

IT-00-39-T
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14 July 2005

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**UNITED
NATIONS**

**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: IT-00-39-T
Date: 14 July 2005
Original: English**

IN THE TRIAL CHAMBER

**Before: Judge Alphons Orié
Judge Joaquín Martín Canivell
Judge Claude Hanoteau**

Registrar: Mr Hans Holthuis

Decision of: 14 July 2005

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

**DECISION ON TODOVIĆ DEFENCE MOTION FOR ACCESS TO CONFIDENTIAL
AND UNDER SEAL MATERIAL IN THE KRAJIŠNIK CASE RELATING TO THE
FOČA PENITENTIARY AND CORRECTION FACILITY**

Office of the Prosecutor:

**Mr. Mark B. Harmon
Mr. Alan Tieger**

Counsel for the Accused:

**Mr. Nicholas Stewart
Ms Chrissa Loukas**

Counsel for Savo Todović:

Mr. Aleksandar Lazarević

Case: IT-00-39-T

14 July 2005

TRIAL CHAMBER I (the “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 (the “Tribunal”);

BEING SEIZED of the “Defence Motion for Access to Confidential and Under Seal Material in the Krajišnik Case Relating to the Foča Penitentiary and Correction Facility” (the “Motion”), filed by the Defence of Savo Todović (the “Applicant”) on 27 May 2005, whereby the Applicant seeks access to all non-public supporting material, transcripts, exhibits, and filings by the parties in the case *Prosecutor v. Momčilo Krajišnik* (the “Krajišnik case”) which relate to Foča KP Dom in the period April 1992 to 30 December 1992, and to all such material on an ongoing basis;

NOTING that, in support of his request, the Applicant argued that there is a geographical, temporal, and material overlap between the two cases and therefore that the material sought in the Motion is directly relevant to the preparation of the Applicant’s case;

NOTING the “Prosecution’s Response to Savo Todović’s Motion for Access to Confidential Material relating to KP Dom Foča” (the “Response”), filed by Prosecution on 10 June 2005, in which the Prosecution does not oppose access to any past material referred to in the Motion provided that the Trial Chamber orders adequate protective measures to maintain the confidentiality of the material in question;

NOTING that the Prosecution states in its Response that “The Applicant does not appear to seek access to *ex parte* material”, but that if the Motion was indeed intended to include such material, the Prosecution would oppose such a request for the reasons set out in the Appeals Chamber decision of 12 April 2005 in the case of *Prosecutor v. Blagoje Simić et al.*¹

NOTING that, moreover, the Prosecution opposes access to future material on an ongoing basis as this would pose an unwarranted and inappropriate limitation on the Trial Chamber’s discretion to deal with issues of confidentiality in the future based on the circumstances existing at the time;

¹ *Prosecutor v. Blagoje Simić*, “Decision on Defence Motion by Franko Simatović for Access to Transcripts, Exhibits, Documentary Evidence and Motions filed by the Parties in the *Simić et al.* case”, Case IT-95-9-A, 12 April 2005.

NOTING that the Applicant did not file a reply to the Prosecution's Response;

CONSIDERING that a party may seek access to non-public material in another case if it can give a sufficient general description of the document sought, even though it cannot describe them in detail, and if it can show a legitimate purpose for such access;

CONSIDERING that, at a minimum, the material sought must be likely to be of material assistance to the Applicant's case and that the relevance of the material sought by a party may be demonstrated by showing the existence of a nexus between the Applicant's case and the case from which such material is sought, that this nexus may amount to a geographical, temporal, or material overlap between the cases;

CONSIDERING that it is within the discretion of the Trial Chamber, having considered the arguments of the parties, to strike a balance between the right of a party to have access to material to prepare its case and the need to ensure the protection of witnesses and the integrity of confidential information;²

FINDING that the Applicant has sufficiently identified and described the non-public material to which he seeks access;

FINDING FURTHER that there is a geographical, temporal and material overlap between the *Krajišnik* case and the case *Prosecutor v. Savo Todović* so that the sought material is likely to be of material assistance to the Applicant and that, therefore, the Applicant has demonstrated a legitimate purpose for the access to non-public *inter partes* material;

CONSIDERING that *ex parte* material, having a higher degree of confidentiality, by its nature contains information which has not been disclosed *inter partes* due to privacy interests of a person or institution, the security interests of a State, or reasons of other public interest;³

² *Prosecutor v. Tihomir Blaškić*, "Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Blaškić*", Case IT-95-14-A, 16 May 2002, para. 29. See also *Simić* Decision, Separate Opinion of Judge Shahabuddeen and Judge Schomburg, paras 4, 5 and 9.

