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-T

Date: 25 April 2012

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **25 April 2012**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION TO UNSEAL ICMP EXHIBITS

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 Accused's "Motion to Unseal ICMP Exhibits", filed on 23 March 2012 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. On 21 and 22 March 2012, the Chamber heard the evidence of Thomas Parsons, the director of forensic science of the International Commission on Missing Persons ("ICMP"), who testified about DNA identification—performed by the ICMP—of persons found in mass graves throughout Bosnia and Herzegovina ("BiH"). During Parsons' testimony, the Office of the Prosecutor ("Prosecution") tendered a number of documents and requested that some of them be admitted under seal. Following the Accused's objection, and an extensive discussion between the parties and the Chamber,[1] the Chamber decided to provisionally place the following 11 documents under seal, namely P4639, P4640, P4641, P4642, P4650, P4651, P4656, P4662, P4663, P4672, and P4673 ("Documents") and, in order to be able to make an informed decision on their status, it invited the parties to file written submissions in relation thereto.[2] In addition, the Prosecution tendered both a confidential and a public redacted version of the transcript of Parsons' testimony from the *Popović* case. These were admitted as P4636 and P4643 respectively.

2. In the Motion, the Accused requests that the Documents be unsealed and made available to the public, with redactions if necessary.[3] He notes that, according to the Appeals Chamber jurisprudence, exhibits may only be kept under seal for exceptional reasons, and submits that such reasons do not exist in relation to the Documents since the fact that a family member may learn through these proceedings that the remains of the victim have been located and identified by the ICMP is insufficient to justify keeping all of the Documents under seal. Doing so, according to the Accused, would mean that the identity of victims in all the cases before the Tribunal should be kept from the public in order to prevent family members learning of the victim's death through the proceedings at the Tribunal.[4] The Accused also submits that there is a strong public interest in the names of the victims identified by the ICMP being known so that

[1] Hearing, T. 26568–26571, 26578–26583 (21 March 2012).
[2] Hearing, T. 26583 (21 March 2012). *See also* Registry's Confidential Memorandum of 27 March 2012, which lists all the Prosecution exhibits admitted through Parsons.
[3] Motion, para. 1.
[4] Motion, paras. 3–4.

"any errors can be discovered".[5] In addition, he argues that placing the Documents under seal violates his right to a public trial as potential eye-witnesses cannot come forward with contradictory information.[6] Finally, the Accused submits that any private information could be redacted from the Documents upon showing a valid reason for doing so.[7]

3. On 10 April 2012, the Prosecution filed the "Prosecution Response to the Motion of the Accused to Unseal ICMP Exhibits" ("Response") in which it opposes the Motion. The Prosecution argues, relying on Rule 75 of the Tribunal's Rules of Procedure and Evidence ("Rules"), that the Documents were properly placed under seal in order to "protect the legitimate and judicially recognised privacy interests of victims and their family members", and that admitting them under seal does not violate any right of the Accused.[8] Elaborating further, the Prosecution submits that by providing their DNA for testing by the ICMP, the relatives of the missing people have become "unwitting witnesses to these proceedings".[9] The Prosecution also notes that ICMP finds it inappropriate that family members may potentially find out about the fate of their loved ones from the present proceedings, since it has no control over whether or when family members are notified of a DNA match.[10] In addition, the release of the Documents may violate privacy and security of family members who "might not" want it known that they have participated in a DNA identification process.[11] Furthermore, genetic information, including genetic relationships (or lack thereof), which is private information belonging to the family members of those missing, may be revealed.[12] The Prosecution then submits that other Chambers have placed some of these Documents under seal, based on the same concerns, and argues that their confidential status should therefore be continued under Rule 75 (F).[13] The Prosecution further claims that admitting the Documents under seal does not violate the Accused's rights as the work of the ICMP is "transparent and subject to public scrutiny" and

