



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-96-23/2-PT
Date: 23 June 2006
Original: English

IN THE REFERRAL BENCH

Before: Judge Alphons Orie, Presiding
Judge O-Gon Kwon
Judge Kevin Parker

Registrar: Mr. Hans Holthuis

Decision of: 23 June 2006

PROSECUTOR

v.

GOJKO JANKOVIĆ

PARTLY CONFIDENTIAL

**DECISION ON FORMER COUNSEL'S MOTION FOR
LEAVE TO HAND OVER CONFIDENTIAL DOCUMENTS
TO NEW COUNSEL**

The Office of the Prosecutor:

Ms. Hildegard Uertz-Retzlaff
Ms. Susan Sommers

**The Government of Bosnia and
Herzegovina**

per: The Embassy of Bosnia and
Herzegovina to The Netherlands, The Hague

Counsel for the Accused:

Mr. Aleksandar Lazarević
Mr. Tomislav Višnjić

THE REFERRAL BENCH 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 SEIZED of the “Former Counsel’s Motion for a Leave to Hand Over Confidential Documents to new Counsel Representing the Accused Before the BiH War Crimes Chamber in Sarajevo” (“Motion”), filed confidentially by Mr. Aleksandar Lazarević, former counsel for Gojko Janković (“Accused”), on 19 April 2006;

RECALLING the ‘Decision on Referral of Case Under Rule 11*bis*’ of 22 July 2005’ (“Referral Decision”), referring the case of *Prosecutor v. Gojko Janković* to the authorities of the State of Bosnia and Herzegovina for referral to the appropriate court, *i.e.*, the State Court, for trial within Bosnia and Herzegovina;

NOTING that the Accused’s former counsel seeks leave of the Referral Bench to disclose to Mr. Milan Trbojević (“New Counsel”), who is currently representing Gojko Janković in proceedings before the State Court of Bosnia and Herzegovina, confidential material disclosed to him by the Prosecutor of this Tribunal in the proceedings against the Accused, as well as confidential material from proceedings against Slobodan Milošević, Momčilo Krajišnik and Dragoljub Kunarac, to which former counsel has been granted access (“Material”);

NOTING that the Material sought to be disclosed to new counsel is subject to various protective measures;

NOTING that in the Referral Decision, the Referral Bench declared that “referral of this case shall not have the effect of revoking the previous Orders and Decisions of the Tribunal in this case” and specifically ordered that the protective measures granted to victims and witnesses shall remain in force;¹

NOTING that the Referral Bench declared, in the same decision, that “[i]t will be for the State Court or the competent national authorities of Bosnia and Herzegovina to determine whether different provision should be made for the purposes of the trial of this case in Bosnia and Herzegovina”;²

CONSIDERING former counsel’s submission that the said material is vital for Gojko Janković’s defence in the ongoing proceedings before the State Court of Bosnia and Herzegovina;

¹ Decision on Referral of Case Under Rule 11*bis*, 22 July 2005, pp. 34-35.

CONSIDERING that the protective measures in force should not be compromised by replacement of counsel;

FOR THESE REASONS

PURSUANT TO RULE 11BIS of the Tribunal's Rules of Procedure and Evidence


GRANTS the Motion;

AUTHORISES Mr. Aleksandar Lazarević to hand over the Material only after there has been filed by Mr. Milan Trbojević the acknowledgement mentioned hereinafter;

ORDERS Mr. Milan Trbojević to comply with all protective measures in force to protect the Material disclosed to him, and to acknowledge in writing to the Registry of the Tribunal, before the Material is handed over to him, that he is bound by these measures; and

ORDERS the authorities of Bosnia and Herzegovina to ensure that the protective measures, as annexed to this Decision, are applied.

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



Judge Alphons Orie
Presiding

Dated this twenty-third day of June 2006

At The Hague

Netherlands

[Seal of the Tribunal]

² *Ibid.*

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

IT-96-23/2-PT 5924
IT-96-23/2-PT 5338
D5338-D5333 RK
22 JUNE 2005
~~IT-02-54-T~~
~~41833, 41377~~
~~22 June 2005~~
98

Case No.: IT-02-54-T

Date: 21 June 2005

Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Order of: 21 June 2005

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**ORDER ON DEFENCE MOTIONS FOR ACCESS TO
CONFIDENTIAL AND UNDER SEAL MATERIAL IN THE
MILOŠEVIĆ CASE**

Office of the Prosecutor

Ms. Carla Del Ponte
Mr. Geoffrey Nice

The Accused

Mr. Slobodan Milošević

Court Assigned Counsel

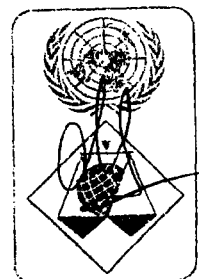
Mr. Steven Kay, QC
Ms. Gillian Higgins

Counsel for Gojko Janković and Savo Todović

Mr. Aleksandar Lazarević

Amicus Curiae

Prof. Timothy McCormack



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 (“International Tribunal”);

