



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-99-36-T
Date: 13 March 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Ivana Janu
Judge Chikako Taya

Registrar: Mr. Hans Holthuis

Decision of: 13 March 2002

PROSECUTOR

v.

**RADOSLAV BRĐANIN
and
MOMIR TALIĆ**

**DECISION ON JOINT MOTION BY MOMCILO KRAJIŠNIK
AND BILJANA PLAVŠIĆ FOR ACCESS TO TRIAL
TRANSCRIPTS OF BOTH OPEN AND CLOSED SESSIONS
AND DOCUMENTS AND THINGS FILED UNDER SEAL**

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman and Ms. Milka Maglov, for Radoslav Brđanin
Mr. Xavier de Roux and Ms. Natacha Fauveau-Ivanović, for Momir Talić

I. BACKGROUND

1. On 8 February 2002 the Defence in the case *The Prosecutor v. Krajišnik and Plavšić* (“the Applicants”) pending before Trial Chamber III filed a joint motion (“the Motion”) seeking an order from Trial Chamber II to allow the Applicants access to trial transcripts of both open and closed sessions and documents and things filed under seal in the case *The Prosecutor v. Brđanin and Talić*. The Applicants further request an order from Trial Chamber II to direct Registry to provide the Applicants access to the materials subject to the Motion in a prompt and timely manner.¹

2. The Applicants argued that the common nature of the two indictments, which was laid out in great detail in the Motion, makes the trial transcripts and other documents and things filed under seal in the case *The Prosecutor v. Brđanin and Talić* material that would significantly assist Krajišnik and Plavšić in their case.²

3. On 25 February 2002 the Prosecution filed its response to the Motion³ in which it stated that the Prosecution has no objection to the Registry providing the Applicants with open session transcripts and redacted closed session transcripts. The Prosecution, however, objects to disclosure of the identities of protected witnesses and to grant access to documents and things filed under seal other than redacted confidential exhibits. The Prosecution further objects to the disclosure in any form of any material provided under Rule 70.

4. On 26 February 2002, both the Defence of Radoslav Brđanin and Momir Talić orally stated that they do not have any objection to the Motion and that the Applicants should have access to everything that was filed in the present case.⁴ The Defence did not file a written response to the Motion.

¹ Joint Notice of Motion to Allow Access to Trial Transcript of Both Open & Closed Sessions & Documents and Things Filed Under Seal, Case No IT-99-36-T, February 8, 2002; (“the Motion”)

² See the Motion, paras 1-9.

³ Prosecution’s Response to “Joint Notice of Motion to Allow Access to Trial Transcript of Both Open & Closed Sessions & Documents and Things Filed Under Seal” by the Accused Momčilo Krajišnik and Biljana Plavšić, Case No. IT-99-36-T, 25 February 2002.

⁴ See trial transcript pp. 2326-2327.

II. DISCUSSION

5. The legal basis of the order sought by the Applicants can be found in Rule 75(D),⁵ which states the following:

“Once protective measures have been issued in respect of a victim or witness, only the Chamber granting such measures may vary or rescind them or authorise the release of protected material to another Chamber for use in other proceedings. If, at the time of the request for variation or release, the original Chamber is no longer constituted by the same Judges, the President may authorise such variation or release, after consulting with any Judge of the original Chamber who remains a Judge of the Tribunal and after giving due consideration to matters relating to witnesses protection.”

6. Some issues raised by the Applicants in their Motion have been dealt with before in the Tribunal and, indeed, in the pre-trial phase of this case.⁶ The relevant jurisprudence has already formulated the principles to be applied in granting access to any accused person awaiting trial to confidential material from a different case. According to these principles, the Defence is always entitled to seek material from *any* source to assist the Accused in his or her case. If the material sought was filed in another trial and remained confidential in that trial, the Defence would be entitled to gain access to that material, provided that it was able

- (a) to identify the documents sought or to describe them by their general nature, and
- (b) to show a legitimate forensic purpose for such access.

Moreover, the Defence should only be granted access to those materials, subject to the imposition of appropriate protective measures.⁷ These requirements will now be examined in turn.

⁵ Rules 66 and 68 relate to the prosecution’s obligations of disclosure. They do not refer to the production of material sought by an accused which he is able to identify sufficiently and which the accused is able to demonstrate may be of assistance to him. The prosecution could not, for example, prevent access by an accused to material publicly available within the Tribunal merely by saying that it must be made available to the accused only through its compliance with Rules 66 and 68. The prosecution does, of course, have a right to be heard in relation to access by an accused to material filed or accepted into evidence on a confidential basis, but that is another matter. See, *The Prosecutor v. Brđanin and Talić*, Decision on Motion by Momir Talić for Access to Confidential Documents, 31 July 2000.

