* case and (b) the submissions of Miletić filed pursuant to Rule 70.¹¹

6. The Prosecution does not oppose the Motion “insofar as it relates to confidential evidentiary material”, referring to the material listed in categories (a) and (c) of the Motion, namely, closed and private session testimony transcripts and confidential exhibits.¹² The Prosecution agrees that there is a temporal and geographical overlap between the *Popović* case and the *Karadžić* case and that *Karadžić* has a legitimate forensic interest in confidential trial exhibits and witness testimony.¹³

7. In relation to conditions of access to this material, the Prosecution makes the following points. First, it will identify to the Registry confidential *inter partes* evidentiary material to which *Karadžić* should not be given immediate access, namely, (i) Rule 70 material for which providers’ consent is required and (ii) any protected witnesses in *Popović* case who may be called in the *Karadžić* case for whom delayed disclosure may be justified.¹⁴ Second, the access to *ex parte* material should not be granted because the Motion offers no particular reasons why the higher standard required for such material is met.¹⁵ Third, for the remaining *inter partes* confidential evidentiary material, the Prosecution will identify any applicable protective measures and cooperate with the Registry to ensure that *Karadžić* is provided access as soon as practicable.¹⁶

8. Specifically on the protected witnesses for whom delayed disclosure may be justified, the Prosecution requests that it be able to withhold material from *Karadžić* that may relate to “protected witnesses *in Popović et al.* who may be called in the [*Karadžić*] case for whom delayed disclosure may be justified”.¹⁷ The Prosecution asserts that the Registry should withhold access to this material “in accordance with the time frames set out in such orders as may be issued by the *Karadžić* Trial Chamber”¹⁸ and that the Prosecution “cannot definitively identify witnesses in common to the two cases before filing its witness list in *Karadžić*, which is not due until 18 May

¹⁰ Popović Response, para. 2.

¹¹ Miletić Response, para. 8.

¹² Prosecution Response, para. 2.

¹³ *Ibid.*, para. 7.

¹⁴ *Ibid.*, para. 9. *See also ibid.*, para. 17 (a)(b).

¹⁵ *Ibid.*, paras. 10–12.

¹⁶ *Ibid.*, para. 13 (submitting that the Prosecution has met with members of the Registry and Information Technology Support Services to identify efficient, cost-effective, and safe methods of providing the Applicant such access as the Trial Chamber may direct)

¹⁷ Motion, para. 9.

¹⁸ *Ibid.*, para. 17(b).

2009”.¹⁹ It also submits that it will notify the Registry should the Prosecution subsequently decide not to call any of these protected witnesses from the *Popović* case in the *Karadžić* case.²⁰

9. The Prosecution, however, opposes the request for access to the material listed in categories (b) and (d) of the Motion, namely, all closed session hearing transcripts, all *inter partes* confidential filings and submissions and all confidential Trial Chamber decisions.²¹ It argues that Karadžić has failed to demonstrate any basis for access to these materials and submits that in light of the jurisprudence of the Tribunal, access will not be granted to confidential materials that bear no relation to material facts in the Applicant’s own case or for reasons that serve some other purpose.²² It is further argued that the Motion seems to attempt to elicit information “in the hopes that something relevant might be found” and thus it is a “fishing expedition”.²³ Accordingly, the Prosecution submits that Karadžić should be denied access to the material listed in categories (b) and (d) of the Motion.²⁴

II. APPLICABLE LAW

10. The Trial Chamber recalls that the applicable law related to the access to confidential material has been discussed and analysed in detail in its “Decision on Tolimir’s Motion for Access to Confidential Material in the *Popović et al.* Case”, issued on 8 July 2009,²⁵ and it incorporates by reference that discussion without repeating it here.²⁶

III. DISCUSSION

11. The Trial Chamber first recalls the “Decision on Radovan Karadžić’s Motion for Access to Confidential material in the Dragomir Milošević Case”, issued by the Appeals Chamber on 19 May 2009 (“*Karadžić* Decision”), in which an analogous motion was ruled upon. The Trial Chamber concurs with this decision.

¹⁹ *Ibid.*, para. 9.

²⁰ *Ibid.*, para. 17(b).

²¹ *Ibid.*, paras. 3, 14–16.

²² *Ibid.*, para. 15, referring to *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Ivan Čermak’s and Mladen Markač’s Joint Motion for Access to Confidential Testimony and Documents in the *Šešelj* Case, 24 May 2007, p. 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Defence Motion Filed by the Defence of Franko Simatović (IT-03-69-PT) for Access to Transcripts and Documents, 20 October 2003, para. 3.

²³ Prosecution Response, para. 14.

²⁴ *Ibid.*, para. 16.

²⁵ See also *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Tolimir’s Motion for Access to Confidential Material in the *Krstić* Case and the *Blagojević* and *Jokić* Case, 8 July 2009.

²⁶ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Motion by Radovan Karadžić, for Access to Confidential Materials in the Gotovina et al. Case, 12 May 2009, para. 5; *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on “Motion by Mićo Stanišić for Access to All Confidential Materials in the Krajišnik Case”, 21 February 2007, p. 6.