[5] Motion, para. 5.
[6] Motion, para. 7.
[7] Motion, para. 6.
[8] Response, paras. 1, 3.
[9] Response, para. 3.
[10] Response, para. 4.
[11] Response, para. 5.
[12] Response, para. 6.
[13] Response, para. 7. The Prosecution lists, in paragraph four and footnote 12 of the Response, four exhibits which were admitted under seal in previous proceedings, namely, P4636, P4651, P4656, and P4662. However, the Chamber notes that, according to the Prosecution's notification for this witness, P4645, P4650, P4663, P4672, and P4673 have also been admitted under seal in the *Prosecutor v. Popović et al*. case. *See* Prosecution's Notification of Submission of Expert Reports Pursuant to Rule 94 *bis* and Written Evidence Pursuant to Rule 92 *ter*, and Request to Add Items to its Rule 65 *ter* Exhibit List, With Appendix A: Witness Thomas Parsons, 19 March 2012, Appendix A, pp. 60880, 60879, 60877. The Chamber further notes that, while P4645 was admitted under seal in the *Popović* case, it was admitted as a public exhibit in this case. The Chamber considers that, in light of its reasoning below, the public status of P4645 should remain unchanged, as it contains no specific information on the genetic material of any individuals and concerns a number of matches made back in 2006 and 2007.

Parsons was cross-examined by the Accused on ICMP's procedures and protocols in public session. Furthermore, according to the Prosecution, the Accused retains the right to conduct any investigations in relation to these particular Documents.[14] Finally, the Prosecution notes that redactions to the Documents are possible but impractical. Were the Documents to be redacted so that the privacy interests are properly protected, only a list of names of victims would remain because the information relating to any connection between the ICMP and the victims or their family members would have to be removed.[15]

II. Applicable Law

4. Article 20(1) of the Tribunal's Statute ("Statute") requires that proceedings be conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Further, Article 21(2) entitles the accused to a fair and public hearing, subject to Article 22, which requires the Tribunal to provide in its Rules for the protection of victims and witnesses.[16] As has been observed in previous Tribunal cases, these Articles reflect the duty of the Trial Chamber to balance the right of the accused to a fair trial, the rights of victims and witnesses to protection, and the right of the public to access information.[17]

5. More specifically, Rule 75(A) states that a "Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused".

6. The Trial Chamber has previously held that documents should be admitted on a confidential basis only in exceptional circumstances, when they contain information which, if disclosed, might cause prejudice, concerns about safety, or serious embarrassment to a party or a witness.[18]

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[14] Response, para. 9.

[15] Response, para. 10.

[16] In addition, Rule 78 provides that "All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided."

[17] *See* Decision on Accused's Motion for Binding Order (UNHCR) and Prosecution's Motion for Reclassification of Public Motion, 4 July 2011, para. 10. *See Also* Decision on Accused's Motion to Revoke Protective Measures for KDZ240, 28 June 2011, para. 15, including the references cited therein.

[18] Order on Reclassification of Exhibit D737, 12 November 2010, para. 10, *See Prosecutor v. Stakić*, IT-92-24-A, Decision on the Defence Motion for Extension of Time, 26 April 2004, para. 6; *Prosecutor v. Haradinaj et al*., Case No. IT-04-84-A, Decision on Lahi Brahimaj Application for Provisional Release, 25 May 2009, para. 5; *Prosecutor v. Blagojević et al*, Case No. IT-02-60-A, Decision on Prosecution Motion to Lift Confidential and *Ex Parte* Status of Appeals Chamber's Decision of 2 December 2005, 11 July 2007.

