



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-PT

Date: 8 July 2009

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost, Pre-Trial Judge

Registrar: Mr. John Hocking

Decision of: 8 July 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON TOLIMIR'S MOTIONS FOR ACCESS
TO CONFIDENTIAL MATERIAL IN THE *KRSTIĆ* CASE
AND THE *BLAGOJEVIĆ* AND *JOKIĆ* CASE
WITH PARTIALLY DISSENTING OPINION OF JUDGE KWON**

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

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”) is seised of “Zdravko Tolimir’s Motion for Access to Confidential Evidence, Submissions and Decisions in the case *the Prosecutor v. Radislav Krstić*” (“*Krstić* Material Request”) and “Zdravko Tolimir’s Motion for Access to Confidential Evidence, Submissions and Decisions in the case *the Prosecutor v. Blagojević and Jokić*” (“*Blagojević* Material Request”), both submitted by the Accused Zdravko Tolimir on 15 April 2009 and filed in the English version on 17 April 2009 (collectively, “Motions”), and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

1. The Motions requests that (i) Tolimir and his defence team be given access to “confidential decisions rendered by the Trial Chamber and Appeals Chamber, testimonies, evidence and submissions filed by the Prosecution and Defence” (“confidential material”) in the case of *Prosecutor v. Krstić* (“*Krstić* case”) and in the case of *Prosecutor v. Blagojević and Jokić* (“*Blagojević* case”)¹ and (ii) all transcripts of testimonies in the *Krstić* and *Blagojević* cases in a *Live Note* format as well as a list of “all adduced evidence” in those cases be provided to him and his defence team.²

2. In the *Krstić* Material Request, Tolimir specifically requests that he and his defence team be given access to two confidential submissions in the *Krstić* case, claiming that they “seem to be of particular relevance with regard to the ‘Prosecution’s Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)’ (“Prosecution Rule 94(B) Motion”)”.³

3. Tolimir submits that there is an obvious link between the present case and the *Krstić* and *Blagojević* cases; that many of the facts requested in the Prosecution Rule 94(B) Motion are found in the trial and appeal judgements rendered in the *Krstić* and *Blagojević* cases; and that many facts and legal issues raised in the present case were dealt with in these cases.⁴

4. On 20 April 2009, the Prosecution filed the “Prosecution’s Consolidated Response to the Accused Tolimir’s Motions for Access to Evidence, Submissions and Decisions in the *Krstić* and *Blagojević* Cases” (“Response”). The Prosecution does not oppose Tolimir’s request for access to confidential testimony, evidence, submissions and decisions *inter partes*, subject to Rule 75(F)(i) of

¹ *Krstić* Material Request, para. 1; *Blagojević* Material Request, para. 1.

² *Krstić* Material Request, para. 4; *Blagojević* Material Request, para. 2.

³ *Krstić* Material Request, para. 2. See Prosecution’s Notice of Disclosure of Expert Witness Reports Pursuant to Rule 94 *bis* and Attached Appendices A and B, 13 March 2009.

Rules of the Procedure and Evidence (“Rules”) and provided that Tolimir and any of his assistants or advisers who have been instructed or authorised to have access to this material shall not disclose to the public, without the leave of the Trial Chamber, confidential information about witnesses for whom protective measures have been granted in the *Krstić* and *Blagojević* cases (“Protected Witnesses”).⁵ However, the Prosecution opposes any request for access to its filings made on an *ex parte* basis.⁶

5. The Prosecution does not object to the Registry making available to Tolimir, in a *Live Note* format, the transcripts of proceedings or a list of the exhibits adduced in the *Krstić* and *Blagojević* cases.⁷

II. APPLICABLE LAW

6. It is well-established in the jurisprudence of the Tribunal that a party is always entitled to seek material from any source, including another case before the Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown.⁸ With regard to *inter partes* confidential material, a requesting party must establish a legitimate forensic purpose for access to confidential material from another case by demonstrating the existence of a nexus between the applicant’s case and the case from which the material is sought and such nexus consists of a geographical, temporal, or otherwise material overlap between the two cases.⁹ Such access may be granted if the Trial Chamber is satisfied that the requesting party has established that the material in question is likely to assist the applicant’s case materially, or that there is at least a good chance that it would.¹⁰

⁴ *Krstić* Material Request, para. 5; *Blagojević* Material Request, para. 3.

⁵ Response, para. 2.

⁶ *Ibid.*, para. 2.

⁷ *Ibid.*, para. 3.

