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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-98-32/1-A

Date: 7 December 2009

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: **Mr. John Hocking**

Decision of: **7 December 2009**

PROSECUTOR

v.

MILAN LUKIĆ
SREDOJE LUKIĆ

PUBLIC

DECISION ON THE PROSECUTION'S "MOTION FOR RECONSIDERATION AND RESCISSION OF THE ORDER TO DISCLOSE ISSUED IN TRIAL CHAMBER'S 'DECISION ON MOTION BY RADOVAN KARADŽIĆ FOR ACCESS TO CONFIDENTIAL MATERIALS IN THE LUKIĆ AND LUKIĆ CASE' OF 10 JULY 2009"

The Office of the Prosecutor:

Mr. Dermot Groome

Counsel for Milan Lukić:

Mr. Tomislav Višnjić
Mr. Dragan Ivetić

Mr. Radovan Karadžić, *pro se*

Counsel for Sredoje Lukić:

Mr. Đuro Čepić
Mr. Jens Dieckmann

1. 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) is seized of the "Prosecution's Motion for Reconsideration and Rescission of the Order to Disclose Issued in Trial Chamber's 'Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the Lukić and Lukić Case' of 10 July 2009", filed on 12 October 2009 ("Motion") by the Office of the Prosecutor ("Prosecution").[1] Neither Radovan Karadžić ("Karadžić"), Milan Lukić nor Sredoje Lukić have responded to the Motion.

I. BACKGROUND

2. On 10 July 2009, Trial Chamber III ("Trial Chamber") granted Karadžić access to *inter partes* confidential material which related to crimes that were allegedly committed in the municipality of Višegrad ("Višegrad Crimes").[2] Pursuant to Rule 75(F) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), the Trial Chamber also ordered that any protective measures ordered in relation to witnesses in the *Lukić* case should continue to have effect *mutatis mutandis* in the *Karadžić* case, except insofar as they had been varied in accordance with the Impugned Decision.[3]

3. On 31 August 2009, the Prosecution filed a submission pursuant to Rule 73*bis*(D) of the Rules, in which it proposed dismissing counts relating to the Višegrad Crimes from the indictment against Karadžić.[4] The Trial Chamber accepted the Prosecution's proposal[5] and the indictment against Karadžić was amended accordingly.[6]

II. PRELIMINARY ISSUE

4. In the Motion, the Prosecution requests *inter alia* the "reconsideration" by the Appeals Chamber of the Impugned Decision.[7] The Appeals Chamber recalls that requests for reconsideration "are the product of the Tribunal's jurisprudence, and are permissible only under certain

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[1] *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T ("*Karadžić* case"); *Prosecution v. Milan Lukić & Sredoje Lukić*, Case No. IT-98-32/1-T ("*Lukić* case").
[2] "Confidential Material" being all confidential *inter partes* material ultimately subject to disclosure pursuant to the "Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the Lukić and Lukić case", 10 July 2009 ("Impugned Decision").
[3] Impugned Decision, p. 9.
[4] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution Submission Pursuant to Rule 73*bis*(D), filed publicly with confidential Appendix A and public Appendix B, 31 August 2009, para. 10, fn. 14.
[5] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on the Application of Rule 73*bis*, 8 October 2009 ("Rule 73*bis* Decision"), paras. 6 and 11(a).
[6] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution's Marked-up Indictment, filed publicly with Appendix A, 19 October 2009 ("Revised Karadžić Indictment"), Appendix A, para. 38; Schedule A, p. 3; Schedule C, p. 14.

conditions".[8] In particular, such a request by definition has to be made before the same Chamber that rendered the impugned decision; thus, the Appeals Chamber considers that the Prosecution erred in requesting the Appeals Chamber to "reconsider" the Impugned Decision. However, since the Impugned Decision has the effect of "rescind[ing], vary[ing] or augment[ing]"[9] protective measures ordered in the *Lukić* proceedings,[10] which the Appeals Chamber is now seized of, the Appeals Chamber considers that the Motion has been correctly brought before it as a motion pursuant to Rules 75(G) and 107 of the Rules.

III. APPLICABLE LAW

5. Rule 75(F) of the Rules provides that:

> Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:
>
> (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ("second proceedings") or another jurisdiction unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; [...]

6. Rule 75(G) of the Rules provides that:

> A party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply:
>
> (i) to any Chamber, however constituted, remaining seised of the first proceedings; [...]

7. The Appeals Chamber recalls 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.[11]

8. With regard to *inter partes* confidential material, the Appeals Chamber has held that the party seeking access must demonstrate a legitimate forensic purpose by establishing that such

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[7] Motion, para. 4.
[8] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution's Request for Reconsideration, 23 July 2009 ("*Karadžić* Decision"), para. 7.
[9] Rule 75(G) of the Rules.
[10] *See* Impugned Decision, p. 9.
[11] *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* Decision of 19 May 2009"), para. 7, *referring to 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 ("*D. Milošević* Decision of 27 April 2009"), para. 4; *Prosecutor v. Milan Martić*, Case No. 11-95-11-A, Decision on Motion by Jovica Stanišić for Access to Confidential Testimony and Exhibits in the Martić Case Pursuant to Rule 75(G)(i), 22 February 2008 ("*Martić* Decision"), para. 9. *See also Prosecutor v. Momčilo Krajišnik*, Case No. 11-00-39-A, Decision on "Motion by Mićo Stanišić for Access to All Confidential Materials in the Krajišnik Case", 21 February 2007, p. 4.