III. Discussion

7. The Chamber recalls the extensive submissions made by the Prosecution during Parsons' testimony, as well as the submissions made in its Response.[19] It would appear that the Prosecution essentially puts forward three reasons why the Documents should remain under seal, namely to (i) protect, due to privacy concerns, the genetic information of the alleged victims and their family members, as well as their genetic relationships, or lack thereof;[20] (ii) conceal the fact that certain family members participated in the ICMP DNA identification process, as they "*might* not want" the public to know that they so participated;[21] and (iii) remove any possibility that family members may find out about the deaths of their relatives through these proceedings.[22] Furthermore, as far as the applicable Rule for ordering this protection is concerned, the Prosecution argues that the family members of victims have become "unwitting witnesses" to the proceedings by donating their genetic material and that therefore Rule 75 should apply to protect them and the information in the Documents.[23]

8. The Chamber does not accept that, simply by donating their genetic material to the ICMP, the family members of those missing have become "unwitting witnesses" in these proceedings such that they may be entitled to protections provided to "victims and witnesses" under Rule 75(A). Thus, the Chamber does not consider that the provisions of Rule 75 can be applied to the Documents in order to protect the concerns of the family members. As a result, even though some of the Documents were admitted under seal in previous cases before this Tribunal, Rule 75 cannot be used to "continue" their confidential status. In addition, as previously stated, the Chamber is of the view that it is not bound by previous decisions on the status of exhibits in other cases and that it is, therefore, appropriate for it to engage in its own assessment regarding whether the Documents should be admitted under seal in these proceedings.[24]

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[19] *See* T. 26562–26564, T. 26568–26571, T. 26578–26583 (21 March 2012); Response, paras. 4–6. The Chamber notes that the Response refers extensively to discussions that took place during Parsons' testimony. However, all the transcript page references used in the Response are inaccurate and as such of limited assistance.

[20] Response, para. 6. *See also* T. 26569, lines 2 to 9, and T. 26570–26571 (21 March 2012).

[21] Response, para. 5 (emphasis added). *See also* T. 26570 (21 March 2012).

[22] Response, para. 4. *See also* T. 26562–26564, 26569–26570, 26581–26582 (21 March 2012). The Chamber notes here the Prosecution's argument that, while there are public lists of persons missing in BiH, there is a difference between such lists and the ICMP reports referring to individual persons, as being on the latter would necessarily mean that those individuals are dead. *See* T. 26580–26581 (21 March 2012).

[23] Response, para. 3.

[24] *See* Decision on Status of Exhibits Admitted Through Witness KDZ492, 13 January 2012, para. 15.

9. Having said that, however, the Chamber also notes that Rule 75(A) provides for protection of the privacy of the victims themselves. Thus, the Chamber considers that, in light of its highly sensitive and personal nature,[25] the information relating to the genetic material of the alleged victims should be kept confidential under Rule 75 in order to protect their privacy. In addition, in an abundance of caution - as it may be used to reveal the genetic information of the victims themselves - the information relating to the genetic material of the victims' family members should also be kept outside of the public domain under Rule 75. In any event, even if Rule 75 does not apply here, the highly sensitive and personal nature of this material is such that it should be protected using the Chamber's discretion under Rule 54. Accordingly, in the Chamber's view, "exceptional circumstances" warrant that any information relating to the genetic material of any individuals be kept under seal, especially since doing so has no negative effect on the Accused's rights, as illustrated by the fact that he does not object to this course of action.[26] Therefore, the Chamber shall examine each of the Documents individually in order to assess whether they reveal any such genetic information.

10. The Chamber adds that it is not persuaded by the Prosecution's submission that some family members "might" not want it known that they participated in the DNA identification process. Since the Prosecution does not point to any specific information as to which individual family members actually have such concerns and instead only argues that these family members "might" have such concerns, the Chamber finds this submission speculative at best and shall therefore not give it any consideration.

11. Finally, as for the notice argument, while generally sympathetic to the submission that family members of victims should not find out from the current proceedings that their relatives are dead, the Chamber is of the view that the success of this argument depends on the individual circumstances surrounding each Document, in particular the time at which the DNA matches were made and whether it is reasonable to assume that by now the family members of the listed individuals have been informed of those matches. Accordingly, the Chamber shall also consider the issue of notice separately with respect to each of Documents discussed below.