⁸ *Prosecutor v. Dragomir 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 (“*Milošević* 19 May Decision”), para. 7, referring to *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Momčilo Perišić’s Request for Access to Confidential Material in the *Dragomir Milošević* case, 27 April 2009 (“*Milošević* 27 April Decision”), para. 4; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Decision on Motion by Jovica Stanišić for Access to Confidential Testimony and Exhibits in the *Martić* Case Pursuant to Rule 75(G)(i), 22 February 2008 (“*Martić* Decision”), para. 9; *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on “Motion by Mićo Stanišić for Access to All Confidential Materials in the *Krajišnik* Case”, 21 February 2007 (“*Krajišnik* Decision”), p. 4. See also *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Jovica Stanišić’s Motion for Access to Confidential Materials in the *Karadžić* case, 20 May 2009 (“*Karadžić* Decision”), para. 4; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-PT, Decision on Stojan Župljanin’s Access to Confidential Material in the *Krajišnik*, *Mrda*, *Stakić* and *Brđanin* Cases, 24 April 2009 (“*Župljanin* Decision”), para. 11.

⁹ *Milošević* 19 May Decision, para. 8; *Milošević* 27 April Decision, para. 5; *Martić* Decision, para. 9; *Krajišnik* Decision, p. 4. See also *Karadžić* Decision, para. 7; *Župljanin* Decision, para. 11.

¹⁰ *Ibid.*

7. As regards confidential material filed *ex parte*, the jurisprudence of the Tribunal requires an applicant to meet a higher standard in establishing a legitimate forensic purpose for its disclosure in light of the special considerations of confidentiality relating to such material.¹¹

8. Furthermore, for material that has been provided under Rule 70, the parties must obtain the consent of the provider before the material or its source can be disclosed to another accused before the Tribunal.¹² This is the case even where the Rule 70 provider(s) consented to the disclosure of the material in one or more prior cases.¹³

9. Rule 75(F)(i) provides that once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (“first proceedings”), such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (“second proceedings”) unless they are rescinded, varied or augmented in accordance with the procedure set out in Rule 75. Rule 75(G)(ii) further provides that a party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply, if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings. Moreover, Rule 75(I) provides that before determining an application under Rule 75(G)(ii), the Chamber shall endeavour to obtain all relevant information from the first proceedings, including from the parties to those proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.

III. DISCUSSION

10. Both the trial and appeal proceedings in the *Krstić* and the *Blagojević* cases are concluded.¹⁴ The Chambers which ordered the protective measures in relation to the material sought are no longer seised of the proceedings in these cases. Therefore, pursuant to Rule 75 (G)(ii), Tolimir properly filed the Motion before this Trial Chamber. As regards the trial proceedings in the *Blagojević* case, the Trial Chamber, in accordance with Rule 75(I), has consulted with Judge Daqun Liu, currently a Judge of the Appeals Chamber and formerly the Presiding Judge of the Trial Chamber I.

¹¹ *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić’s Motion for Access to All Confidential Materials in the *Brdanin* Case, 24 January 2007, para. 14. *See also* *Karadžić* Decision, para. 8; *Župljanin* Decision, para. 11; *Krajišnik* Decision, p. 5.

¹² *Karadžić* Decision, para. 9; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Motion by Radovan Karadžić, for Access to Confidential Materials in the *Gotovina et al.* Case, 12 May 2009 (“*Gotovina* Decision”), para. 5; *Krajišnik* Decision, pp. 5–6. *See also* *Milošević* 19 May Decision, para. 15; *Milošević* 27 April Decision, para. 13.

¹³ *Karadžić* Decision, para. 9; *Gotovina* Decision, para. 5; *Krajišnik* Decision, p. 6.

11. As a preliminary matter, while Tolimir has identified the material by its general nature, he does not advance any arguments whether he also seeks access to the *ex parte* confidential material in the respective cases. For this reason, the Trial Chamber considers that Tolimir does not seek access to any *ex parte* confidential material and thus will not make any finding in this regard.

12. As to the existence of a legitimate forensic purpose for access to the *inter partes* confidential material sought, Tolimir submits that there is an obvious link between the present case and the *Krstić* and *Blagojević* cases.¹⁵ The Trial Chamber concurs that there is a significant factual nexus between the present case and the two cases in so far as the three cases cover similar temporal and geographical scopes. The Trial Chamber is satisfied that Tolimir has shown a legitimate forensic purpose for being granted access to the *inter partes* confidential material.

