



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-PT

Date: 9 September
2009

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost, Pre-Trial Judge

Registrar: Mr. John Hocking

Decision of: 9 September 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON MOTION BY RADOVAN KARADŽIĆ FOR ACCESS TO
CONFIDENTIAL MATERIALS IN THE TOLIMIR CASE**

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Radovan Karadžić

The Accused

Zdravko Tolimir

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 seized of the “Motion by Radovan Karadžić for Access to Confidential Materials in the Tolimir case”, filed by the Accused Radovan Karadžić on 20 April 2009 (“Motion”), and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

1. In his Motion, Karadžić seeks access for the duration of the pre-trial and trial proceedings to the confidential material in the case *Prosecutor v. Tolimir* (“*Tolimir case*”),¹ including (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.² He argues that the Motion is submitted to this Trial Chamber in accordance with Rule 75(G)(i) of the Rules of Procedure and Evidence (“Rules”).³

2. Karadžić avers that there is a significant geographical and temporal overlap between his case and the *Tolimir case* and that the indictments in both cases relate to crimes that allegedly occurred in Srebrenica in 1995.⁴ He also argues that the material sought is crucial to the effective investigation and preparation of his defence case as it directly impacts on the Prosecution’s assertion that he participated in a joint criminal enterprise (“JCE”) and “it is expected that there will be significant overlap” in the witnesses who will testify in both cases.⁵ It is further submitted that the principle of equality of arms requires that he be granted access to the materials requested.⁶

3. Finally, Karadžić requests that since the *Tolimir case* is ongoing, the Trial Chamber grant the access on an on-going basis for the duration of the pre-trial and trial proceedings.⁷ It is also submitted that he will comply with all protective measures already in place for material sought from the *Tolimir case*.⁸

4. The Accused Zdravko Tolimir submitted on 4 May 2009 and filed in the English version on 8 May 2009 the “Response to the Motion by Radovan Karadžić for Access to Confidential Materials” (“*Tolimir Response*”).

¹ Motion, para. 1.

² *Ibid.*, para. 1.

³ *Ibid.*, para. 12.

⁴ *Ibid.*, paras. 6–7.

⁵ *Ibid.*, para. 10.

⁶ *Ibid.*, para. 11.

⁷ *Ibid.*, para. 14.

⁸ *Ibid.*, para. 5.

5. Tolimir submitted that the Motion was grounded and that Karadžić should be granted access to all confidential materials, as well as to materials which are confidential and *inter partes*;⁹ and that there were in fact no grounds for some materials which have been designated confidential to have this status.¹⁰

6. The Prosecution filed the “Prosecution’s Response to the Motion by Radovan Karadžić for Access to All Confidential Material” on 4 May 2009 (“Prosecution Response”).

7. The Prosecution submits that since no evidentiary materials have been entered into the record in the *Tolimir* case, there is no confidential evidentiary record to which Karadžić should have access;¹¹ and that Karadžić has no legitimate interest in procedural matters or matters relating solely to the Accused.¹²

8. The Prosecution submits that if the Chamber is minded to grant access to Karadžić, it requests an order safeguarding the safety of witnesses and the security of sensitive information.¹³ The Prosecution would identify to the Registry confidential *inter partes* evidentiary material to which Karadžić should not be given immediate access, namely, Rule 70 material for which providers’ consent is required and any protected witnesses in the *Tolimir* case who may be called in the *Karadžić* case for whom delayed disclosure may be justified.¹⁴ In addition, the Prosecution contends that the access to *ex parte* material should not be granted because the Motion offers no particular reasons why the higher standard required for such material is met.¹⁵

9. The Prosecution submits that Karadžić has demonstrated no legitimate forensic purpose for access to all closed session hearing transcripts and all confidential *inter partes* filings and submissions and all confidential Trial Chamber decisions.¹⁶ It argues that Karadžić does not attempt to show why these materials would assist him in his trial preparation and that in the absence of any justification his request can only be considered as a “fishing expedition”.¹⁷

⁹ Tolimir Response, para. 2.