material "is likely to assist the [party's] case materially, or at least there is a good chance that it would".[12] This standard may be met by showing the existence of a factual nexus between the two cases such as a "geographical, temporal or otherwise material overlap".[13] The relevant Chamber must "find a balance between the right of a party to have access to material to prepare its case and the need to guarantee the protection of witnesses".[14]

IV. DISCUSSION

A. Submissions of the parties

9. The Prosecution argues that the removal of the crimes committed in the municipality of Višegrad from the Revised Karadžić Indictment means that there is no longer a nexus between the *Karadžić* case and the *Lukić* case. Consequently, "the basic *foundation* of the Trial Chamber's Decision is no longer valid",[15] and the Prosecution suggests that the broad disclosure of the Confidential Material ordered pursuant to the Impugned Decision should be rescinded accordingly.

10. The Prosecution acknowledges[16] however, that certain limited Confidential Material should still be disclosed to Karadžić.[17] This extends to material relating to two crime base witnesses currently on the Karadžić witness list who also testified in the *Lukić* case[18] ("Crime Base Witnesses Confidential Material"), and "two *inter partes* confidential materials" in the *Lukić* case relating to four expert witnesses overlapping with the *Karadžić* case[19] ("Expert Witnesses Confidential Material") (collectively, "Remaining Confidential Material").

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[12] *D. Milošević* Decision of 19 May 2009, para. 8; *D. Milošević* Decision of 27 April 2009, para. 5; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić's Motion for Access to All Confidential Materials in the *Brđanin* Case, 24 January 2007, para. 12; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. 11-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005, para. 8.

[13] *D. Milošević* Decision of 19 May 2009, para. 8; *D. Milošević* Decision of 27 April 2009, para. 5; *see also Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić and Čerkez Case, 23 January 2003, p. 4; *Martić* Decision, para. 9.

[14] *Prosecutor v. Radovan 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. 5; *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. 2.

[15] Motion, para. 7 (emphasis added).

[16] Motion, para. 13.

[17] *Ibid. referring to Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision on Haradinaj Motion for Access, Balaj Motion for Joinder and Balaj Motion for Access to Confidential Materials in the Limaj Case, 31 October 2006 ("*Limaj* Decision"), para. 17.

[18] Motion, para. 13, *referring to* Ferid Spahić and VG-136.

[19] Motion, para. 13, *referring to* Amor Masović, Ewa Tabeau, Mirsad Tokaca and John Clark.

B. Analysis

11. The Appeals Chamber recalls that the Trial Chamber found that the locations of the Višegrad Crimes, and the temporal overlap between these crimes and those indicted in the *Lukić* case, constituted a nexus warranting disclosure of confidential information in relation to events in the municipality of Višegrad as a whole.[20] The Appeals Chamber notes, however, that after the Impugned Decision was rendered, the Višegrad Crimes were removed from the Revised Karadžić Indictment.[21] Consequently, the Appeals Chamber considers that there is no "good chance" overall that the Confidential Material will be of material assistance to the *Karadžić* case. As a result, the legitimate forensic purpose for the full disclosure of the Confidential Material has ceased to exist.

12. However, the Appeals Chamber considers that the Crime Base Witnesses Confidential Material should be disclosed to Karadžić as both witnesses testified in the present case and are on the Prosecution's witness list in the *Karadžić* case.[22] On the same basis, the Appeals Chamber considers that the Expert Witnesses Confidential Material should also be disclosed. The Appeals Chamber notes, however, that the Prosecution has provided little information in relation to the Remaining Confidential Material. In order to assist the Registry to identify the Remaining Confidential Material, the Prosecution must provide the Registry and the Appeals Chamber with a more detailed description of this material.

V. DISPOSITION

13. For the foregoing reasons and pursuant to Rules 73, 75 and 107 of the Rules, the Appeals Chamber:

GRANTS the Motion;

UPHOLDS the Impugned Decision to the extent that it orders the disclosure of the Remaining Confidential Material;

RESCINDS the Impugned Decision in respect of the disclosure of Confidential Material except as it relates to the Remaining Confidential Material;

OBSERVES that the protective measures granted in respect of witnesses in the present case pursuant to the Impugned Decision will continue to apply *mutatis mutandis* in respect of the

[20] Impugned Decision, p. 5.
[21] Rule 73*bis* Decision.
[22] Motion, para. 13. *See Limaj* Decision, para. 17; *see also* Rules 66(A)(ii) and 75(F)(ii) of the Rules.

disclosure of the Remaining Confidential Material in accordance with Rule 75(F)(i) and (ii) of the Rules; and

ORDERS the Prosecution to provide details of the Remaining Confidential Material to the Appeals Chamber and the Registry, within seven days from the date of this decision.

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

Dated this seventh day of December 2009
At The Hague,
The Netherlands

Judge Mehmet Güney
Presiding Judge

[Seal of the Tribunal]