12. The Trial Chamber notes the Motion specifies that Karadžić requests access to all *inter partes* confidential material in the *Popović* case²⁷ and is satisfied that Karadžić has identified the material sought with sufficient particularity. Nowhere in the Motion does the Accused request access to *ex parte* material. For this reason, the Trial Chamber will not make any finding in this regard.

13. As to the existence of a legitimate forensic purpose for access to the material sought, the Trial Chamber concurs that there is a significant factual nexus between the two cases, in that the events addressed in the *Popović* case are closely related to the charges brought against Karadžić. In particular, the accused of the *Popović* case are alleged to have been members of the JCE with Karadžić to forcibly transfer or deport the Bosnian Muslim population from Srebrenica and Žepa and murder the able-bodied Muslim men from Srebrenica between 11 July 1995 and 1 November 1995.²⁸ In turn, the Karadžić Third Amended Indictment alleges that Karadžić participated in the JCE between 11 July and 1 November 1995 with the purpose “to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the women, young children and some elderly men from Srebrenica”.²⁹ In the light of above, the Trial Chamber is satisfied that a significant factual nexus between the *Karadžić* and *Popović* cases exists, warranting granting Karadžić access to the material listed in categories (a) and (c) of the Motion, that is, all *inter partes* confidential closed and private session testimony transcripts and all *inter partes* confidential exhibits in the *Popović* case.

14. With respect to the material listed in categories (b) and (d) of the Motion, namely, all *inter partes* confidential filings and submissions, all confidential Trial Chamber decisions, and all closed session hearing transcripts, the Trial Chamber recalls that it is incumbent on the party seeking access to avoid engaging in a “fishing expedition”.³⁰ In this case, the Trial Chamber considers that the Motion does not amount to such abuse. The Trial Chamber finds that if Karadžić has access to the filings, submissions, decisions and hearing transcripts relating to material, *e.g.* exhibits and testimony transcript, he will be able to understand and make use of confidential evidentiary material in the *Popović* case better.³¹ According to the jurisprudence of the Tribunal, the applicable standard is only that there be a “good chance” that the confidential materials will materially assist the case of the party seeking access and that it does not require “accused seeking access to *inter partes* confidential materials in other cases to establish a specific reason that each individual item is likely

²⁷ Motion, para. 11.

²⁸ *Popović* Indictment, paras. 26, 96–97.

²⁹ *Karadžić* Third Amended Indictment, para. 20.

³⁰ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3.

³¹ *See Karadžić* Decision, para. 11.

to be useful”.³² The principle of equality of arms also demands the Chamber give Karadžić a chance to understand the proceedings and evidence and evaluate their relevance to his own case, in common with the Prosecution.³³ Accordingly, once Karadžić has been granted access to the material in categories (a) and (c) of the Motion, which are confidential exhibits and confidential or closed session testimonies, he should not be prevented from accessing filings, submissions, decisions and hearing transcripts which may relate to such confidential evidence.³⁴ The Trial Chamber grants Karadžić’s request for access to the material listed in categories (b) and (d) of the Motion. It notes, however, that, as the Appeals Chamber notes,³⁵ the Prosecution and the accused in the *Popović* case will have the opportunity to apply to the Trial Chamber for any additional protective measures or redactions, as detailed below, should they deem it necessary.

15. The Trial Chamber notes that some of the *inter partes* confidential material might fall into the category of Rule 70. The jurisprudence of the Tribunal is that such material shall not be released to Karadžić and his defence team unless the provider consents to such disclosure. In addition, the *inter partes* confidential material might also contain personal information about the accused and their family members in the *Popović* case. In this respect, Miletić contends that such material should not be disclosed as it has no bearing on the substance of the Karadžić case. The Trial Chamber is of the view that material of this nature shall not be disclosed to Karadžić.

16. With regard to the protected witnesses for whom delayed disclosure may be justified, the Trial Chamber recalls the *Karadžić* Decision, which found that:

the Trial Chamber seized of the *Karadžić* case is best placed to evaluate, pursuant to Rule 69 of the Rules, whether exceptional circumstances exist to warrant delayed disclosure of the materials related to Prosecution witnesses. Considering the fact that the Prosecution was to provide its witness list by 18 May 2009, the Appeals Chamber deems that, in these circumstances, it is in the interests of judicial expediency to adopt the approach [suggested by the Prosecution]. Accordingly, the Appeals Chamber allows the Prosecution to withhold the material until the Trial Chamber seized of the *Karadžić* case decides on the Prosecution’s request for delayed disclosure of *inter partes* confidential material from the *Dragomir Milošević* case.³⁶

In light of this, the Trial Chamber grants the Prosecution request that the material related to protected witnesses in the *Popović* case for whom delayed disclosure may be justified be withheld until the Trial Chamber seized of the *Karadžić* case decides on the Prosecution’s request for delayed disclosure of *inter partes* confidential material from the *Popović* case.

³² *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motion by Radivoje Miletić for Access to Confidential Information, 9 September 2005 (“*Miletić* Decision”), p. 4; *Karadžić* Decision, para. 11.

