

UNITED
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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-05-88/2-T
IT-09-92-PT

Date: 9 March 2012

Original: English

IN TRIAL CHAMBER II

Before: Judge Christoph Flügge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Decision of: 9 March 2012

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON MLADIĆ MOTION
FOR ACCESS TO CONFIDENTIAL MATERIALS**

The Prosecutor v. Zdravko Tolimir

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

The Prosecutor v. Ratko Mladić

Office of the Prosecutor
Mr. Dermot Groome
Mr. Peter McCloskey

Counsel for Ratko Mladić
Mr. Branko Lukić



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”);

BEING SEISED OF the “Defence Request for Access to Confidential Materials from *Tolimir* Case”, filed by the Defence for Ratko Mladić (“Mladić Defence”) on 3 February 2012 (“Motion”), in which the Mladić Defence requests access to the following confidential *inter partes* materials from the *Prosecutor v. Zdravko Tolimir* (“Requested Material” and “*Tolimir* case”, respectively) on a regular and continuous basis:

- (a) all confidential closed and private session trial transcripts;
- (b) all confidential exhibits;
- (c) all confidential filings and submissions, including all confidential Trial Chamber decisions;
and
- (d) all documentary evidence submitted by the parties;¹

NOTING that the Mladić Defence further requests that if the Motion is granted, the materials and testimony of Witness Dragomir Pećanac, namely, all confidential transcripts of his testimony during the week of 16–20 January 2012, confidential exhibits, and “any material Mr. Pecanac has handed over to the ICTY prior to his testimony” (“Pećanac Material”), be disclosed in a more urgent manner than the other Requested Material;²

NOTING the submission of the Mladić Defence that it is the established jurisprudence of the Tribunal that confidential materials from another case may be obtained by the accused if the materials sought has been identified or described by its general nature,³ and that access to confidential materials in another case be granted if it is “likely to assist the applicant’s case materially or there is a good chance that it would” and “the geographic, temporal and substantive overlap” between two cases in question is sufficient to conclude that such material may be of assistance to the applicant’s case;⁴

NOTING that the Mladić Defence argues that there is a significant geographical, temporal, and factual nexus between the case of *Prosecutor v. Ratko Mladić* (“*Mladić* case”) and the *Tolimir* case, that both accused are charged for participating in the crimes that have allegedly been committed in

¹ Motion, paras. 2, 9.

² *Ibid.*, para. 3

³ *Ibid.*, para. 5.

Srebrenica in July 1995,⁵ and that access to the Requested Material should be granted because of its importance to the effective investigation and preparation of its defence and in accordance with the principle of equality of arms;⁶

NOTING that the Mladić Defence submits that it will comply with any order regarding witness protection or “eventual special regime of confidentiality of some documents”, as prescribed in Rule 75 of the Rules of Procedure and Evidence (“Rules”);⁷

NOTING the “Response to Request by the Defence of Ratko Mladić for Access to Confidential Materials From the Tolimir Case”, submitted by the Accused Zdravko Tolimir in BCS on 6 February 2012 and filed in English on 7 February 2012 (“Accused Response” and “Accused”, respectively), in which the Accused supports the Motion, submitting that access to the Pećanac Material, including the exhibits marked for identification pending translation, should be granted urgently;⁸

NOTING the “Prosecution Response to Mladić Motion for Access to Confidential Materials from Tolimir case”, filed on 17 February 2012 (“Prosecution Response”), in which the Prosecution submits that:

- (a) it does not oppose the Motion in respect of evidentiary confidential *inter partes* material, provided that the Chamber modifies existing protective measures, establishes clear conditions on access, and takes account of material provided pursuant to Rule 70;⁹
- (b) it defers to the Chamber’s discretion in respect of granting access to non-evidentiary confidential *inter partes* material, including closed session hearing transcripts under category (a), or category (c) documents, which “may contain sensitive information of little or no value to the Mladić Defence”;¹⁰ and it submits that access to this material should be granted only if the Chamber is satisfied that the Mladić Defence has a legitimate forensic interest in the particular material and does not seek its access improperly;¹¹

⁴ *Ibid.*, para. 6.

⁵ *Ibid.*, paras. 4, 7.

⁶ *Ibid.*, para. 6.

