

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-05-88-T

Date: 8 July 2009

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D 3583 - D 3576
08 JULY 2009

IT-05-88-T
D 29405 - D 29398
08 JULY 2009

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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: 8 July 2009

PROSECUTOR

v.

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

PUBLIC

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

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć 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 Petrović for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Vinko Pandurević

Case No. IT-05-88-T



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 “Zdravko Tolimir’s Motion for Access to Confidential Evidence, Submissions and Decisions in the case *the Prosecutor v. Popović et al.*”, submitted by the Accused Zdravko Tolimir on 15 April 2009 and filed in the English version on 17 April 2009 (“Motion”), and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

1. The Motion requests that (i) Tolimir and his defence team be given access to “confidential decisions issued by the Trial Chamber and Appeals Chamber, testimonies, evidence and submissions filed by the Prosecution and Defence” (“confidential material”) in the case of *Prosecutor v. Popović et al.* (“Popović case”);¹ and (ii) all transcripts of testimonies in the *Popović* case in a *Live Note* format as well as a list of “all adduced evidence” be provided to him and his defence team.² He submits that there is an obvious link between the present case and the *Popović* case, the greater part of the respective indictments are identical, and a large number of identical facts and legal issues are raised in both cases.³

2. On 20 April 2009, the following responses were filed: “Vujadin Popović’s Response to Tolimir’s Motion for Disclosure” (“Popović Response”); the “Response to Zdravko Tolimir’s Motion for Access to Confidential Material”, filed by Miletić (“Miletić Response”);⁴ and the “Prosecution’s Response to Zdravko Tolimir’s Motion for Access to Evidence, Submissions and Decisions” (“Prosecution Response”).⁵

3. Popović submits that he does not oppose the Motion.⁶ Miletić argues that he does not object to the Motion, provided the protective measures in place are respected, 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 *Popović* case, and (b) the submissions of Miletić filed pursuant to Rule 70 of the Rules of Procedure and Evidence (“Rules”).⁷ With regard to (b), Miletić submits that the disclosure of the Rule 70 submissions at this stage could compromise the final agreement with the institution that provided the information to his Defence; that should the Trial Chamber consider that the Rule 70 submissions must be disclosed to Tolimir, Miletić Defence

¹ Motion, para. 1.

² *Ibid.*, para. 3.

³ *Ibid.*, para. 4.

⁴ The original French version was filed on 20 April 2009 and the English version was filed on 11 May 2009.

⁵ Its original confidential status was lifted by the Notice of Change of Filing Status Concerning “Prosecution’s Response to Zdravko Tolimir’s Motion for Access to Evidence, Submissions and Decisions”, 18 June 2009.

⁶ Popović Response, para. 2.

⁷ Miletić Response, para. 7.

team will disclose them in redacted versions upon a Trial Chamber's request; and that should the Rule 70 submissions be admitted into evidence, Tolimir be granted access to them only after the institution providing the documents has given its consent.⁸

4. The Prosecution does not oppose Tolimir's request for access to confidential material, that is, testimonies, evidence, submissions and decisions *inter partes*, subject to Rule 75(F)(i) and provided that Tolimir and any of his assistants or advisers who have been instructed or authorised to have access to this material shall not disclose to the public, without the leave of the Trial Chamber, confidential information about witnesses for whom protective measures have been granted in the *Popović* case ("Protected Witnesses").⁹ However, the Prosecution opposes any request for access to its own filings made on an *ex parte* basis.¹⁰

5. The Prosecution does not object to the Registry making available to Tolimir, in a *Live Note* format, the transcripts of the proceedings or a list of the exhibits adduced in the *Popović* case.¹¹

II. APPLICABLE LAW

6. It is well-established in the jurisprudence of the Tribunal that a party is always entitled to seek material from any source, including 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.¹² With regard to *inter partes* confidential material, a requesting party must establish a legitimate forensic purpose for access to confidential material from another case by demonstrating the existence of a nexus between the applicant's case and the case from which the material is sought and such nexus consists of a

⁸ *Ibid.*, para. 8.

⁹ Prosecution Response, para. 2. The Prosecution submits that Tolimir and his assistants or advisers shall not disclose to the public (a) the identity of Protected Witnesses and their whereabouts, transcripts of the testimonies of the Protected Witnesses and the contents thereof, exhibits and the contents thereof, or any information which would enable the Protected Witnesses to be identified and would breach the confidentiality of the protective measures already in place, and (b) any documentary, or other evidence, or any written statement of a Protected Witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony of a Protected Witness. *Ibid.*

¹⁰ *Ibid.*, para. 2.

¹¹ *Ibid.*, para. 3.

¹² *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 ("*Milošević* 19 May Decision"), 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 ("*Milošević* 27 April Decision"), para. 4; *Prosecutor v. Milan Martić*, Case No. IT-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; *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 ("*Krajišnik* Decision"), p. 4. See also *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 ("*Karadžić* Decision"), para. 4; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-PT, Decision on Stojan Župljanin's Access to Confidential Material in the *Krajišnik, Mrda, Stakić and Brđanin* Cases, 24 April 2009 ("*Župljanin* Decision"), para. 11.

geographical, temporal, or otherwise material overlap between the two cases.¹³ Such access may be granted if the Trial Chamber is satisfied that the requesting party has established that the material in question is likely to assist the applicant's case materially, or that there is at least a good chance that it would.¹⁴

7. As regards confidential material filed *ex parte*, the jurisprudence of the Tribunal requires an applicant to meet a higher standard in establishing a legitimate forensic purpose for its disclosure in light of the special considerations of confidentiality relating to such material.¹⁵

8. Furthermore, for material that has been provided under Rule 70, the parties must obtain the consent of the provider before the material or its source can be disclosed to another accused before the Tribunal.¹⁶ This is the case even where the Rule 70 provider(s) consented to the disclosure of the material in one or more prior cases.¹⁷

9. Finally, Rule 75(F)(i) provides that once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal ("first proceedings"), such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ("second proceedings") unless they are rescinded, varied or augmented in accordance with the procedure set out in Rule 75. Rule 75(G)(i) further provides that a party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply to any Chamber, however constituted, remaining seised of the first proceedings.