³³ *Karadžić* Decision, para. 11. See also, *Miletić* Decision, p. 4, where the Appeals Chamber considered that “the Trial Chamber’s decisions may help the Applicant to prepare his case by shedding light on the Trial Chamber’s treatment of legal and factual issues that may be common to the two cases”.

³⁴ See *Karadžić* Decision, para. 11.

³⁵ *Ibid.*

³⁶ *Karadžić* Decision, para. 14.

17. The Trial Chamber notes that, in accordance with Rule 75(F), protective measures previously ordered in the *Popović* case should continue to apply to any material released to Karadžić.

18. Finally, the Trial Chamber notes that Karadžić specifically requests access to confidential material on an ongoing basis for the duration of the trial proceedings. In principle, it is the preferred approach of the Trial Chamber to limit access to material up to the date of the request (or decisions upon that request).³⁷ However, as a matter of judicial economy, and based on the particular circumstances of both cases—the evidentiary phase of the *Popović* case will be over soon and *Karadžić* case is expected to commence in the near future—the Trial Chamber considers that access to confidential material in the *Popović* case should be granted to *Karadžić* and his defence team on an ongoing basis.

IV. DISPOSITION

19. For the foregoing reasons, pursuant to Rules 54, 69, 70 and 75 of the Rules, the Trial Chamber hereby **GRANTS** the Motion in part, and **ORDERS** as follows:

- 1) On an ongoing basis and unless directed otherwise by the Trial Chamber, the Registry shall provide access to Karadžić and his defence team, subject to Rule 70 consent where applicable, and with the exception of material related to personal information about the Accused and their family members in the *Popović* case, to all *inter partes* confidential material in the *Popović* case, including all closed and private session testimony transcripts, all closed session hearing transcripts, all confidential exhibits, all *inter partes* confidential filings and submissions and all confidential Trial Chamber decisions.
- 2) The Prosecution shall identify to the Registry, as soon as practicable, what *inter partes* confidential material in the *Popović* case can be immediately disclosed to Karadžić and what *inter partes* confidential materials, if any, cannot be immediately disclosed to Karadžić, because they are subject to delayed disclosure pursuant to a decision in the *Karadžić* case or because the Prosecution has requested or is about to request the Trial Chamber in the *Karadžić* case that they be subject to delayed disclosure.
- 3) The Registry shall disclose the material that cannot be immediately disclosed pursuant to point 2) above, only in accordance with a decision on delayed disclosure by the Trial

³⁷ See in this regard *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Jovica Stanišić's Motion for Access to Confidential Materials in the *Karadžić* case, 20 May 2009, para. 18.

Chamber in the *Karadžić* case or upon the notification by the Prosecution that it has decided not to call a particular witness.

- 4) The defence teams in the *Popović* case shall assist the Registry in identifying material related to personal information about the accused and their family members.
- 5) The Prosecution and the Defence teams in the *Popović* case shall identify, as soon as practical, to the Registry any material in the *Popović* case that has been provided subject to Rule 70, and subsequently, seek leave from the Rule 70 providers to disclose such to Karadžić and his defence team and inform the Registry whether such consent has been obtained.
- 6) The Registry shall withhold any material provided pursuant to Rule 70, as identified by the Prosecution and the Defence teams in the *Popović* case, until the express consent of the providers is obtained. Where consent cannot be obtained from provider(s) of any material subject to Rule 70, the material shall not be disclosed.
- 7) Except where directly and specifically necessary for the preparation of the case, and only upon leave granted by the Trial Chamber, Karadžić and his defence team shall not disclose to the public, to the media, or to his family members and associates:
 - a. the names, identifying information or whereabouts of protected witnesses in the *Popović* case, or any other information which would enable protected witnesses to be identified, or would breach the confidentiality of the protective measures already in place, or
 - b. any non-public evidence (including documentary, audio-visual, physical or other evidence) or any written statement or prior testimony of protected witnesses disclosed to Karadžić and his defence team, or the contents thereof, in whole or in part.
- 8) If any confidential or non-public material is disclosed to the public, Karadžić shall inform any person to whom disclosure is made that he or she is forbidden to copy, reproduce, or publicise the material or to disclose it to any other person, and that he or she must return the material to Karadžić and his defence team as soon as the material is no longer needed for the preparation of the case.
- 9) If a member of the defence team of Karadžić withdraws from the case, all material in his or her possession shall be returned to the Registry.

10) Subject to the modifications prescribed above, any other protective measures already in place in relation to the material disclosed shall remain in place.

11) For the purpose of this Decision:

- a. the “defence team” of Karadžić means four legal advisers, two case managers and one investigator who have been assigned by the Registry and any others specifically to be assigned by the Registry to the defence team;
- b. the “public” means all persons, governments, organisations, entities, clients, associations and groups, other than Judges of the Tribunal and the staff of the Registry, the Prosecution, or Karadžić and his defence team; the “public” includes, without limitation, family, friends, and associates of Karadžić, and those accused and their defence counsel in other cases or proceedings before the Tribunal; and
- c. the “media” means all video, audio, and print media personnel including journalists, authors, television, and radio personnel and their agents and representatives.

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



Carmel Agius
Presiding

Dated this thirtieth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]