13. The Trial Chamber notes that some of the *inter partes* confidential material might fall into the category of Rule 70. In light of the jurisprudence, such material shall not be released to Tolimir and his defence team unless the provider consents to such disclosure. In addition, the *inter partes* confidential material might also contain information about personal and family situation of *Krstić*, *Blagojević* and *Jokić*. The Trial Chamber is of the view that such material has no bearing on the substance of the present case and thus holds that the material of this nature shall not be disclosed to Tolimir and his defence team.

14. Tolimir further asks for all confidential transcripts of testimonies in the *Krstić* and *Blagojević* cases in a *Live Note* format and a list of “all adduced evidence” in those cases.¹⁶ A request for access to confidential transcripts in another case is commonly made before the Tribunal and when such request is granted, the Registry provides an applicant with CD-ROMs containing the relevant transcripts. The Trial Chamber believes that this arrangement will fully assist Tolimir and his defence team in the preparation of his case. As to a list of adduced evidence, the Trial Chamber construes it to mean a list of exhibits that were admitted into evidence in the respective cases. The Trial Chamber has been informed that the Registry is in a position to provide Tolimir with such a list. However, given that certain information on that list may fall within the purview of Rule 70, the Trial Chamber will grant access to such exhibits, pending the consent of the Rule 70 provider. Exhibits, if any, relating to the personal information of *Krstić*, *Blagojević* and *Jokić* and their family members shall be redacted from the list to be given to Tolimir and his defence team.

¹⁴ The Appeals Chamber rendered its judgements in the *Krstić* case on 19 April 2004 and in the *Blagojević* case on 9 May 2007.

¹⁵ See *Krstić* Material Request, para. 5; *Blagojević* Material Request, para. 3.

¹⁶ See *Krstić* Material Request, para. 4; *Blagojević* Material Request, para. 2.

15. Finally, the Trial Chamber notes that, in accordance with Rule 75(F), protective measures previously ordered in the *Krstić* and *Blagojević* cases should continue to apply to any material released to Tolimir and his defence team.

IV. DISPOSITION

16. For the foregoing reasons, pursuant to Rules 54, 70 and 75 of the Rules, the Trial Chamber **GRANTS** the Motions in part, and **ORDERS** as follows:

1. The Registry shall provide access for Tolimir and his defence team, subject to Rule 70 consent where applicable, and with the exception of material related to personal information about Krstić, Blagojević and Jokić and their family members, to all *inter partes* confidential material in the trial and appellate proceedings of the *Krstić* and the *Blagojević* cases, including all transcripts of hearings held in private and closed session, all relevant exhibits kept under seal and all confidential filings, submissions and decisions.
2. Given that the *Krstić* and *Blagojević* cases are both concluded, to the extent possible the Registry shall identify material related to personal information about Krstić, Blagojević and Jokić and their family members and shall not disclose such material to Tolimir and his defence team.
3. The Prosecution shall identify to the Registry any material in these cases that has been provided subject to Rule 70, and subsequently, seek leave from the Rule 70 providers to disclose such to Tolimir and his defence team and inform the Registry whether such consent has been obtained; in the case of any Rule 70 material generated by the Defence in these cases, the Registry shall, with the assistance of the Prosecution as may be necessary, identify such material and seek leave from the Rule 70 providers to disclose the material to Tolimir and his defence team.
4. The Registry shall withhold any material provided pursuant to Rule 70, as identified by the Prosecution or by the Registry, until the responses of the provider(s) have been relayed. Where consent cannot be obtained from provider(s) of any material subject to Rule 70, the material shall not be disclosed.
5. The Registry shall provide Tolimir and his defence team with CD-ROMs of the relevant transcripts and a list of exhibits admitted in the trial and appellate proceedings of the *Krstić* and the *Blagojević* cases, subject to Rule 70 and with the exception of material related to personal information about Krstić, Blagojević and Jokić and their family members.