⁶ See for example *Prosecutor v. Kvočka*, Decision on Defense Request for Release of Confidential Material, 3 October 2000; *Prosecutor v. Brđanin and Talić*, Second Decision on Motions by Radoslav Brđanin and Momir Talić for Access to Confidential Documents, November 15, 2000; *Prosecutor v. Hadzihasanović et al.*, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, October 10, 2001; *Prosecutor v. Brđanin and Talić*, Order by the President of the Tribunal on the Motions of Momir Talić and Radoslav Brđanin for Access to Confidential Information in the Cases *The Prosecutor v. Tadić* and *The Prosecutor v. Kovačević*, 11 September 2000; *Prosecutor v. Sikirića et al*, Order Granting Request for Release of Transcript Pursuant to Rule 75(D), 30 March 2001; *Prosecutor v. Sikirića et al*, Order Releasing Transcript and Granting Protective Measures, 18 January 2001.

⁷ *Prosecutor v. Hadzihasanović et al*, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 October 2001, par 10.

7. As to the first of those requirements, the Defence does not have the onus of identifying “exactly what material it seeks”.⁸ An applicant seeking access who is able to show a legitimate forensic purpose for that access cannot be expected to identify exactly what material he needs if he does not know (due to confidentiality orders) what form that material is in or what its exact nature is. The underlying reason for requiring an identification of the documents or of the nature of the documents sought is to prevent an accused or applicant from conducting a “fishing expedition” – that is, seeking access to material in order to discover whether he has any case at all to make.⁹ It is sufficient to require the party to identify as clearly as possible the documents or the nature of the documents to which he seeks access.

8. Given the substantive similarities and the common nature of the Indictment against Brđanin and Talić and the Indictments against Krajišnik and Plavšić, which are laid out in detail in the Motion,¹⁰ with regard to trial transcripts of closed sessions and confidential exhibits, this is manifestly not a “fishing expedition” by the Applicants and therefore, the Trial Chamber is satisfied that this first requirement is met.

9. As to the second of those requirements, that a party must show a legitimate forensic purpose for seeking access, he must show that such access would be likely to assist his case materially, or that there is at least a good chance that it will give that assistance.¹¹

10. The Trial Chamber is satisfied that it is reasonable to say that there is a good chance that the transcripts and exhibits from the case of Prosecutor v. Brđanin and Talić arising out of the events alleged to have occurred in part in the same area and at the same time as those with which the case Prosecutor v. Krajišnik and Plavšić is concerned will materially assist or at least be materially relevant to the Applicants in their case. Moreover, the Trial Chamber takes into consideration that the principle of equality of arms must be interpreted more liberally in this Tribunal than it is in domestic courts, and that every practicable facility must be granted to assist an accused in

⁸ Prosecutor v. Blaskić, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, par 55.

⁹ Prosecutor v. Hadzihasanović et al., Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, October 10, 2001, quoting Prosecutor v. Delalić et al, Case IT-86-21-A, Separate Opinion of Judge David Hunt on Motion by Esad Landžo to Preserve and Provide Evidence, 22 April 1999, par 4.

¹⁰ Joint Notice of Motion to Allow Access to Trial Transcript of Both Open & Closed Sessions & Documents and Things Filed Under Seal, Case No IT-99-36-T, February 8, 2002, paras 1-9.

¹¹ Prosecutor v. Brđanin and Talić, Decision on Motion by Momir Talić for Disclosure of Evidence, 27 July 2000, paras 5-8.

presenting his or her case.¹² The Defence is rarely in the same position as the Prosecution in gathering information and it is only fair that the Defence should be able to take advantage of the work that the Prosecution has already done, even if that is in another case.