³ *Simić* Decision, p. 4; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, "Decision on 'Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Naletilić and Martinović*' and 'Jadranko Prlić's Notice of Joinder to Slobodan Praljak's Motion for Access'", Case IT-98-34-A, 13 June 2005, p. 6.

CONSIDERING therefore that a legitimate purpose for having access to *ex parte* material would require that the Trial Chamber identifies, based on the submission of the applicant, a need for obtaining access to such material which outweighs the special interests that justified the material to be accepted as *ex parte*;

FINDING that, based on the submission by the Applicant, there is no such need in the present case;

CONSIDERING that extending the reach of the order beyond the date of this Decision, as has been requested by the Applicant, would be inappropriate as it would impose a constraint upon the Trial Chamber's flexibility in responding appropriately to protection issues which may arise in respect of future material in this case;⁴

FOR THE FOREGOING REASONS, the Trial Chamber,

GRANTS the Motion in part and **ORDERS** as follows;

- (a) the Prosecution shall determine whether any of the non-public material falls under Rule 70 and shall seek the consent of the party which provided such material before disclosing it to the Applicant, and, if the consent of that party is given, provide the material in unredacted form to the Applicant or apply for redaction within 14 days of the date of this Decision;
- (b) subject to any application by either party in the *Krajišnik* case for redaction within 14 days of the date of this Decision, the Registry is to grant the Applicant access to non-public *inter partes* material in the *Krajišnik* case filed up to and including the date of the issuance of this Decision;
- (c) the material to which access is granted shall remain subject to the same protective measures as were imposed by the Trial Chamber or were carried over from other cases pursuant to Rule 75(F);

⁴ *Prosecutor v. Tihomir Blaškić*, "Decision on Joint Defence Motion of Enver Hadžihasanović and Amir Kubura for Access to Further Confidential Materials in the Appeal Proceedings of the *Blaškić* case", Case IT-95-14-A, 3 March 2004, pp. 3-4.


- (d) the Applicant, his Counsel, and any employees who have been instructed or authorized by his Counsel to have access to the confidential material in the present case shall not, without the express leave of the Trial Chamber and unless absolutely necessary for the preparation of the Applicant's case;
- (i) disclose to any third party the names of witnesses, their whereabouts, copies of witness statements or the contents of those statements, transcripts of witness testimonies or the content of those testimonies, exhibits or the contents of those exhibits, or any information which would enable the witnesses to be identified and would breach the protective measures already in place;
 - (ii) disclose to any third party any documentary or other evidence, in whole or in part, of any non-public evidence, statement, or prior testimony;
 - (iii) contact any witness from the *Krajišnik* case whose identity was subject to protective measures without first demonstrating to the Trial Chamber that the witness may materially assist the Applicant's case in some identified way and that such assistance is not otherwise reasonably available to the Applicant.

If, for the purposes of preparing the Applicant's case, confidential material is disclosed to third parties – provided that the conditions set out in paragraph (d) are met – any person to whom disclosure of the confidential material in this case is made shall be informed that he or she is forbidden to copy, reproduce, or publicize, in whole or in part, any non-public information or to disclose it to any other person, and that any such information in material form must be returned to the Applicant or his Counsel as soon as it is no longer needed for the preparation of the case.

For the purposes of the above paragraphs, "third parties" do not include: (i) the Applicant, (ii) the Applicant's Counsel and any employees who have been instructed or authorized by the Applicant's Counsel to have access to the confidential material, (iii) personnel from the Tribunal, including members of the Office of the Prosecutor;

DISMISSES the Motion in relation to any implicit request for access to *ex parte* material and in relation to the request for access to possible future confidential material in the *Krajišnik* case.

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



Alphons Orie
Presiding Judge

Done this 14th day of July 2005.
At The Hague,
The Netherlands.

[Seal of the Tribunal]