⁷ *Ibid.*, para. 8.

⁸ Accused Response, para. 3.

⁹ Prosecution Response, paras. 2–3. With regard to Rule 70 material, the Prosecution submits that it will “identify to the Registrar [...] any Rule 70 material to which Mladić should not be granted immediate access, and seek the necessary consent from the provider.” Prosecution Response, para. 10. Similarly, it will “identify to the Registrar [...] any confidential *inter partes* material related to protected witnesses for whom orders of delayed disclosure have been issued [...]” *Ibid.*, para. 11.

¹⁰ *Ibid.*, para. 2.

¹¹ *Ibid.*, para. 9.

(c) it opposes the request for access to confidential *ex parte* material in its entirety;¹² and

(d) it requests that the Pećanac Material be provided as soon as practicable;¹³

NOTING that the Prosecution submits, further, that it understands “all documentary evidence submitted by the parties” under category (d) to mean documents submitted by the parties during the proceedings but not admitted, namely documents marked for identification (“MFI”), documents marked as not admitted (“MNA”), or documents which are otherwise excluded;¹⁴

NOTING and recalling the applicable law governing a request for access to confidential materials as set out in detail in the Chamber’s previous decisions, which entitles a party to seek material from any source, including confidential *inter partes* material from another case before the Tribunal, to assist in the preparation of its case as long as the material sought has been identified or described by its general nature and a legitimate forensic purpose for such access has been shown;¹⁵

NOTING that the applicant may demonstrate the relevance of the material sought by showing the existence of a factual nexus between the applicant’s case and the case from which the material is sought; and that access to confidential material may be granted if the applicant demonstrates that such material may be of material assistance to their case;¹⁶

NOTING that for materials that have been provided under Rule 70, the parties must obtain the consent of the provider before the materials or its source can be disclosed to the applicant;¹⁷

NOTING further that pursuant to Rule 75(F)(i), protective measures ordered in respect of a victim or witness in any proceedings before the Tribunal “shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal”, and that once access to confidential materials from another case is granted, it will then be decided, if required, whether and what additional protective measures are necessary in order to strike a balance between the applicant’s right to have access to such materials to prepare the applicant’s case and guaranteeing the protection and integrity of confidential information;¹⁸

¹² *Ibid.*, paras. 2, 12–13.

¹³ *Ibid.*, para. 20.

¹⁴ *Ibid.*, para. 1, fn. 2.

¹⁵ *E.g.*, Decision on Defence Requests for Access to Confidential Materials in the *Prosecution v. Tolimir* Case, 2 June 2010 (“2 June 2010 Decision”), para. 2. *See also* *Prosecutor v. Popović et al.*, Case No. IT-05-88-A&IT-95-5/18-T, Decision on Motion by Radovan Karadžić for Access to Confidential Filings, 15 February 2012 (“*Popović et al.* Appeal Decision”), p. 2.

¹⁶ 2 June 2010 Decision, para. 9; *Popović et al.* Appeal Decision, p. 2.

¹⁷ 2 June 2010 Decision, para. 10 (further stating that: “This is the case even where the Rule 70 provider(s) consented to the disclosure of the material in one or more prior cases.”).

¹⁸ *Prosecutor v. 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, para. 19.

CONSIDERING that confusingly the Prosecution refers to confidential *ex parte* material in the Response, whereas the Motion itself does not; in light of the wording of the Motion, the Chamber therefore considers that the Mladić Defence does not seek access to confidential *ex parte* material, and thus will not make any finding in this respect;

CONSIDERING that the Chamber is satisfied that the Mladić Defence has identified the Requested Material with sufficient specificity, save for “all documentary evidence submitted by the parties” under category (d), and that even assuming, as the Prosecution submits, the Mladić Defence seeks access to MFI or MNA documents under that category, such materials are “by definition not admitted into evidence and not part of the evidentiary record and, as such, remain within the domain of the tendering party”, and thus it is more appropriately addressed to the parties in the *Tolimir* case;¹⁹ among the MFI documents, however, there are two confidential MFI Chamber exhibits, which are in the Chamber’s custody;