6. Except where directly and specifically necessary for the preparation of the case, and only upon leave granted by the Trial Chamber, Tolimir and his defence team shall not disclose to the public, to the media, or to his family members and associates:
 - a. the names, identifying information or whereabouts of Protected Witnesses in the *Krstić* and *Blagojević* cases, or any other information which would enable Protected Witnesses to be identified, or would breach the confidentiality of the protective measures already in place, or
 - b. any non-public evidence (including documentary, audio-visual, physical or other evidence) or any written statement of Protected Witnesses, or prior testimony disclosed to Tolimir and his defence team, or the contents thereof, in whole or in part.
7. Tolimir and his defence team shall not disclose to the public any confidential or non-public material disclosed from the *Krstić* and *Blagojević* cases except to the limited extent that such disclosure is directly and specifically necessary for the preparation of the case, and only after obtaining leave of the Trial Chamber. If any confidential or non-public material is disclosed to the public, Tolimir and his defence team shall inform any person to whom disclosure is made that he or she is forbidden to copy, reproduce, or publicise the material or to disclose it to any other person, and that he or she must return the material to Tolimir and his defence team as soon as the material is no longer needed for the preparation of the case.
8. If a member of the defence team of Tolimir withdraws from the case, all material in his or her possession shall be returned to the Registry.
9. Subject to the modifications prescribed above, any other protective measures already in place in relation to the material disclosed shall remain in place.
10. For the purpose of this Decision:
 - a. the “defence team” of Tolimir means legal advisers and a case manager who have been assigned by the Registry and any others specifically to be assigned by the Registry to his defence team;
 - b. the “public” means all persons, governments, organisations, entities, clients, associations and groups, other than Judges of the Tribunal and the staff of the Registry, the Prosecution, or Tolimir and his defence team; the “public” includes, without limitation, family, friends, and associates of Tolimir, and those accused and their defence counsel in other cases or proceedings before the Tribunal; and

- c. the “media” means all video, audio, and print media personnel including journalists, authors, television, and radio personnel and their agents and representatives.

Judge Kwon appends his partially dissenting opinion.

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



Carmel Agius
Presiding

Dated this eighth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

V. PARTIALLY DISSENTING OPINION OF JUDGE O-GON KWON

A. Introduction

1. While I agree with the Trial Chamber's overall conclusion, I object to the disposition insofar as it requires the Registry to (a) identify to the extent possible and prevent disclosure to Tolimir and his defence team of "material related to personal information about Krstić, Blagojević and Jokić and their family members"; and (b) with the assistance of the Prosecution as may be necessary, identify any Rule 70 material generated by the Defence in the Krstić, Blagojević and Jokić cases and seek leave from the Rule 70 providers to disclose that material to Tolimir and his defence team. The reasons for my objection are set out below.

B. Personal and Family Matters

2. First, the scope of material that may constitute personal information of the accused in question and their family members is not particularised in the decision. The specific documents or details are not set out: for example, "personal information" could include anything from the accused's hair colour to his whereabouts. The burden will therefore fall to the Registry to decide whether or not a certain document should be disclosed, and if so, whether any redaction should be made. I do not consider it appropriate for the Registry, as a neutral organ of the Tribunal, to be responsible for such an assessment and decision. Further, I have reservations as to whether it would even be possible at all, given the vast size and scope of the confidential material in these cases.

3. Though the majority rules that the Registry should identify such material "to the extent possible", this qualification is also vague: should each and every document be examined for potential personal information, can certain categories of document be ignored, can a representative sample be taken? The extent to which the Registry should examine the material is not clear, and I am of the opinion that, if the Registry is to be tasked with making such an assessment, the standard by which the assessment should be carried out should be prescribed in greater detail by the Trial Chamber.

4. Furthermore, as a general rule, I would assume that any information regarding each accused's personal and family situation which they did not want disclosed to other parties would have been filed *ex parte* in the first instance. Therefore I consider it unnecessary for the Registry to conduct a full review of all *inter partes* confidential materials in order to exclude or redact such information.

C. Defence Rule 70 material

5. Second, as for the Rule 70 material from the Defence, I am of the opinion that the Registry is not in a position to know what materials were provided to the Defence pursuant to Rule 70, let alone the identity and contact details of the providers of such material, and neither is the Prosecution. I am therefore concerned by that part of the disposition which requires the Registry, albeit with the assistance of the Prosecution, to identify Rule 70 material generated by the defence and seek leave from the providers of such material to disclose it. I do not see how it is possible for the Registry to do so without at least a basic knowledge of such material and its source.

D. Conclusion

6. I understand that the Motions were "cross-filed" with the legal representatives of Krstić, Blagojević and Jokić, and that none of these parties have filed any objection. I therefore do not consider it necessary for the *inter partes* filings to be reviewed in their entirety by the Registry for the purposes of excluding any personal or Rule 70 information.

7. In my opinion, even if such information is to be excluded as suggested by the majority, the Registry should not be obliged to do any more than consult with the legal representatives of Krstić, Blagojević and Jokić regarding the proposed disclosure. In the event that no response is forthcoming, this may be taken as tacit acceptance of the proposed disclosure, and the Registry should not be obliged to review the material in question for the purpose of excluding personal or Rule 70 information.

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



Judge O-Gon Kwon

Dated this eighth day of June 2009
At The Hague
The Netherlands

[Seal of the Tribunal]