

**UNITED  
NATIONS**



Mechanism for International Criminal Tribunals

Case Nos.: MICT-15-95  
              MICT-15-85  
  
Date: 8 February 2017  
  
Original: English

**BEFORE A SINGLE JUDGE**

**Before:** Judge Aminatta Lois Runeni N’gum  
**Registrar:** Mr. Olufemi Elias  
**Decision of:** 8 February 2017

**PROSECUTOR**

**v.**

**ZDRAVKO TOLIMIR**

***PUBLIC***

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**DECISION ON VUJADIN POPOVIĆ’S REQUEST FOR ACCESS  
TO CONFIDENTIAL MATERIAL  
IN THE PROSECUTOR V. ZDRAVKO TOLIMIR CASE**

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**The Office of the Prosecutor:**

Mr. Serge Brammertz  
Mr. Mathias Marcussen

**Counsel for Mr. Vujadin Popović:**

Mr. Zoran Živanović

**Counsel for Mr. Zdravko Tolimir:**

Mr. Aleksandar Gajić

1. I, Aminatta Lois Runeni N’gum, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Single Judge in this case,<sup>1</sup> am seised of a motion filed by Vujadin Popović (“Popović”) on 9 January 2017, requesting access to *inter partes* confidential material in the case of *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2 (“*Tolimir* case”).<sup>2</sup> The Prosecution filed its response on 12 January 2017.<sup>3</sup> Popović submitted a reply on 16 January 2017.<sup>4</sup>

## I. BACKGROUND

2. Popović was the Chief of Security of the Army of Republika Srpska (“VRS”) Drina Corps and held the rank of Lieutenant-Colonel.<sup>5</sup> On 10 June 2010, Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) convicted Popović of genocide, extermination and persecution as crimes against humanity, and murder as a violation of the laws or customs of war, for events that unfolded in July 1995 in the wake of the fall of Srebrenica and Žepa, and sentenced him to life imprisonment.<sup>6</sup> On 30 January 2015, the ICTY Appeals Chamber reversed in part Popović’s convictions for genocide, extermination and persecution as crimes against humanity, and murder as a violation of the laws or customs of war, entered a conviction for conspiracy to commit genocide, and affirmed Popović’s sentence of life imprisonment.<sup>7</sup> Popović is currently serving his sentence in the Federal Republic of Germany.<sup>8</sup>

3. Zdravko Tolimir (“Tolimir”) was an Assistant Commander and the Chief of the Sector for Intelligence and Security Affairs of the Main Staff of the VRS.<sup>9</sup> On 12 December 2012, Trial Chamber II of the ICTY convicted Tolimir of genocide, conspiracy to commit genocide, murder as a violation of the laws or customs of war, as well as extermination, persecution, and inhumane acts through forcible transfer as crimes against humanity with respect to the events that occurred in July 1995 in Srebrenica and Žepa and sentenced him to life imprisonment.<sup>10</sup> On 8 April 2015, the

<sup>1</sup> Order Assigning a Single Judge to Consider an Application, 16 January 2017, p. 1.

<sup>2</sup> Vujadin Popović Defence Request for Access to Confidential Materials in the *Prosecutor v. Zdravko Tolimir* Case, 9 January 2017 (“Motion”). See also Vujadin Popović’s Defence Corrigendum of the Request for Access to Confidential Materials in the *Prosecutor v. Zdravko Tolimir* Case, 11 January 2017.

<sup>3</sup> Prosecution Response to Popović Defence Request for Access to Confidential Materials in the *Tolimir* Case (“Response”), 12 January 2017.

<sup>4</sup> Vujadin Popović’s Defence Reply on the Prosecution’s Response to Popović’s Defence Request for Access to Confidential Materials in the *Prosecutor v. Zdravko Tolimir* Case, 16 January 2017 (“Reply”).

<sup>5</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Judgement, 30 January 2015 (“Appeal Judgement”), para. 4; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version) (“Trial Judgement”), paras. 3, 1090.

<sup>6</sup> Trial Judgement, paras. 1-3, 86, p. 832.

<sup>7</sup> Appeal Judgement, para. 2117.

<sup>8</sup> See *Prosecutor v. Vujadin Popović*, Case No. MICT-15-85-ES.2, Order Designating State in which Vujadin Popović is to Serve His Sentence, 28 May 2015, pp. 1, 2.

<sup>9</sup> *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, Judgement, 8 April 2015 (“*Tolimir* Appeal Judgement”), para. 2; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Judgement (public with confidential annex C) (“*Tolimir* Trial Judgement”), 12 December 2012, paras. 2, 83.