CONSIDERING that there is a significant factual nexus between the two cases in that the charges against the Accused are closely related to those brought against Mladić, and that in particular, the Accused is alleged to have been a member of the Joint Criminal Enterprise (“JCE”) together with, *inter alia*, Mladić to forcibly remove the Bosnian Muslim population from Srebrenica and Žepa and murder the able-bodied Bosnian Muslim men from Srebrenica in July 1995,²⁰ whereas the Fourth Amended Indictment in the *Mladić* case alleges that Mladić participated in an overarching JCE to permanently remove Bosnian Muslims from the territories of Bosnia and Herzegovina claimed as Bosnian Serb territories, including Srebrenica, while acting in concert with other members of the JCE, including, among others, members of the Army of Republika Srpska;²¹

CONSIDERING that for the reasons above the Chamber is satisfied that a legitimate forensic purpose for such access has been shown, which warrants granting the Mladić Defence access to all confidential testimony transcripts falling under category (a) and all confidential exhibits under category (b);

CONSIDERING that in accordance with the jurisprudence of the Tribunal, once the Mladić Defence has been granted access to the aforementioned materials, it should not be prevented from accessing filings, submissions, decisions and *hearing* transcripts which may relate to such confidential evidence,²² and that the Chamber therefore finds that it is in the interests of justice to grant the Mladić Defence access to all confidential hearing transcripts falling under category (a) and

¹⁹ Decision on Motion for Access to MFI and MNA Documents, 18 January 2012 (“18 January 2012 Decision”), pp. 2–3 (quotation at p. 3).

²⁰ Third Amended Indictment, paras. 27, 35, 71.

²¹ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Fourth Amended Indictment, paras. 8, 11.

all confidential *inter partes* filings and submissions, including all confidential Chamber decisions under category (c);

CONSIDERING that with regard to the two confidential MFI Chamber exhibits that are in the Chamber's custody, the Chamber finds it appropriate to order *proprio motu* the Registry to provide them to the Mladić Defence;²³

CONSIDERING that the Mladić Defence fails to indicate any specific reasons that warrant granting its request for urgent disclosure of the Pećanac Material, and that the request is in any event moot as the Requested Material will be provided to the Mladić Defence as a whole in electronic format where possible, following the issuance of this Decision without delay;

CONSIDERING that some of the confidential *inter partes* materials might fall into the category of Rule 70 and such material shall not be released to the Mladić Defence unless the provider consents to such disclosure;

CONSIDERING that pursuant to Rule 75(F), protective measures, including delayed disclosure,²⁴ which are in force in the *Tolimir* case, will apply to any materials to be released to the Mladić Defence;

CONSIDERING that as a matter of judicial economy, and based on the particular circumstances of the *Mladić* case, for which the presentation of evidence is expected to start on 14 May 2012,²⁵ the Chamber considers that access to confidential *inter partes* materials in the *Tolimir* case should be granted to the Mladić Defence on an ongoing basis;

PURSUANT TO Rules 54, 69, 70 and 75 of the Rules,

HEREBY GRANTS the Motion **IN PART**;

ORDERS as follows:

1. On an ongoing basis and unless otherwise directed by the Chamber, the Registry shall provide access for the Mladić Defence, subject to Rule 70 consent and delayed disclosure where applicable, to all confidential *inter partes* materials in the *Tolimir* case, including all testimony and hearing transcripts held in private and closed session, all exhibits under seal,

²² E.g., 18 January 2012 Decision, p. 2.

²³ See Decision on Momčilo Perišić's Urgent Motion for Access to Confidential Materials, 26 January 2012, pp. 2-3. The MFI Chamber exhibits are Exs. C00001, C00002.

²⁴ *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 ("*Brđanin* Decision"), para. 17.

²⁵ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Scheduling Order, 15 February 2012, p. 7.

two confidential MFI Chamber exhibits in the *Tolimir* case (Exs. C00001 and C00002), and all confidential filings, submissions and Chamber decisions.

