



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

Date: 2 June 2010

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: 2 June 2010

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON DEFENCE REQUESTS FOR ACCESS TO
CONFIDENTIAL MATERIALS IN THE *PROSECUTOR V. TOLIMIR*
CASE**

Office of the Prosecutor
Mr. Peter McCloskey

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 seised of “General Miletić’s Request for Access to Confidential Information in the Tolimir Case” (“Miletić Motion”) filed on 1 March¹ and hereby renders its decision thereon.

A. MOTION

1. The Miletić Motion requests that the Miletić Defence be given access to all confidential transcripts of all hearings in closed and private session and to all confidential evidence, which will be admitted or presented in Case No. IT-05-88/2-T *Prosecutor v. Tolimir* (“*Tolimir Case*”), including all confidential orders and decisions regarding evidence rendered in the *Tolimir Case*.² The Miletić Defence request is limited to *inter partes* material.³ The Miletić Defence requests access to the confidential materials on a regular and continuous basis.⁴

2. The Miletić Defence submits that there is an obvious link between the Case No. IT-05-88/T, *Prosecutor v. Popović et al.* (“*Popović et al. case*”) and the *Tolimir* case in that both cases are related to the same events which occurred in July 1995 in eastern Bosnia.⁵ The Miletić Defence submits that although the trial hearings in the Miletić case have finished, the investigations concerning the events in Srebrenica and Žepa are ongoing and new evidence relevant to the Miletić Defence may be presented during the trial of Zdravko Tolimir.⁶ The Miletić Defence further submits that taking into account the factual similarities between the two cases, the confidential information in the *Tolimir* case may be relevant to the Miletić case.⁷

3. The Miletić Defence also requests that the Trial Chamber order the Registry to ensure that it is given access to public materials in the *Tolimir Case* on a regular and continuous basis and as soon as possible.⁸

¹ Original in French “*Requête du Général Miletić aux Fins D’Acces à des Informations Confidentielles dans l’Affaire Tolimir*”, filed on 1 March 2010; translation into English, “General Miletić’s Request for Access to Confidential Information in the Tolimir Case”, filed on 3 March 2010.

² Miletić Motion, para. 1.

³ *Ibid.*, para. 1.

⁴ *Ibid.*, para.9(b).

⁵ *Ibid.*, para.4.

⁶ *Ibid.*, para.5.

⁷ *Ibid.*, para. 6.

⁸ *Ibid.*, para.9(c).

B. JOINDER

4. On 4 March 2010, the Nikolić Defence filed “Motion on Behalf of Drago Nikolić Joining *Requête du Général Miletić aux Fins D’Acces à des Informations Confidentielles dans l’Affaire Tolimir*” (“Nikolić Joinder Motion”). The Nikolić Defence joins and adopts *mutatis mutandis* all arguments found in the Miletić Motion⁹ and requests that the Trial Chamber allow Nikolić access to all confidential materials in the *Tolimir* case.¹⁰

5. On 8 March 2010 the Popović Defence filed “Vujadin Popović Defence Notification on Joining General Miletić’s Request for Access to Confidential Information in the *Tolimir* Case” (“Popović Joinder Notification”). The Popović Defence submits that it fully agrees with all arguments presented in the Miletić Motion, joins the Miletić Motion and requests that the access to the confidential information from the *Tolimir* Case, described in the Miletić Motion, be granted.¹¹

6. On 12 March 2010, the Pandurević Defence filed “Motion on behalf of Vinko Pandurević Joining General Miletić’s Request for Access to Confidential Information in the *Tolimir* Case” (“Pandurevic Joinder Motion”). The Defence for Vinko Pandurević joins and adopts all arguments raised in the Miletić Motion and requests the Trial Chamber to allow Pandurević access to all confidential materials in the *Tolimir* Case.¹²

C. RESPONSES

7. On 5 March 2010, the Prosecution filed “Prosecution Consolidated Response to Miletić and Nikolić Motions Requesting Access to Confidential Information in the *Tolimir* Case” (“Prosecution Response”). The Prosecution supports the Miletić and Nikolić requests for access to confidential materials in the *Tolimir* Case and further requests that any order for access should grant all seven *Popović et al.* Accused access to these materials.¹³

8. On 8 March 2010, Tolimir filed “Response to the Requests filed by the Miletić Defence and the Nikolić Defence for access to Confidential Information in the *Prosecutor v. Tolimir* Case” (“Tolimir Response”). Tolimir submits that the Chamber should grant access to confidential material in the *Tolimir* Case to the Accused in the *Popović et al.* Case under the same conditions

⁹ Nikolić Joinder Motion, para. 2.

¹⁰ Nikolić Joinder Motion, para. 3.

¹¹ Popović Joinder Notification, para. 2

¹² Pandurevic Joinder Motion, p. 2.

¹³ Prosecution Response, para. 1.

and in the same manner as Tolimir was granted access on 8 July 2009¹⁴ to confidential materials in the *Popović et al* case.¹⁵

D. APPLICABLE LAW

9. 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.¹⁶ 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 geographical, temporal, or otherwise material overlap between the two cases.¹⁷ 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.¹⁸

10. 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.¹⁹ This is the case even where the Rule 70 provider(s) consented to the disclosure of the material in one or more prior cases.²⁰

11. 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

¹⁴ *Prosecutor v. Vujadin Popović et al.*, IT-05-88-T, Decision on Tolimir Motion for Access to Confidential Material, para 16.

¹⁵ Tolimir Response, para. 2.

¹⁶ *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, Mrđa, Stakić and Brdanin* Cases, 24 April 2009 ("*Župljanin* Decision"), para. 11.

¹⁷ *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.