BEING SEISED OF (1) “Gojko Janković’s Defence Motion for Access to Confidential and Under Seal Material in the *Milošević* Case Relating to the Municipality of Foča”, filed on 27 May 2005 (“Janković Motion”), and (2) “Savo Todović’s Defence Motion for Access to Confidential and Under Seal Material in the *Milošević* Case Relating to the Foča Penitentiary and Correction Facility”, filed on 26 May 2005 (“Todović Motion”) (collectively, “Motions”), in which the Defence of Gojko Janković and Savo Todović (collectively, “the Applicants”) argues that the requirements for access to confidential material from other proceedings have been met;

NOTING that both Motions seek access “on a continuous basis, where applicable”, to four categories of material from the *Milošević* case, limited in the Janković Motion to material relating to the Municipality of Foča between April 1992 and February 1993, and in the Todović Motion to material relating to the Foča Penitentiary and Correction Facility (“Foča KP Dom”) between April 1992 and October 1994:

1. All confidential supporting material that accompanied the indictment, with the temporal and geographical limitations described above;
2. All closed and private session transcripts, with the temporal and geographical limitations described above;
3. All confidential and under seal trial exhibits with the temporal and geographical limitations described above, including but not limited to witness statements, documentary evidence, audio and video CDs and tapes, photographs, Rule 92 *bis* material, and other relevant tangible objects admitted by the Trial Chamber; and
4. All confidential filings by the Parties in the *Milošević* case, with the temporal and geographical limitations described above;

NOTING that the Applicants also specifically seek access to any Rule 70 material that falls within the four categories listed above;¹

NOTING that the amended indictment in *Prosecutor v. Janković et al.* charges Applicant Janković with torture and rape as crimes against humanity and violations of the laws or customs of war, and alleges that he was “involved in the military attack on Fo[ć]a town and various surrounding villages and the arrest of civilians in leading positions”, and that “[a]ll these acts are said to have taken place in the Buk Bijela complex, Fo[ć]a High School, Partizan Sports Hall

¹ See Janković Motion, para. 10; Todović Motion, para. 12.

and elsewhere on the territory of the Municipality of Fo[č]a in the period between April 1992 and February 1993";²

NOTING that the original indictment against Applicant Todović charges him with, *inter alia*, the following crimes arising from the operation of the KP Dom between April 1992 and October 1994: persecution as a crime against humanity; and torture, inhumane treatment, murder or wilful killing, imprisonment, and unlawful detention as grave breaches of the Geneva Conventions, crimes against humanity, and violations of the laws or customs of war;³ and that the proposed joint indictment recently filed in *Prosecutor v. Rašević and Todović* seeks to charge Applicant Todović as a participant in a joint criminal enterprise, the purpose of which "was to imprison Muslim and other non-Serb civilians from Foča and the surrounding areas in inhumane conditions and subject them to beatings, torture, enslavement, deportations and forcible transfers";⁴

NOTING that the amended Bosnia indictment against Accused Milošević charges him with genocide, crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws or customs of war arising from, *inter alia*, the persecution, extermination, murder, wilful killing, unlawful confinement, imprisonment under inhumane conditions, torture, forcible transfer, or deportation of non-Serbs in Foča,⁵

CONSIDERING that a party is always entitled to seek material from any source to assist in the preparation of its case if the document sought has been identified or described by its general nature, and if a legitimate forensic purpose for such access has been shown; and that access to confidential material from another case is granted if the party seeking it can establish that it may be of material assistance to its case;⁶

CONSIDERING that the relevance of the material sought by a party may be determined by showing the existence of a nexus between the applicant's case and the case from which such material is sought,⁷ and therefore that access to material may be granted if the party seeking it

² Janković Motion, para. 4; *see also Prosecutor v. Janković, Zelenović, and Stanković*, Case No. IT-96-23-2-I, "Amended Indictment", 20 April 2001, paras. 3.1, 5.2–5.4, 5.8, 6.4, 6.11, 6.17, 7.14–7.16, 7.20, 7.22, 7.25, 9.1–9.3.

³ *See Prosecutor v. Krnojelac, Todović, and Rašević*, Case No. IT-97-25-I, "Indictment", 17 June 1997, paras. 5.1–5.3, 5.25–5.26, 5.29, 5.34–5.35, 5.41.

⁴ *See Prosecutor v. Rašević and Todović*, Case No. IT-97-25/1-PT, "[Proposed] Joint Amended Indictment", 25 May 2005, para. 4.

⁵ *See Prosecutor v. Milošević*, Case No. IT-02-54-T, "Amended Indictment (Bosnia)", 22 November 2002, paras. 33, 36, 37, 40.

⁶ *See Prosecutor v. Blaškić*, Case No. IT-95-14-A, "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]", 16 May 2002, at para. 14.