11. Finally, as to the third requirement – the protective measures to be applied – Trial Chamber I in the Kvočka case ordered that

“the transcripts, exhibits and confidential materials in the Kvočka case, to date, be disclosed to Trial Chamber II for any purposes that it will deem appropriate in accordance with its jurisprudence in practice, which might allow for disclosure to the Defence in the Brđanin and Talić case, *subject to its taking measures guaranteeing the witnesses in consultation with the Victims and Witnesses Section and, where appropriate, documentary or other evidence, mutatis mutandis, the same degree of protection as they enjoyed previously, and if necessary additional measures such as the adoption of different pseudonyms in the two cases and the prohibition of any mention, should such be the case, of the fact a witness might have already testified before the Tribunal*” (emphasis added).¹³

12. The nature of appropriate protective measures that provide effective protection to witnesses and other persons identified in those documents, *i.e.*, the conditions under which confidential material should be granted to the Applicants, are discussed in some detail in a previous decision of Trial Chamber II during the pre-trial phase of this case.¹⁴

13. The Applicants state in the Motion that the Accused are mindful for the need for confidentiality as to some of the material and that they stand ready to honour and respect any confidentiality terms and conditions and will undertake all necessary steps to do so.¹⁵

14. Krajišnik and Plavšić have sought access to this material because, as already stated, the case *The Prosecutor v Brđanin and Talić* deals with the same geographical region and the same period as the events alleged against the Applicants. At this stage, they do not need to know the identity of the witnesses who gave this evidence in order to determine whether any particular piece of this evidence will in fact assist them in the preparation for their trial. If, having considered the material, the Applicants wish to give further consideration to a particular piece of this evidence, either with a view to calling the witness in the trial themselves or to interview the witness in order to obtain

¹² In this regard see *Prosecutor v. Tadić*, Case IT-94-1-A, Judgement, 15 July 1999, par 52.

¹³ *Prosecutor v. Kvočka et al*, Decision on Defense Request for Release of Confidential Material, 3 October 2000, p. 3. See also Order on the Motions of Momir Talić and Radoslav Brđanin for Access to Confidential Information in the Cases *The Prosecutor v Tadić* and *The Prosecutor v Kovačević*, 11 September 2000, at p. 4.

¹⁴ *Prosecutor v. Brđanin and Talić*, Second Decision on Motions by Radoslav Brđanin and Momir Talić for Access to Confidential Documents, 15 November 2000, paras 8-13.

¹⁵ Joint Notice of Motion to Allow Access to Trial Transcript of Both Open & Closed Sessions & Documents and Things Filed Under Seal, Case No IT-99-36-T, February 8, 2002, par 11.

additional information, then at that stage, and only at that state, they will be in a position to justify the revelation to them of the identity of that protected witness.¹⁶

15. After the Applicants have looked at the evidence in a redacted form, and demonstrated that access to a protected witness may materially assist them in the conduct of the defence and that such assistance is not otherwise reasonable available to them, the Trial Chamber might give consideration to whether access to the witness, direct or indirect, should be granted, and the nature of any variation to the protective measures in favour of those protected witnesses which is required.¹⁷

16. Moreover, it would be a waste of the Tribunal's resources for the Trial Chamber to seek the assistance of the Victims and Witnesses Section pursuant to Rule 69(B) by contacting every witness who gave evidence in this case in order to advise the Trial Chamber what protective measures would be appropriate in relation to the disclosure of their identity to the Applicants if that disclosure is to be granted. However, once the list of witnesses has been narrowed to those for whom the Applicants are able to demonstrate a real need, it would be appropriate for the Trial Chamber to consult the Victims and Witnesses Section, which in turn would contact those witnesses. (That list of witnesses may be nominated by the Applicants to the Trial Chamber on an *ex parte* basis, so that the prosecution is not informed prematurely of the case they may be seeking to make.) Then, and only then, can the Trial Chamber properly decide (on the basis of the information provided by the Victims and Witnesses Section) whether, and under what circumstances, the identity of those witnesses may be revealed to the accused.¹⁸

17. The Trial Chamber finds that the same general procedure might be applied with respect to copies of confidential trial exhibits. That is, after review of the redacted confidential exhibits, the Applicants may apply for access to the exhibits in their original form, under the same test and conditions required for access to a protected witness.

18. As the Prosecution pointed out, the request for access to "other documents and things filed under seal" is very broad. The Prosecution contests that if interpreted literally, the Motion seeks access to all confidential filings, including non-evidentiary filings, which are completely irrelevant to the Applicants. The Trial Chamber is satisfied that an accurate application of the conditions for

¹⁶ Prosecutor v. Brđanin and Talić, Second Decision on Motions by Radoslav Brđanin and Momir Talić for Access to Confidential Documents, 15 November 2000, par 10.

¹⁷ *Idem*, par 12.

granting access to confidential filings to the Applicants, as set out above, might exclude that these kinds of filings can be accessed by the Applicants. In order to be granted access, the Applicants have to identify the documents sought or describe them by their general nature, and need to show a legitimate forensic purpose for such access. In the present case, the Trial Chamber finds that the Applicants did not fulfil these requirements with regard to documents other than trial transcripts and exhibits. The Trial Chamber, in order to grant access to eventual other filings, must be provided with some additional information regarding those other things filed under seal, which would describe their general nature.

