

4-06-90-T
D 23355-D 23351
12 May 2009

23355
4/3.



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-06-90-T
Date: 12 May 2009
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Kinis
Judge Elizabeth Gwaunza

Acting Registrar: Mr John Hocking

Decision of: 12 May 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON MOTION BY RADOVAN KARADŽIĆ FOR ACCESS
TO CONFIDENTIAL MATERIALS IN THE GOTOVINA ET AL. CASE

Prosecutor v. Gotovina et al.

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi

Counsel for the Accused

Mr Luka Mišetić, Mr Gregory Kehoe and
Mr Payam Akhavan for Mr Ante Gotovina

Mr Steven Kay, QC, Mr Andrew Cayley and
Ms Gillian Higgins for Mr Ivan Čermak

Mr Goran Mikuličić and Mr Tomislav Kuzmanović
for Mr Mladen Markač

Prosecutor v. Karadžić

Office of the Prosecutor

Mr Alan Tieger
Ms Hildegard Uertz-Retzlaff

The Accused

Mr Radovan Karadžić

I. PROCEDURAL HISTORY

1. On 14 April 2009, the Accused Radovan Karadžić (“Applicant”) filed a motion, requesting access to confidential material from the *Gotovina et al.* case, namely access to (a) all confidential closed and private session testimony transcripts, (b) all closed session hearing transcripts, (c) all confidential exhibits; and (d) all confidential *inter partes* filings and submissions and all confidential Trial Chamber decisions.¹ On 28 April 2009, the Prosecution filed a response, requesting that the Motion be denied.²

II. SUBMISSIONS

2. The Applicant claimed that the confidential information sought would be important for the effective investigation and preparation of his defence, and would materially assist his case.³ He argued that there is an interrelation between the factual bases for the allegations against himself and those against the Accused in the *Gotovina et al.* case.⁴ Namely, he argued that there is a significant geographical overlap between his case and the *Gotovina et al.* case, because the indictments in both cases involve crimes that allegedly occurred in Bosnia and Herzegovina, and because the facts alleged in the *Gotovina et al.* case provide context to certain acts charged against the Applicant.⁵ He submitted that there is also a temporal overlap between the two cases, specifying that he faces charges covering the period from 1991 to November 1995, while the temporal scope of the *Gotovina et al.* case runs from July to September 1995.⁶ The Applicant further argued that he should be granted access to the requested materials on the basis of the principle of the equality of arms.⁷ The Applicant assured the Chamber that he would respect all protective measures placed on him by the operation of Rule 75 of the Tribunal’s Procedure and Evidence (“Rules”), should the Chamber grant his motion.⁸ The Applicant sought disclosure of the requested material on a continuous basis, as the *Gotovina et al.* case is ongoing.⁹

3. The Prosecution submitted that the Applicant has misrepresented the scope of the *Gotovina et al.* case, resulting in the erroneous claim that the two cases are “exceptionally

¹ Motion by Radovan Karadžić for Access to Confidential Materials in the *Gotovina et Al.* case, 14 April 2009 (“Motion”), paras 1, 13.

² Prosecution’s Response to Motion by Radovan Karadžić for Access to Confidential Materials in the *Gotovina* Case, 28 April 2009 (“Response”), paras 1, 14.

³ Motion, paras 6, 10-11, 13.

⁴ Motion, paras 6, 9-10.

⁵ Motion, paras 6-7, 9.

⁶ Motion, paras 6, 8-9.

⁷ Motion, paras 6, 11.

⁸ Motion, para. 5.

⁹ Motion, para. 14.

intertwined”.¹⁰ It alleged that there is virtually no overlap between the two cases, which charge crimes carried out in different countries, at largely different times, involving different perpetrators and victims.¹¹ The Prosecution, *inter alia*, points out that the Croatian Krajina and the Bosnian Krajina are distinct geographical areas in different countries.¹² In any event, according to the Prosecution, mere temporal overlap between two cases does not amount to a legitimate forensic purpose.¹³ It asserted that the Applicant failed to show a legitimate forensic purpose for his request and failed to show how the requested material could assist him in his defence.¹⁴ In addition, as regards the request for access to confidential filings and decisions, the Prosecution argued that the Applicant had not substantiated his request.¹⁵ The Prosecution concluded that the Applicant’s request is a classic “fishing expedition”.¹⁶