¹⁸ *Ibid.*

¹⁹ *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.

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)(ii) further provides that a party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply, if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings. Moreover, Rule 75(I) provides that before determining an application under Rule 75(G)(ii), the Chamber shall endeavour to obtain all relevant information from the first proceedings, including from the parties to those proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.

E. DISCUSSION

12. As to the existence of a legitimate forensic purpose for access to the *inter partes* confidential material sought, the Miletić Defence submits that there is an obvious link between the *Popović et al* Case and the *Tolimir* Case.²¹ The Trial Chamber concurs that there is a significant factual nexus between the two cases in so far as they certainly meet the requirement of having similar temporal and geographical scopes. The Trial Chamber is satisfied that the Miletić Defence has shown a legitimate forensic purpose for being granted access to the *inter partes* confidential material.

13. 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 the Miletić Defence unless the provider consents to such disclosure. In addition, the *inter partes* confidential material might also contain information about the personal and family situation of Tolimir. The Trial Chamber is of the view that such material has no bearing on the substance of the *Popović et al.* case and thus holds that the material of this nature shall not be disclosed to the Miletić Defence.

14. The Miletić Defence does not seek access to *ex parte* confidential material. Therefore the Trial Chamber will not deal with it in this Decision.

15. The Trial Chamber notes that, in accordance with Rule 75(F), protective measures ordered in the *Tolimir* case will continue to apply to any material released to the Miletić Defence.

16. The Trial Chamber notes that the Miletić Defence request access to confidential materials for the duration of the trial proceedings. In principle, it is the preferred approach of the Trial

²⁰ *Karadžić* Decision, para. 9; *Gotovina* Decision, para. 5; *Krajišnik* Decision, p. 6.

²¹ *See Miletić Motion*, para. 6.

Chamber to limit access to material up to the date of the request (or decisions upon that request).²² However, as a matter of judicial economy, and based on the particular circumstances of both cases—the evidentiary phase of the *Popović et al* case is completed and the case against Tolimir has only recently commenced—the Trial Chamber considers that access to confidential material in the *Tolimir* case should be granted to the Miletić Defence on an ongoing basis.

17. With regard to the request of the Miletić Defence that the Registry be ordered to ensure that it is given access to public materials in the *Tolimir* Case on a regular and continuous basis and as soon as possible,²³ the Trial Chamber notes that many public materials from the *Tolimir* Case, such as transcripts of hearings, are already on the website of the Tribunal.²⁴ Public exhibits from the *Tolimir* Case will not be available on the website until the Judgement has been delivered but they are available from the Registry upon request.

18. Lastly, the Trial Chamber finds in the interests of justice and as a matter of judicial economy that what has been granted to the Miletić Defence shall also be granted to the Defence for the other Accused in the *Popović et al.* Case.

II. DISPOSITION

For the foregoing reasons, pursuant to Rules 54, 70 and 75 of the Rules, the Trial Chamber **GRANTS** the Miletić Motion **IN PART**, and **ORDERS** as follows:

1. On an ongoing basis and unless otherwise directed by the Chamber, the Registry shall provide access for all the Accused in the *Popović et al.* Case, subject to Rule 70 consent where applicable, and with the exception of material related to personal information about Tolimir and his family members, to all *inter partes* confidential material in the *Tolimir* Case, including all transcripts of hearings held in private and closed session, all relevant exhibits kept under seal and all confidential filings, submissions and decisions.
2. The Tolimir Defence shall assist the Registry in identifying material related to personal information about Tolimir and his family members and such material shall not be disclosed to the Accused in the *Popović et al.* Case.
3. The Prosecution and the Defence teams in the *Tolimir* Case shall identify to the Registry any material in the *Tolimir* case that has been provided subject to Rule 70, and subsequently,

²² See in this regard *Karadžić* Decision, para. 18.

²³ *Ibid*, para.9(c).

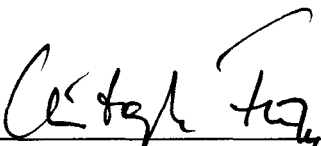
²⁴ www.icty.org/action/cases/4 and icr.icty.org.

seek leave from the Rule 70 providers to disclose such to the Accused in the *Popović et al.* Case 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 *Tolimir* 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. No *ex parte* confidential material from the *Tolimir* Case shall be disclosed to the Accused in the *Popović et al.* Case.
6. Except where directly and specifically necessary for the preparation of the case, and only upon leave granted by the Trial Chamber, the Accused in the *Popović et al.* Case shall not disclose to the public, to the media, or to their 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 of Protected Witnesses, or prior testimony disclosed to the Accused in the *Popović et al.* Case, or the contents thereof, in whole or in part.
7. The Accused in the *Popović et al.* Case 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 Trial Chamber. If any confidential or non-public material is disclosed to the public, the Accused in the *Popović et al.* Case 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 the Accused in the *Popović et al.* Case as soon as the material is no longer needed for the preparation of the case.
8. If any member of the Defence in the *Popović et al.* Case 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. With respect to public materials in the *Tolimir* Case that are not currently on the Tribunal website, the Registry shall provide access to the Accused in the *Popović et al.* Case upon request in as efficient a manner as possible.
11. For the purpose of this Decision:
- a. the “the Accused in the *Popović et al.* Case” means Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević, their defence counsel and immediate legal assistants and staff and any others specifically to be assigned by the Registry to their defence teams;
 - 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 Accused in the *Popović et al.* Case and their Defence Teams; the “public” includes, without limitation, family, friends, and associates of the Accused in the *Popović et al.* Case, 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.



Christoph Flügge
Presiding

Dated this second day of June 2010
At The Hague
The Netherlands

[Seal of the Tribunal]