⁷ *See id.*, para. 15.

demonstrates a “geographical, temporal or otherwise material overlap” between the two proceedings;⁸

CONSIDERING that the significant similarities in the facts giving rise to the charges against the Applicants and the Accused Slobodan Milošević, with regard to events in Foča between April 1992 and October 1994, constitute a clear geographical and temporal overlap between the two proceedings;

CONSIDERING, however, that no legitimate forensic purpose has been shown for access to the confidential filings of the Parties in this case;

CONSIDERING that the *Simić* Appeals Chamber has ruled that “*ex parte* material, being of a higher degree of confidentiality, by nature contains information which has not been disclosed *inter partes* solely because of security interests of a State, other public interests, or privacy interests of a person or institution”, and that, like the Applicant in *Simić*, the Applicants in this matter “cannot demonstrate a legitimate forensic purpose in relation to such *ex parte* material”;⁹

CONSIDERING that some of the material to which access is sought contains information that may identify protected witnesses, and that the Applicants have undertaken “to fully comply and abide by any and all limitations, redactions, and protective measures regarding identity of any protected person, as well as any and all orders of this Trial Chamber regarding non-disclos[ure] to the public [of] any confidential or non-public material disclosed”;¹⁰

PURSUANT TO Rules 54 and 75 of the Rules,

HEREBY GRANTS THE MOTIONS IN PART, AND ORDERS AS FOLLOWS:

- (1) The Prosecution shall determine whether any of the confidential material in the first three categories listed above falls under Rule 70, and shall contact the providers of such material to seek their consent for disclosure of that material;

⁸ See *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, “Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić and Čerkez Case”, 23 January 2003, p. 4.

⁹ *Prosecutor v. Simić*, Case No. IT-95-9-A, “Decision on Defence Motion by Franko Simatovic for Access to Transcripts, Exhibits, Documentary Evidence and Motions Filed by the Parties in the *Simić et al.* Case”, 13 April 2005, p. 4.

¹⁰ Janković Motion, para. 13; Todović Motion, para. 15.

- (2) Gojko Janković and his defence counsel shall have access to the following categories of *inter partes* confidential material, after the Prosecution has redacted any information that may reveal the identity of any protected person:
- (a) All confidential supporting material, relating to the Municipality of Foča between April 1992 and February 1993, which accompanied the indictment;
 - (b) All closed and private session transcripts relating to the Municipality of Foča between April 1992 and February 1993; and
 - (c) All confidential and under seal trial exhibits relating to the Municipality of Foča between April 1992 and February 1993;
- (3) Savo Todović and his defence counsel shall have access to the following categories of *inter partes* confidential material, after the Prosecution has redacted any information that may reveal the identity of any protected person:
- (a) All confidential supporting material, relating to the Foča KP Dom between April 1992 and October 1994, which accompanied the indictment;
 - (b) All closed and private session transcripts relating to the Foča KP Dom between April 1992 and October 1994; and
 - (c) All confidential and under seal trial exhibits relating to the Foča KP Dom between April 1992 and October 1994;
- (4) The Applicants' request for continuous access to these materials is denied without prejudice to future periodic requests for access to material corresponding to the geographical and temporal specifications in the Motions;
- (5) The Applicants and their defence counsel shall not disclose to the public any confidential or non-public material disclosed to it from the *Milošević* case except to the limited extent that such disclosure to members of the public is directly and specifically necessary for the preparation and presentation of the Applicants' cases; and
- (6) The Motions are otherwise denied.

For the purposes of this decision, "the public" means and includes, all persons, governments, organizations, entities, clients, associations and groups, other than the Judges of the International Tribunal, the staff of the Registry, the Prosecutor and her representatives, and the Applicant and his defence team. "The public" also includes, without limitation, families, friends, and

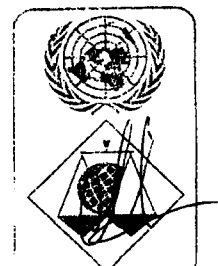
associates of the Applicant; accused and defence counsels in other cases or proceedings before the International Tribunal; the media; and journalists.

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

Judge Robinson
Presiding

Dated this twenty-first day of June 2005
At The Hague
The Netherlands

[Seal of the Tribunal]



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~~D11846 - D11839~~
~~16 July 2005~~

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IT-96-23/2-PT

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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 JANKOVIĆ DEFENCE MOTION FOR ACCESS TO
CONFIDENTIAL AND UNDER SEAL MATERIAL IN THE KRAJIŠNIK CASE
RELATING TO THE MUNICIPALITY OF FOČA**

Office of the Prosecutor:

Mr. Mark B. Harmon
Mr. Alan Tieger

Counsel for the Accused:

Mr. Nicholas Stewart
Ms Chrissa Loukas

Counsel for Gojko Janković:

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 Municipality of Foča” (the “Motion”), filed by the Defence of Gojko Janković (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 the municipality of Foča 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 Gajko Janković’s Motion for Access to Confidential Material relating to the municipality of 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. Gojko Janković* 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.

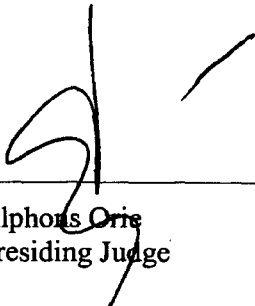
- (d) the Applicant, his Counsel, and any employees who have been instructed or authorized by his Counsel to have access to the confidential material in the present case shall not, without the express leave of the Trial Chamber and unless absolutely necessary for the preparation of the Applicant's case;
- (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]