¹⁰ *Ibid.*, para. 3.

¹¹ Prosecution Response, para. 8.

¹² *Ibid.*, para. 8.

¹³ *Ibid.*, para. 9.

¹⁴ *Ibid.*, para. 9.

¹⁵ *Ibid.*, paras. 10–12.

¹⁶ *Ibid.*, para. 13.

¹⁷ *Ibid.*, para. 13.

II. APPLICABLE LAW

10. 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.¹⁸ With regard to confidential *inter partes* 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 geographical, temporal, or otherwise material overlap between the two cases.¹⁹ 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.²⁰

11. 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.²¹

12. 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.²² This is the case even where the Rule 70 provider(s) consented to the disclosure of the material in one or more prior cases.²³

¹⁸ *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 Milosević* case, 19 May 2009 ("Karadžić 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 Milosević* 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 (*Jovica Stanišić 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, Mrđa, Stakić and Brdanin* Cases, 24 April 2009 ("Župljanin Decision"), para. 11.

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

²⁰ *Ibid.*

²¹ *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić's Motion for Access to All Confidential Materials in the *Brdanin* Case, 24 January 2007, para. 14. See also *Župljanin Decision*, para. 11; *Jovica Stanišić Decision*, para. 8.

²² *Jovica Stanišić 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 *Karadžić Decision*, para. 15; *Milošević 27 April Decision*, para. 13.

²³ *Jovica Stanišić Decision*, para. 9; *Gotovina Decision*, para. 5; *Krajišnik Decision*, p. 6.

13. 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

14. The Trial Chamber first recalls the “Decision on Radovan Karadžić’s Motion for Access to Confidential material in the Dragomir Milošević Case”, issued by the Appeals Chamber on 19 May 2009 (“*Karadžić Decision*”), in which an analogous motion was ruled upon. The Trial Chamber concurs with this decision.

15. The Trial Chamber notes that the Motion specifies that Karadžić requests access to all confidential *inter partes* material in the *Tolimir* case²⁴ and is satisfied that Karadžić has identified the material sought with sufficient particularity. Nowhere in the Motion does the Accused request access to *ex parte* material. For this reason, the Trial Chamber will not make any finding in this regard.

16. As to the existence of a legitimate forensic purpose for access to the material sought, the Trial Chamber concurs that there is a significant factual nexus between the two cases, in that the events addressed in the *Tolimir* case are closely related to the charges brought against Karadžić. In particular, Tolimir is alleged to have been a member of the JCE with Karadžić to forcibly transfer or deport the Bosnian Muslim population from Srebrenica and Žepa and murder the able-bodied Muslim men from Srebrenica.²⁵ In turn, the Karadžić Third Amended Indictment alleges that Karadžić participated in the JCE between 11 July and 1 November 1995 with the purpose “to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the women, young children and some elderly men from Srebrenica”.²⁶ In the light of above, the Trial Chamber is satisfied that a significant factual nexus between the *Karadžić* and *Tolimir* cases exists, warranting granting Karadžić access to the material listed in categories (a) and

²⁴ Motion, para. 11.

²⁵ *Tolimir* Indictment, paras. 27, 35, 71.

²⁶ *Karadžić* Third Amended Indictment, para. 20.

(c) of the Motion, that is, all confidential *inter partes* closed and private session testimony transcripts and all confidential *inter partes* exhibits in the *Tolimir* case.