II. APPLICABLE LAW

4. When requesting access to confidential *inter partes* material, the applicant must identify or describe the material it seeks by its general nature and show a legitimate forensic purpose for gaining access to it.¹⁷ Such purpose may be established by showing the existence of a geographical and temporal nexus between the applicant’s case and the case from which the material is sought.¹⁸ Furthermore, the Chamber must be satisfied that there is a good chance that access to the material would materially assist the applicant in his or her case.¹⁹

5. As for material that has been provided pursuant to Rule 70 of the Rules the Prosecutor must obtain the consent of the provider before the material or its source can be disclosed to another accused before the Tribunal.²⁰ This is the case even where the Rule 70 provider has consented to the disclosure of the material in one or more prior cases.²¹

¹⁰ Response, paras 2, 6, 10-11.

¹¹ Response, paras 2, 6-9.

¹² Response, para. 10.

¹³ Response, para. 9.

¹⁴ Response, paras 3, 9, 11, 13.

¹⁵ Response, para. 12.

¹⁶ Response, paras 3, 13.

¹⁷ *Prosecutor v. Mrkšić et al.*, Appeals Chamber, Decision on Veselin Šljivančanin’s Motion Seeking Access to Confidential Material in the *Kordić and Čerkez* Case, 22 April 2008 (“*Mrkšić Decision*”), para. 7; *Prosecutor v. Krajišnik*, Appeals Chamber, Decision on “Motion by Mićo Stanišić for Access to All Confidential Materials in the Krajišnik Case” (“*Krajišnik Decision*”), 21 February 2007, p. 4.

¹⁸ *Mrkšić Decision*, para. 7; *Krajišnik Decision*, pp. 4-5.

¹⁹ *Mrkšić Decision*, para. 7; *Krajišnik Decision*, p. 4.

²⁰ *Krajišnik Decision*, pp. 5-6.

²¹ *Krajišnik Decision*, p. 6.

6. Pursuant to Rule 75(F)(i), protective measures that have been ordered for a witness or victim in any proceedings before the Tribunal shall continue to have effect *mutatis mutandis* in any other proceedings, unless and until they are rescinded, varied or augmented.

III. DISCUSSION

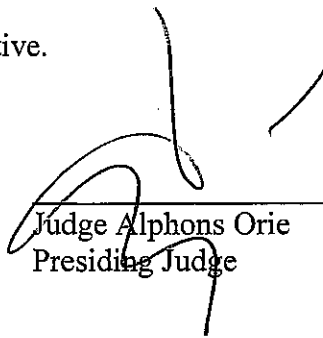
7. The Applicant has described the material that he seeks in general terms. However, the indictment in the *Gotovina et al.* case concerns alleged crimes against Serbs in Croatia, namely in the Krajina, not in Bosnia as submitted by the Applicant.²² Only the crimes charged in Counts 2 and 3 of the *Gotovina et al.* indictment show some relation to Bosnia and Herzegovina, as these Counts charge deportation and forcible transfer of members of the Krajina Serb population from the southern portion of the Krajina to other places within and outside Croatia, *inter alia* to Bosnia and Herzegovina. In so far as this may create some contextual link between these allegations and the events charged in the *Karadžić* indictment, which are alleged to have been committed in Bosnia and Herzegovina, it is not clear to the Chamber, nor does the Applicant explain, how access to material on Krajina Serb refugees in Bosnia and Herzegovina could materially assist the Applicant in his defence. Hence, the Applicant, by merely making generalized statements, based on incorrect premises, has failed to show a sufficient geographical nexus between the cases. Missing that, the temporal overlap between the two cases that the Applicant alleges alone is insufficient to show a legitimate forensic purpose for gaining access to the requested material. The Applicant also had not made any other submissions so as to show such a legitimate forensic purpose. The Chamber furthermore is not satisfied that there is a good chance that access to the material in the *Gotovina et al.* case would materially assist the Applicant in the preparation of his defence.

²² Amended Joinder Indictment, 12 March 2008, paras 13, 48-53.

IV. DISPOSITION

8. Accordingly, the Chamber, pursuant to Rules 54, 70, and 75 of the Rules, hereby **DENIES** the Motion.

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



Judge Alphons Orié
Presiding Judge

Dated this twelfth day of May 2009
At The Hague
The Netherlands

[Seal of the Tribunal]