12. Starting with P4651 and P4673, the Chamber notes that these two exhibits do not name any alleged victims or their family members but simply report on the numbers of victims identified by the ICMP. In addition, they contain no genetic information of any individuals.

[25] *See* S and Marper v. the United Kingdom, ECHR Judgement, Application numbers 30562/04 and 30566/04, 4 December 2008, paras. 71–72, 74–75.

[26] Motion, paras. 1, 6; *see also* T. 26579 (21 March 2012).

Accordingly, the Chamber is of the view that P4651 and P4673 should be reclassified as public documents.

13. With respect to P4639, P4640, and P4641, the Chamber notes that these are ICMP reports dealing with DNA matches of individually named victims of the Korićanske Stijene incident, which is a scheduled incident in the Third Amended Indictment.[27] The Chamber also notes that the most recent of these reports dates back to early 2010, that is some two years ago. Furthermore, as pointed out by the Accused's legal adviser, these reports concern alleged victims that have already been named publicly as having been killed during this incident.[28] Accordingly, the Chamber is of the view that the Prosecution's notice argument fails in case of these three exhibits. Having said that, however, the Chamber notes that these exhibits, or parts thereof, contain coded genetic information of the alleged victims and their family members.[29] In light of its reasoning above in paragraph 9, the Chamber is of the view that such information should be redacted from these three exhibits before they are made available to the public. Accordingly, the Chamber considers that P4639, P4640, and P4641 should remain under seal but instructs the Prosecution to file public redacted versions of the same, removing any reference to genetic information of the alleged victims and their family members.

14. The Chamber notes that P4642 is a list of DNA match reports that have been issued by the ICMP between November 2001 and August 2011, representing DNA match reports considered by the ICMP to be related to the fall of Srebrenica and Žepa in 1995.[30] This list contains no information on the genetic material of the victims or their family members and shows that most remains were submitted for identification and matched some years ago. However, a few names on the list are highlighted in yellow and it can be seen from the list that their remains were submitted for DNA identification in late 2010 or sometime during 2011. Dušan Janc, a former Prosecution investigator, testified before this Chamber that these individuals were recent additions to the list of matches made by the ICMP.[31] Accordingly, given that the matches relating to these individuals were made relatively recently, namely August 2011, the Chamber considers that their names should not be in the public domain at this

[27] *See* Schedule B15.6 of the Third Amended Indictement.

[28] The victims of the Korićanske Stijene incident have been named in the public indictment first issued against Darko Mrđa back in 2002, and then amended in 2003.

[29] The Chamber notes Parsons' testimony to the effect that even where genetic data listed on a DNA match report is coded, there is a potential for genetic relationships, including a lack thereof, to be revealed. *See* T. 26563, 26570–26571 (21 March 2012).

[30] *See* T. 26572–26578 (21 March 2012).

[31] *See* T. 26940 (27 March 2012). It was put to Parsons during his cross-examination in the *Popović* case, that Dušan Janc had testified in that case that the yellow highlighting indicated matches for which the families of the victims have not yet been informed of the ICMP's findings. Parsons was unable to confirm that, however. *See*

stage, in order to prevent the potential of their family members finding out of the match through the current proceedings. Accordingly, the Chamber considers that P4642 should remain under seal but that the Prosecution should file a public redacted version of the same, which will contain no reference to the names highlighted in yellow.

15. The Chamber notes that P4656 is the earlier version of P4642, last updated in January 2009.[32] Accordingly, as it contains no information regarding the genetic material of the victims or their families, and given that it has been over three years since the matches referred to in that list were made by the ICMP, during which time the relatives of those matched should have been informed of the matches, the Chamber considers that no exceptional circumstances exist justifying its confidential status. For that reason, the Chamber shall order that this exhibit be reclassified as a public exhibit. Similarly, P4662 is an even earlier version of P4642, dating back to July 2008. Accordingly, for the same reasons as given in relation to P4656, the Chamber considers that this exhibit should be reclassified as public too.