17. With respect to the material listed in categories (b) and (d) of the Motion, namely, all closed session hearing transcripts and all confidential *inter partes* filings and submissions and all confidential Trial Chamber decisions, the Trial Chamber recalls that it is incumbent on the party seeking access to avoid engaging in a “fishing expedition”.²⁷ In this case, the Trial Chamber considers that the Motion does not amount to such abuse. The Trial Chamber finds that if Karadžić has access to the filings, submissions, decisions and hearing transcripts relating to confidential evidentiary material in the *Tolimir* case, he will be able to understand and make use of the confidential evidentiary material better.²⁸ According to the jurisprudence of the Tribunal, the applicable standard is only that there be a “good chance” that the confidential materials will materially assist the case of the party seeking access and that it does not require “accused seeking access to confidential *inter partes* materials in other cases to establish a specific reason that each individual item is likely to be useful”.²⁹ The principle of equality of arms also demands that the Chamber give Karadžić a chance to understand the proceedings and evidence and evaluate their relevance to his own case, in common with the Prosecution.³⁰ Accordingly, once Karadžić has been granted access to the material in categories (a) and (c) of the Motion, which are confidential exhibits and confidential closed and private session testimonies, he should not be prevented from accessing filings, submissions, decisions and hearing transcripts which may relate to such confidential evidence.³¹ The Trial Chamber grants Karadžić’s request for access to the material listed in categories (b) and (d) of the Motion. It notes, however, that, as the Appeals Chamber notes,³² the Prosecution and Tolimir will have the opportunity to apply to the Trial Chamber for any additional protective measures or redactions, should they deem it necessary.

18. The Trial Chamber notes that some of the confidential *inter partes* material might fall into the category of Rule 70. The jurisprudence of the Tribunal is that such material shall not be released to Karadžić and his defence team unless the provider consents to such disclosure.

²⁷ *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. 3.

²⁸ See *Karadžić* Decision, para. 11.

²⁹ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motion by Radivoje Miletić for Access to Confidential Information, 9 September 2005 (“*Miletić* Decision”), p. 4; *Karadžić* Decision, para. 11.

³⁰ *Karadžić* Decision, para. 11. See also, *Miletić* Decision, p. 4, where the Appeals Chamber considered that “the Trial Chamber’s decisions may help the Applicant to prepare his case by shedding light on the Trial Chamber’s treatment of legal and factual issues that may be common to the two cases”.

³¹ See *Karadžić* Decision, para. 11.

³² *Ibid.*

19. With regard to the protected witnesses for whom delayed disclosure may be justified, the Trial Chamber recalls the *Karadžić* Decision, which found that:

the Trial Chamber seized of the *Karadžić* case is best placed to evaluate, pursuant to Rule 69 of the Rules, whether exceptional circumstances exist to warrant delayed disclosure of the materials related to Prosecution witnesses. Considering the fact that the Prosecution was to provide its witness list by 18 May 2009, the Appeals Chamber deems that, in these circumstances, it is in the interests of judicial expediency to adopt the approach [suggested by the Prosecution]. Accordingly, the Appeals Chamber allows the Prosecution to withhold the material until the Trial Chamber seized of the *Karadžić* case decides on the Prosecution's request for delayed disclosure of *inter partes* confidential material from the *Dragomir Milošević* case.³³

In light of this, the Trial Chamber grants the Prosecution request that the material related to protected witnesses in the *Tolimir* case for whom delayed disclosure may be justified be withheld until the Trial Chamber seized of the *Karadžić* case decides on the Prosecution's request for delayed disclosure of confidential *inter partes* material from the *Tolimir* case.

20. The Trial Chamber notes that pursuant to Rule 75(F) protective measures in force in the *Tolimir* case should apply to any material released to Karadžić.

21. Finally, the Trial Chamber notes that Karadžić specifically requests access to confidential material on an ongoing basis for the duration of the pre-trial and trial proceedings. In principle, it is the preferred approach of the Trial Chamber to limit access to material up to the date of the request (or decisions upon that request).³⁴ However, as a matter of judicial economy, and based on the particular circumstances of both cases—the trials in both cases are expected to commence in the near future—the Trial Chamber considers that access to confidential material in the *Tolimir* case should be granted to Karadžić and his defence team on an ongoing basis.