<sup>10</sup> *Tolimir* Trial Judgement, paras. 5-10, 1239, 1242.

ICTY Appeals Chamber partly reversed Tolimir's convictions for genocide and extermination as a crime against humanity and upheld his sentence of life imprisonment.<sup>11</sup>

## II. SUBMISSIONS

4. Popović seeks access to all confidential *inter partes* material in the *Tolimir* case to search for new facts for the purpose of preparing a review application under Rule 146 of the Rules of Procedure and Evidence of the Mechanism ("Rules").<sup>12</sup> He submits that, with the exception of inhumane acts (forcible transfer) and deportation as crimes against humanity, he has been convicted for the same crimes that formed the basis of Tolimir's conviction.<sup>13</sup> For this reason, he argues that "it has been established that the confidential material from the *Tolimir* [c]ase is likely to be highly relevant to the factual allegations and evidence" against him.<sup>14</sup> Accordingly, Popović submits that this "material is likely to materially assist" him.<sup>15</sup> He adds that he was granted access to confidential material from the trial proceedings in the *Tolimir* case, but not to "such materials from the Appeal Stage of the *Tolimir* case in particular after 30 January 2015 when the Appeal Judgement in *Popović et al.* was rendered".<sup>16</sup>

5. The Prosecution responds that Popović fails to establish a legitimate forensic purpose for the requested access and that he should be denied any further access to the confidential material in the *Tolimir* case.<sup>17</sup> Specifically, the Prosecution contends that Popović does not make any submissions on a new fact, let alone one that is capable of constituting the basis for a review application under Rule 146 of the Rules.<sup>18</sup>

6. In his reply, Popović maintains his arguments that the requested material is capable of assisting him in the preparation of a review application,<sup>19</sup> and contends that after the

<sup>11</sup> *Tolimir* Appeal Judgement, para. 649.

<sup>12</sup> Motion, pp. 2, 3. See Reply, paras. 4, 5.

<sup>13</sup> Motion, p. 3.

<sup>14</sup> Motion, p. 3.

<sup>15</sup> Motion, p. 3. See Motion, p. 2; Reply, para. 11.

<sup>16</sup> Motion, p. 3, referring to *Prosecutor v. Zdravko Tolimir*, Case Nos. IT-05-88/2-T & IT-05-88-T, Decision on Defence Requests for Access to Confidential Materials in the *Prosecutor v. Tolimir* Case, 2 June 2010 ("*Tolimir* Decision of 2 June 2010"). See Reply, paras. 6-8.

<sup>17</sup> Response, paras. 1, 3.

<sup>18</sup> Response, para. 2, referring, *inter alia*, to *Prosecutor v. Radovan Karadžić*, Case Nos. MICT-13-55-A & MICT-14-83, Decision on Stanislav Galić's Motion for Access to Confidential Materials in the *Karadžić* Case, 9 June 2016 ("*Karadžić* Decision of 9 June 2016"), paras. 9-12; *Eliézer Niyitegeka v. Prosecutor*, Case No. MICT-12-16, Decision on Niyitegeka's Urgent Request for Orders Relating to Prosecution Witnesses, 29 January 2016 ("*Niyitegeka* Decision of 29 January 2016"), para. 9.

<sup>19</sup> Reply, paras. 11-12. Popović adds that the Prosecution's reliance on the *Karadžić* Decision of 9 June 2016 and *Niyitegeka* Decision of 29 January 2016 is inapposite as they address arguments that are distinct from his. See Reply, paras. 13, 14.

pronouncement of the Appeal Judgement in his case, the assignment of his defence team ceased and he no longer received disclosures from the *Tolimir* case.<sup>20</sup>

### III. APPLICABLE LAW

7. Pursuant to Rule 86(F) of the Rules, protective measures ordered in proceedings before the ICTY continue to have effect *mutatis mutandis* in any other proceedings before the Mechanism unless and until they are rescinded, varied, or augmented. In accordance with the settled jurisprudence of the ICTY and the ICTR, a party is entitled to seek material from any source, including from another case before the ICTY, to assist in the preparation of its case.<sup>21</sup> Where a party requests access to confidential material from another case, such material must be identified or described by its general nature and a legitimate forensic purpose must be demonstrated.<sup>22</sup> Consideration must be given to the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the requesting party's case and the case from which such material is sought.<sup>23</sup> Further, the requesting party must establish that this material is likely to assist its case materially, or that there is at least a good chance that it would.<sup>24</sup>

