



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
IT-95-5/18-T
Date: 18 January 2012
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: 18 January 2012

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

DECISION ON MOTION FOR ACCESS TO MFI AND MNA DOCUMENTS

The Prosecutor v. Zdravko Tolimir

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

The Prosecutor v. Radovan Karadžić

Office of the Prosecutor
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused
Radovan Karadžić

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”);

BEING SEISED OF the “Motion for Access to ‘MFI’ and ‘MNA’ Documents”, filed on 22 November 2011 (“Motion”), in which the accused Radovan Karadžić requests access to documents marked for identification (“MFI”) and documents marked as not admitted (“MNA”) in the case of *Prosecutor v. Zdravko Tolimir* (“*Tolimir case*”) pursuant to Rule 75(G)(i) of the Rules of Procedure and Evidence (“Rules”);¹

NOTING that Karadžić recalls the “Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the Tolimir Case”, filed on 9 September 2009 (“Pre-Trial Decision”), in which the Chamber granted Karadžić access to, *inter alia*, all confidential exhibits in the *Tolimir case*;²

NOTING that Karadžić submits that the Registry did not disclose to him MFI or MNA documents because the Registry did not consider such documents to be “exhibits” within the meaning of the Pre-Trial Decision, and he therefore seeks a further order from the Chamber so that such documents may be disclosed to him;³

NOTING that Karadžić submits that there are many possible reasons for documents being MFI or MNA and the fact that a document is not admitted as an exhibit in a particular case does not mean that it lacks value or relevance to an accused charged with “the same events” as those charged in the case from which the accused seeks MFI or MNA documents;⁴

NOTING that Karadžić submits that the Chamber has already found that Karadžić’s case has sufficient overlap with that of the *Tolimir case* as to warrant disclosure of confidential materials and, therefore, the Chamber should extend this access to MFI and MNA documents from the *Tolimir case*;⁵

NOTING the “Reply to Radovan Karadžić’s Motion for Access to Documents Marked for Identification or Documents Marked as Not Admitted”, filed on 25 November 2011 (“Reply”), in which the accused Zdravko Tolimir (“the Accused”) supports the Motion and submits several

¹ Motion, para. 1.

² *Ibid.*, para. 2.

³ *Ibid.*, paras. 3–4.

⁴ *Ibid.*, para. 5.

⁵ *Ibid.*, para. 6.

reasons why MFI and MNA documents might be of great importance to the preparation of an effective defence;⁶

NOTING that the Prosecution did not file a response to the Motion;

NOTING and recalling the applicable law governing party motions for access to confidential materials as set out in detail in the Pre-Trial Decision, which entitles a party to seek material from any source as long as a legitimate forensic purpose for such access has been shown, including access to confidential *inter partes* material where the applicant can demonstrate the existence of a factual nexus between the applicant's case and the case from which the material is sought;⁷

NOTING the Chamber's finding of a significant factual nexus between Karadžić's case and the *Tolimir* case,⁸ and its ensuing order that "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";⁹

NOTING that once an accused has been granted access to confidential exhibits, confidential testimony, or testimony heard in closed session in another case before the Tribunal, the accused should not be prevented from accessing the motions, submissions, decisions, and hearing transcripts that may be related to them;¹⁰

CONSIDERING, however, that it is the established jurisprudence of the Tribunal that Chambers do not disclose confidential material which has not been admitted into evidence to accused in other cases;¹¹

⁶ Reply, paras. 2–3.

⁷ Pre-Trial Decision, paras. 10–13.

⁸ *Ibid.*, para. 16.

⁹ *Ibid.*, para. 23.1 (emphasis added).

¹⁰ *Prosecutor v. 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, para. 11.

¹¹ *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Mićo Stanišić Motion for Disclosure of Exhibit List and "MFI" Materials from *Šešelj* Case (IT-03-67), 8 September 2011 (English translation), 1 August 2011 (French original) ("*Šešelj* Decision"), para. 15; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Zdravko Tolimir's Urgent Request for Disclosure of Confidential Material from the *Perišić* Case, 30 September 2010, para. 11 (holding that the Chamber was not competent to decide on an accused's request for confidential material used during witness interviews, but not tendered into evidence because such material was not part of the trial record, and reminding the accused of the Prosecution's disclosure obligations pursuant to Rules 66 and 68); *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, 10 June 2009, Decision on Defence Motion for Access to Transcripts, Exhibits and Documents in the *Đorđević* Case, para. 21.

CONSIDERING that MFI and MNA materials are by definition not admitted into evidence and not part of the evidentiary record and, as such, remain within the domain of the tendering party;

NOTING further that pursuant to Rules 66 and 68, the Prosecution has an obligation to disclose to an accused, *inter alia*, any materials in its custody or control which are significant to the preparation of the defence or are intended for use by the Prosecutor as evidence at trial,¹² or that in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence,¹³ and if an accused believes that the Prosecution has failed to fulfil its disclosure obligations, the accused may request an order for access to such materials;¹⁴

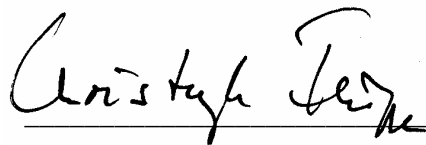
NOTING that the Prosecution is a single indivisible unit and, as such, the disclosure obligations of the Prosecution team in the *Tolimir* case apply to all accused before the Tribunal¹⁵ and include the MFI and MNA materials it has tendered in any case;

CONSIDERING that for the reasons stated above the Chamber finds that Karadžić's request to the Chamber for access to MFI and MNA documents in the *Tolimir* case is premature and, at this stage, is more appropriately addressed to the parties in the *Tolimir* case;

PURSUANT TO Rules 54 and 75(G)(i) of the Rules,

HEREBY DENIES the Motion without prejudice.

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



Judge Christoph Flügge

Presiding Judge

Dated this eighteenth day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

¹² Rule 66(B).

¹³ Rule 68(i).

¹⁴ *Karemera, Ngirumpatse, and Nzirorera v. Prosecutor*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, para. 12.

¹⁵ *Šešelj* Decision, para. 24.