22. The Trial Chamber acknowledges that no evidence has yet been admitted in the *Tolimir* case and that, therefore, there is at the present time no confidential evidentiary material. However, evidence will in due course be admitted and, under the terms of the present Decision, Karadžić will have access to it on an ongoing basis. The Trial Chamber recalls that the Appeals Chamber held that Karadžić will be able to better understand and make use of confidential evidentiary material in the *Dragomir Milošević* case, such as exhibits and testimony transcripts, if he has access to the filings, submissions, decisions and hearing transcripts relating to that material³⁵ and that the applicable standard is only that there be a “good chance” that the confidential materials will

³³ *Karadžić* Decision, para. 14.

³⁴ See in this regard *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, para. 18.

³⁵ *Karadžić* Decision, para. 11.

materially assist the case of the party seeking access.³⁶ There is a good chance that the non-evidentiary confidential materials that have been produced so far in the *Tolimir* case will materially assist Karadžić in that he will be better able to understand and make use of the confidential evidentiary material that will be provided to him in due course in the future. Therefore the Trial Chamber does not accept the submission of the Prosecution that the Motion is premature given the stage of the case on the grounds that no evidentiary materials have yet been entered in the record.³⁷

IV. DISPOSITION

23. For the foregoing reasons, pursuant to Rules 54, 69, 70 and 75 of the Rules, the Trial Chamber hereby **GRANTS** the Motion in part, and **ORDERS** as follows:

1. On an ongoing basis, in accordance with the terms and conditions of the present Decision and unless directed otherwise by the Trial Chamber, the Registry shall provide access to Karadžić and his defence team, subject to Rule 70 consent where applicable, to all confidential *inter partes* material, including all confidential closed and private session testimony transcripts, all closed session hearing transcripts, all confidential exhibits, all confidential *inter partes* filings and submissions and all confidential Trial Chamber decisions.
2. The Prosecution shall identify to the Registry, as soon as practicable, what confidential *inter partes* material in the *Tolimir* case can be immediately disclosed to Karadžić and what confidential *inter partes* materials, if any, cannot be immediately disclosed to Karadžić, because they are subject to delayed disclosure pursuant to a decision in the *Karadžić* case or because the Prosecution has requested or is about to request the Trial Chamber in the *Karadžić* case that they be subject to delayed disclosure.
3. The Registry shall disclose the material that cannot be immediately disclosed pursuant to point 2 above, only in accordance with a decision on delayed disclosure by the Trial Chamber in the *Karadžić* case or upon the notification by the Prosecution that it has decided not to call a particular witness.
4. The Prosecution, Tolimir and his defence team shall identify, as soon as practical, to the Registry any material in the *Tolimir* case that has been provided subject to Rule 70, and subsequently, seek leave from the Rule 70 providers to disclose such to Karadžić and his defence team and inform the Registry whether such consent has been obtained.

³⁶ *Karadžić* Decision, para. 11.

5. The Registry shall withhold any material provided pursuant to Rule 70, as identified by the Prosecution, Tolimir and his defence team, 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.
6. Except where directly and specifically necessary for the preparation of the case, and only upon leave granted by the Trial Chamber, Karadžić 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 *Tolimir* 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 or prior testimony of protected witnesses disclosed to Karadžić and his defence team, or the contents thereof, in whole or in part.
7. If any confidential or non-public material is disclosed to the public, Karadžić 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 Karadžić 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 Karadžić 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 Karadžić means four legal advisers, two case managers and one investigator who have been assigned by the Registry and any others specifically to be assigned by the Registry to the defence team;

³⁷ Prosecution Response, para. 8.

- 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 Karadžić and his defence team; the “public” includes, without limitation, family, friends, and associates of Karadžić, 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 9th day of September 2009
At The Hague
The Netherlands

[Seal of the Tribunal]