19. The Trial Chamber is satisfied that Rule 70(B) constitutes an exception to the general obligation of disclosure, which applies also in the present case. Therefore, if the Prosecution is in possession of information that has been provided to the Prosecutor on a confidential basis and that has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecution without the consent of the person or entity providing the initial information. However, as Rule 70(B) further states, this information shall in any event not be given in evidence without prior disclosure to the accused.

20. The wording of the Motion filed by the Applicants leaves doubt as to whether it is meant to include also access to the trial transcripts of closed sessions and documents and things filed under seal in the case Brđanin and Talić *after the date of the decision*. The case law of the Tribunal has not yet dealt with the question whether a Trial Chamber is allowed to grant such running leave. However, based on the principles discussed above, the following conclusion might be drawn:

21. Rule 75(D) states that a Chamber that granted protective measures in respect of a victim or a witness might rescind them or authorise the release of protected material to another Chamber for use in other proceedings *after* such protective measure have been issued. The wording of the Rule leaves no doubt that a Chamber can vary or rescind protective measures or authorise their release to another Chamber only *ex post*, which means, after having issued the protective measures. Therefore, pursuant to the wording of this Rule, the Trial Chamber rejects to allow the Applicant to access protected material that will be filed after the date of the relevant order.

¹⁸ *Idem*, par 13.

22. Should a Chamber grant such a motion, this would mean that the Prosecution would not be given any opportunity to be heard on the merits concerning the documents sought in the particular case.¹⁹ It is obvious that this requirement can not be met *ex ante*, i.e.: before the confidential transcript or other documents or things under seal are filed.

23. Given the substantive similarities of the two cases, the Trial Chamber understands that most of the future confidential filings will be disclosed to the Applicants pursuant to the Prosecution's obligation under Rules 66 and 68. As to those filings that do not fall under those Rules, the Trial Chamber encourages the parties to find an agreement, which would allow a practical solution, in order to avoid a flood of similar motions.

24. The Application further sought an order of Trial Chamber II to direct Registry to provide the Defence access to the materials subject to the Motion in a prompt and timely manner. The Trial Chamber is aware of the delay in the posting of public transcripts on the ICTY Web Page. Registry, who assured their co-operation in finding a practical solution to this problem, suggested that pursuant to an order of the Trial Chamber they would make the electronic version of public transcripts available to the Applicants on the working day following the day when the transcript was filed. Thus, Registry would forward the electronic version of public transcripts to an email address provided by the Applicants.

¹⁹ In an earlier decision Trial Chamber II found that before making an order pursuant to Rule 75(D), the prosecution should have the opportunity to be heard on the merits concerning the documents sought in the particular case. See *Prosecutor v. Brđanin and Talić*, Decision on Second Motion by Radoslav Brđanin for Access to Confidential Documents, 20 June 2001, par 5.

III. DISPOSITION

For the foregoing reasons, **TRIAL CHAMBER II** hereby orders as follows:

The Applicants are granted:

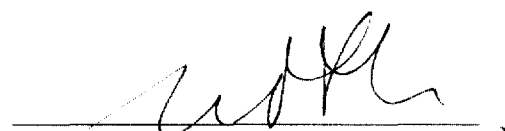
- (a) access by the Registry to open session transcripts produced by Trial Chamber II in the Radoslav Brđanin and Momir Talić trial on a continuous manner;
- (b) access by the Registry to closed session transcripts produced by Trial Chamber II in the Radoslav Brđanin and Momir Talić trial, to date, after the redaction by the Registry of those parts of it which will reveal the identity of any witness who gave evidence for either party on a confidential basis and provided that the necessary protective measures are applied;
- (c) leave to make an application at the appropriate time justifying the revelation to them of the identity of any particular witness;
- (d) access by the Registry to confidential trial exhibits introduced in Trial Chamber II in the Radoslav Brđanin and Momir Talić trial, to date, after the redaction by the Registry of those parts of the exhibit which will reveal the identity of any protected person and provided that the necessary protective measures are applied; and
- (e) leave to make an application at the appropriate time justifying the revelation to them of the exhibit in its original form.

The Registry is directed:

- (f) to provide the Applicants with the documents under (a), (b) and (d) in a prompt and timely manner.

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

Dated this 13th day of March 2002
At The Hague,
The Netherlands.



Judge Carmel Agius
Presiding Judge