III. DISCUSSION

10. The Trial Chamber makes the following preliminary considerations. While Tolimir has identified the material by its general nature, he does not advance any arguments whether he also seeks access to the *ex parte* confidential material in the *Popović* case. For this reason, the Trial Chamber considers that Tolimir does not seek access to any *ex parte* confidential material and will not make any finding in this regard.

¹³ *Milošević* 19 May Decision, para. 8; *Milošević* 27 April Decision, para. 5; *Martić* Decision, para. 9; *Krajišnik* Decision, p. 4. See also *Karadžić* Decision, para. 7; *Župljanin* Decision, para. 11.

¹⁴ *Ibid.*

¹⁵ *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. 14. See also *Karadžić* Decision, para. 8; *Župljanin* Decision, para. 11; *Krajišnik* Decision, p. 5.

¹⁶ *Karadžić* Decision, para. 9; *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 ("*Gotovina* Decision"), para. 5; *Krajišnik* Decision, pp. 5–6. See also *Milošević* 19 May Decision, para. 15; *Milošević* 27 April Decision, para. 13.

¹⁷ *Karadžić* Decision, para. 9; *Gotovina* Decision, para. 5; *Krajišnik* Decision, p. 6.

11. As to the existence of a legitimate forensic purpose for access to the material sought, Tolimir submits that there is an obvious link between the *Popović* and the Tolimir cases.¹⁸ The Trial Chamber concurs that there is a significant factual nexus between the two cases in so far as they have similar temporal and geographical scopes, namely July 1995 in and around the Srebrenica and Žepa enclaves. Moreover, the crimes alleged in the indictment of the *Popović* case and in the indictment against Tolimir were committed in the course of the same series of events.¹⁹ The Trial Chamber is satisfied that Tolimir has shown a legitimate forensic purpose for being granted access to the *inter partes* confidential material.

12. The Trial Chamber notes that some of the *inter partes* confidential material might fall into the category of Rule 70. In light of the jurisprudence, such material shall not be released to Tolimir 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 Tolimir case. The Trial Chamber is of the view that material of this nature shall not be disclosed to Tolimir or his defence team.

13. Tolimir further asks for all transcripts of testimonies in a *Live Note* format and a list of “all adduced evidence” in the *Popović* case.²⁰ A request for access to confidential transcripts in another case is commonly made before the Tribunal and when such request is granted, the Registry provides an applicant with CD-ROMs containing the relevant transcripts. The Trial Chamber believes that this arrangement will fully assist Tolimir in the preparation of his case. In respect of the list of evidence adduced in the *Popović* case, the Trial Chamber construes it to mean a list of exhibits that have been admitted into evidence in that case. The Trial Chamber has been informed that the Registry is in a position to provide Tolimir with such a list. However, given that certain information on that list may fall within the purview of Rule 70, the Trial Chamber will grant access to such exhibits, pending the consent of the Rule 70 provider. Exhibits, if any, relating to the personal information about the Accused in the *Popović* case and their family members shall be redacted from the list to be given to Tolimir and his defence team.

14. 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 Tolimir.

15. Lastly, the Trial Chamber notes that Tolimir does not specifically request access to confidential material for the duration of the trial proceedings. In principle, it is the preferred

¹⁸ *Ibid.*, para. 4.

¹⁹ See Decision on Motion for Joinder, 20 July 2007, para. 31 & n. 95.

²⁰ Motion, para. 3.

approach of the Trial Chamber to limit access to material up to the date of the request (or decisions upon that request).²¹ 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 the case against Tolimir 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 Tolimir and his defence team on an ongoing basis.

IV. DISPOSITION

16. For the foregoing reasons, pursuant to Rules 54, 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 Tolimir 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 transcripts of hearings held in private and closed session, all relevant exhibits kept under seal and all confidential findings, submissions and decisions.
2. 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.
3. The Prosecution and the Defence teams in the *Popović* case shall identify 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 Tolimir and his defence team and inform the Registry whether such consent has been obtained.
4. 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.
5. The Registry shall provide Tolimir and his defence team with CD-ROMs of the relevant transcripts and a list of exhibits admitted in the *Popović* case, subject to Rule 70 and with the exception of material related to personal information about the Accused and their family members in the *Popović* case.

²¹ See in this regard *Karadžić* Decision, para. 18.

6. Except where directly and specifically necessary for the preparation of the case, and only upon leave granted by the Trial Chamber, Tolimir 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 of Protected Witnesses, or prior testimony disclosed to Tolimir and his defence team, or the contents thereof, in whole or in part.
7. Tolimir and his defence team shall not disclose to the public any confidential or non-public material disclosed from the *Popović* 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 Trial Chamber. If any confidential or non-public material is disclosed to the public, Tolimir and his defence team 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 Tolimir and his defence team as soon as the material is no longer needed for the preparation of the case.
8. If a member of the defence team of Tolimir withdraws from the 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.
10. For the purpose of this Decision:
 - a. the “defence team” of Tolimir means legal advisers and a case manager 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 Tolimir and his defence team; the “public” includes, without limitation, family, friends, and associates of Tolimir, 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 eighth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