16. With respect to P4650 and P4663, the Chamber notes that both are excerpts from the above lists of individuals for whom DNA match reports have been issued by the ICMP. Both exhibits were discussed with Parsons in April 2009 in the *Popović* case and thus any DNA matches referred to therein would have been made by that time.[33] In addition, neither of the two exhibits contains any information on the genetic material of the listed individuals or their family members. Accordingly, given that both P4650 and P4663 concern individuals for whom DNA matches were made by, at the very latest, April 2009, the Chamber considers it reasonable to assume that by now the family members of those individuals have been informed of their deaths. For that reason, and bearing in mind that these exhibits contain no reference to the genetic material of any of the individuals listed or their family members, the Chamber is of the view that no exceptional circumstances exist justifying their confidential status. The Chamber shall, therefore, order that P4650 and P4663 be reclassified as public exhibits. As a side note, the Chamber observes that P4650 is almost illegible and instructs the Prosecution to upload a more eligible copy of the same.

17. With respect to P4672, the Chamber notes that it is an identification report for one individual, issued in 2007 by the Institute for Forensic Evidence in Tuzla. The report refers to the individual's family members and the fact that a DNA match was made using their DNA samples but contains no specific genetic information relating to either the individual or his

P4636 (Transcript of Thomas Parsons' testimony from the *Popović et al.* case), T. 3347–33458. The Chamber notes that this question related to an earlier version of P4642.

[32] *See* P4636 (Transcript of Thomas Parsons' testimony from the *Popović et al.* case), T. 3340.

family members. Accordingly, given that this match was made back in 2007 the Chamber considers it reasonable to assume that the family members mentioned in the report have been informed of the match made by the ICMP by now. Bearing this in mind, as well as the fact that the exhibit contains no specific genetic information, the Chamber is of the view that this exhibit should be reclassified as public.

18. Finally, the Chamber notes that P4636 is a 147 page long transcript of Parsons' evidence from the *Popović* case and that it was admitted under seal during his evidence in the present case. The public redacted version of P4636 has been admitted as P4643 and is only 61 pages long.[34] Looking at the redactions made, it would appear that the Prosecution has simply removed the last 86 pages of P4636. However, it is unclear to the Chamber on what basis such a wholesale removal of pages was made. In addition, given the Chamber's position on the confidentiality or otherwise of some of the Documents as explained herein, it is unclear whether there is still any need for P4636 to remain under seal and if so, the extent to which redactions should be made to its public redacted version. Accordingly, the Chamber shall order the Prosecution to report back on this issue, either submitting an explanation as to why the current redactions to the transcript are necessary, if at all, or submitting a new proposed public redacted version of the transcript with more appropriate redactions, bearing in mind the findings above.

IV. Disposition

19. Accordingly, the Trial Chamber, pursuant to Articles 20(1) and 21(2) of the Statute and Rules 54, 75(A), and 78 of the Rules, hereby **GRANTS** the Motion in part and **ORDERS** as follows:

(a) exhibits P4650, P4651, P4656, P4662, P4663, P4672, and P4673 shall be reclassified as public exhibits;

(b) exhibits P4639, P4640, P4641, and P4642 shall remain under seal;

(c) the Prosecution shall file public redacted versions of exhibits P4639, P4640, P4641, and P4642 in line with the instructions given in paragraphs 13 and 14 above, by 2 May 2012; after which time these shall be assigned exhibit numbers by the Registry; and

[33] In fact, according to the information entered into ecourt, P4650 appears to date back to 2007.
[34] *See* T. 26584 (21 March 2012).

(d) the Prosecution shall report back to the Chamber as to the basis on which P4636 has been redacted as P4643, and whether such redactions are still necessary in light of the findings above.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-fifth day of April 2012
At The Hague
The Netherlands

[Seal of the Tribunal]