2. The Prosecution and the Accused shall identify to the Registry any material in the *Tolimir* case that has been provided subject to Rule 70, and subsequently, seek leave from the provider(s) of materials pursuant to Rule 70 to disclose such to the Mladić Defence and inform the Registry whether such consent has been obtained.
3. The Registry shall withhold any material provided pursuant to Rule 70, as identified by the Prosecution and the Accused, until the express consent of the provider(s) is obtained. Where consent cannot be obtained from the provider(s) of any material subject to Rule 70, the material shall not be disclosed.
4. No confidential *ex parte* material from the *Tolimir* case shall be disclosed to the Mladić Defence in this Decision.
5. The Prosecution and the Accused shall file a notification of confidential *inter partes* materials that may be disclosed to the Mladić Defence within 14 days of the issuance of this Decision and, whenever confidential *inter partes* materials are admitted after this notification, the Prosecution and the Accused shall file on the first day of the following month a further notification of the materials that may be disclosed to the Mladić Defence.
6. Except where directly and specifically necessary for the preparation of the case, and only upon leave granted by the Chamber, the Mladić Defence shall not disclose to the public, to the media, or to their family members and associates:
 - a. the names, identifying information or whereabouts of any witness in the *Tolimir* case, or any other information which would enable any witness 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 of a witness, or prior testimony disclosed to the Mladić Defence, or the contents thereof, in whole or in part.
7. The Mladić Defence shall not disclose to the public any confidential or non-public material disclosed from the *Tolimir* case except to the limited extent that such disclosure is directly and specifically necessary for the preparation of the case, and only after obtaining leave of the Chamber. If, following the Chamber's leave, any confidential or non-public material is disclosed to the public, the Mladić Defence shall inform any person to whom disclosure is

made that he or she is forbidden to copy, reproduce, or publicise the material or disclose it to any other person, and that he or she must return the material to the Mladić Defence as soon as the material is no longer needed for the preparation of the *Mladić* case.

8. If any member of the Mladić Defence withdraws from the *Mladić* case, all material in his or her possession shall be returned to the Registry.
9. Subject to the modifications prescribed above, any other protective measures already in place in relation to the material disclosed shall remain in place. If required and without undue delay, the parties in the *Tolimir* case shall file a request to the Chamber for additional protective measures or redactions before identifying the above material to the Registry.
10. For the purpose of this Decision:
 - a. the “Mladić Defence” means Ratko Mladić, his defence counsel, immediate legal assistants and staff, and any others specifically to be assigned by the Registry to their 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 the Mladić Defence; the “public” includes, without limitation, family, friends, and associates of the Mladić Defence, and those accused and their defence counsel in other cases or proceedings before the Tribunal; and

the "media" means all video, audio, and print media personnel including journalists, authors, television, and radio personnel and their agents and representatives.

DENIES the request for access to "all documentary evidence submitted by the parties" under category (d) without prejudice.

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



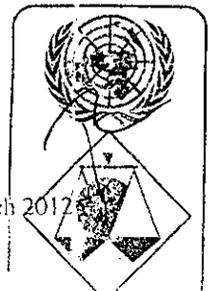
Judge Christoph Flüge

Presiding Judge

A separate opinion by Judge Antoine Kesia-Mbe Mindua is appended to this Decision.

Dated this ninth day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]



SEPARATE OPINION OF JUDGE ANTOINE KESIA-MBE MINDUA

1. I agree with my colleagues that the confidential *ex parte* material should not be disclosed to the Mladić Defence. However, I depart from them in their interpretation of whether the Mladić Defence seeks access to such material. In my view, it does.
2. While paragraph one of the Motion explicitly requests “access to all *inter partes* confidential material” from this case, the immediately following paragraph does not, simply referring to “all confidential material”. The wording is not consistent and there is no clear linkage between the two paragraphs, making the request ambiguous. Because the language of paragraph two does not show explicitly that the confidential material sought in this paragraph is the *inter partes* material mentioned in paragraph one, it is perhaps even misleading to the extent that the Prosecution submits in paragraph two of the Response that “[it] opposes Mladić’s request for access to confidential *ex parte* material in its entirety.” In my opinion, as the Prosecution rightly does, it is more reasonable to construe the request as seeking access to both confidential materials, *inter partes* and *ex parte*.
3. With this understanding, I now proceed to consider the request for access to confidential *ex parte* materials in this case. Being mindful of the higher standard for granting requests for access to such material,²⁶ I find that a legitimate forensic purpose has not been shown to warrant such access. Therefore, I would deny this specific application without prejudice.

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



Judge Antoine Kesia-Mbe Mindua

Dated this ninth day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ See in this regard, *Brdanin* Decision, para. 14.