### IV. DISCUSSION

8. Popović has identified the material sought with sufficient precision by referring to all confidential *inter partes* material from the *Tolimir* case.<sup>25</sup> I further note that, in support of his request, Popović refers to a decision granting him access to confidential material from the trial proceedings in the *Tolimir* case.<sup>26</sup> As such, to the extent that Popović's current request encompasses material for which he has already been granted access, the request is moot.<sup>27</sup>

<sup>20</sup> Reply, para. 9. Popović contends that the current counsel assigned for the review proceedings has the duty to inspect all available material likely favourable for his case and assess if such material contains new facts for the purposes of review under Rule 146(A) of the Rules. See Reply, paras. 9, 10, referring to the Code of Professional Conduct for Defence Counsel Appearing before the Mechanism, MICT/6, 14 November 2012 ("Code of Conduct for Defence Counsel"), Articles 11, 12.

<sup>21</sup> *Prosecutor v. Radovan Karadžić*, Case Nos. MICT-13-55-A & MICT-14-83, Decision on Stanislav Galić's Further Motion for Access to Confidential Materials in the *Karadžić* Case, 4 August 2016 ("*Karadžić* Decision of 4 August 2016"), para. 11 and references therein.

<sup>22</sup> *Karadžić* Decision of 4 August 2016, para. 11 and references therein.

<sup>23</sup> *Karadžić* Decision of 4 August 2016, para. 11 and references therein.

<sup>24</sup> *Karadžić* Decision of 4 August 2016, para. 11 and references therein.

<sup>25</sup> See Motion, pp. 2, 3. Cf. *Prosecutor v. Dragomir Milošević*, Case Nos. IT-98-29/1-A & IT-95-5/18-PT, Decision on Radovan Karadžić's Motion for Access to Confidential Material in the *Dragomir Milošević* Case 19 May 2009, para. 9.

<sup>26</sup> See Motion, p. 3, referring to *Tolimir* Decision of 2 June 2010. See also Reply, paras. 6-8.

<sup>27</sup> See, e.g., *Prosecutor v. Vojislav Šešelj*, Case Nos. MICT-16-99-A & MICT-15-96-PT, Decision on Stanišić's Request for Access to Confidential Materials in the *Šešelj* Case, 24 January 2017, p. 2 (where the Presiding Judge states that Stanišić's access continues under the same terms and conditions as was granted by the ICTY since there has been no rescission, variation, or augmentation of the protective measures applicable to the materials in question). I note that the Prosecution's last notification of compliance with the *Tolimir* Decision of 2 June 2010 was filed on 12 April 2013. See

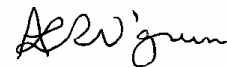
9. With respect to any material from the appeal proceedings in the *Tolimir* case, I observe that Popović's case has concluded<sup>28</sup> and that the only legitimate forensic purpose for obtaining access to such material is to establish a new fact capable of constituting the basis for a review of his convictions.<sup>29</sup> In this respect, Popović simply points to the nexus between his case and the *Tolimir* case, without explaining how the material requested would serve to establish a new fact and impact his conviction. Accordingly, Popović has failed to demonstrate a legitimate forensic purpose for receiving access to the requested material.<sup>30</sup>

## V. DISPOSITION

10. For the foregoing reasons, the Motion is **DISMISSED**.

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

Done this 8<sup>th</sup> of February 2017,  
At The Hague,  
The Netherlands.




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Judge Aminatta Lois Runeni N'gum  
Single Judge

[Seal of the Mechanism]

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*Prosecutor v. Zdravko Tolimir*, Case Nos. IT-05-88/2-A & IT-05-88-A, Prosecution's Notice of Compliance with Decision on Defence Requests for Access to Confidential Materials in the Tolimir Case, 12 April 2013 (confidential).

<sup>28</sup> See *supra* para. 2.

<sup>29</sup> See *Karadžić* Decision of 9 June 2016, para. 10; *Niyitegeka* Decision of 29 January 2016, para. 9; *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33-R86.2, Second Decision on Motion for Access to Confidential Material from the *Nshogoza* Case, 9 November 2015, para. 5. As to Popović's argument that the Prosecution's reliance on the *Karadžić* Decision of 9 June 2016 and the *Niyitegeka* Decision of 29 January 2016 is inapposite, I observe that they state the relevant law applicable with respect to access to confidential material from other cases for the purpose of a review application. See *supra* n. 19.

<sup>30</sup> As to Popović's argument concerning his counsel's duty to inspect all available material likely favourable for his case, I consider that the obligations stemming from Articles 11 and 12 of the Code of Conduct for Defence Counsel do not impact the analysis for determining requests for access to confidential material from another case. See *supra* n. 20.