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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 No.	IT-03-69-A
		Date:	25 June 2015
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Carmel Agius
Judge Liu Daqun
Judge Arlette Ramaroson
Judge Koffi Kumelio A. Afande

Registrar: **Mr. John Hocking**

Decision of: **25 June 2015**

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

PUBLIC

DECISION ON PROSECUTION MOTION TO REPLACE AUDIOVISUAL FILES OF WITNESS MILAN BABIĆ'S TESTIMONY AND TO LIFT CONFIDENTIALITY OF TRANSCRIPT EXCERPT

The Office of the Prosecutor:
Mr. Michelle Jarvis
Mr. Mathias Marcussen

Counsel for the Defence:
Mr. Wayne Jordash and Mr. Scott Martin for Mr. Jovica Stanišić
Mr. Mihajlo Bakrač and Mr. Vladimir Petrović for Mr. Franko Simatović

THE APPEALS 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 ("Appeals Chamber" and "Tribunal", respectively);

RECALLING the decision rendered orally by Trial Chamber I of the Tribunal in the *Krajišnik* case[1] ("*Krajišnik* Trial Chamber") on 10 March 2005 and the decision issued by Trial Chamber II of the Tribunal ("Trial Chamber II") in the *Krajišnik* case on 23 July 2009, which both ordered to lift the confidentiality, with the exception of certain portions, of the testimony of Milan Babić ("Babić") provided in closed session in that case;[2]

RECALLING the decision issued by Trial Chamber I of the Tribunal in the present case ("Trial Chamber") on 16 December 2010, in which the Trial Chamber admitted excerpts of the transcripts ("Transcript Excerpts") as well as DVDs containing audiovisual files ("Audiovisual Files") of Babić's testimony in the *Martić* case[3], the *Milošević* case,[4] and the *Krajišnik* case,[5] which were subsequently numbered as Exhibits P01877, P01878, and P01879, respectively;

BEING SEISED OF the "Prosecution Motion to Replace Audiovisual Files of Witness Milan Babić's Testimony and to Lift Confidentiality of Transcript Excerpt", filed publicly with confidential annexes by the Office of the Prosecutor ("Prosecution") on 16 October 2014 ("Motion"), in which the Prosecution seeks to: (i) replace the Audiovisual Files of Babić's testimony, contained in Exhibits P01877, P01878, and P01879, with the audiovisual files of the DVDs attached as confidential Annex A to the Motion; and (ii) lift the confidentiality of a portion of the transcript of Babić's testimony in the *Krajišnik* case contained in Exhibit P01879, which is attached as confidential Annex B to the Motion;[6]

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[1] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T.

[2] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, T. 10274-10277, 10 March 2005 ("Oral Decision"); *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A [*sic*], Decision on Prosecution Motion to Determine Confidentiality, 23 July 2009 ("Decision Lifting Confidentiality"). In the Oral Decision, the *Krajišnik* Trial Chamber ordered to lift the confidentiality of Babić's testimony which was given between 2 and 7 June 2004 with the exception of limited portions containing discussions on the reasons for which the Prosecution initially applied for protective measures for this witness. However, when citing the transcript pages to be made public, the Trial Chamber omitted to include the transcript pages relating to Babić's testimony on 3 June 2004 in its entirety. The Prosecution filed a motion requesting a clarification. This motion was assigned by the President of the Tribunal to Trial Chamber II. In the Decision Lifting Confidentiality, Trial Chamber II further ruled that Babić's testimony given on 3 June 2004 should be made public, specifying that this concerned transcript pages 3375-3415. See Decision Lifting Confidentiality, pp. 1-2.

[3] *Prosecutor v. Milan Martić*, Case No. IT-95-11-T.

[4] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T.

[5] *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Prosecution's Motion for Admission of Evidence of Witness Milan Babić Pursuant to Rule 92 *Quater*, 16 December 2010 ("Decision on Admission of Evidence"), paras 29, 50.

[6] Motion, paras 1, 8. See also Motion, paras 3, 5. In the alternative, should the Appeals Chamber decline to lift the confidentiality of the portion of the transcript of Babić's testimony in the *Krajišnik* case contained in Exhibit P01879, the Prosecution requests that Exhibit P01879 be placed under seal. See Motion, paras 7, 9.

NOTING that the Prosecution submits that it was notified by the Registry of the Tribunal ("Registry") that the Audiovisual Files of Exhibits P01877, P01878, and P01879 do not correspond to the Transcript Excerpts, as the Transcript Excerpts are portions of Babić's testimony while the Audiovisual Files contain Babić's testimony as a whole in the *Martić*, *Milošević*, and *Krajišnik* cases;[7]

NOTING that the Prosecution argues that, given the "apparent intent" of the Trial Chamber to admit only excerpts of Babić's testimony in those cases, the Audiovisual Files should correspond to the Transcript Excerpts;[8]

NOTING that the Prosecution submits that the DVDs attached as confidential Annex A to the Motion contain audiovisual files that correspond to the Transcript Excerpts;[9]

NOTING that the Prosecution also submits that, while a portion of the Transcript Excerpts in Exhibit P01789 corresponding to transcript page 3415, lines 5-25 of Babić's testimony on 3 June 2004 in the *Krajišnik* case is in closed session ("Portion Marked as Confidential"),[10] Exhibit P01879 was tendered as a public exhibit, and that the confidentiality of Babić's testimony in the *Krajišnik* case, including the Portion Marked as Confidential, was lifted by the *Krajišnik* Trial Chamber in the Oral Decision as further clarified in the Decision Lifting Confidentiality;[11]

NOTING that the Prosecution observes that the public redacted version of the transcript of Babić's testimony in the *Krajišnik* case, in which the Portion Marked as Confidential is redacted, nonetheless reveals that the Registry has interpreted the Oral Decision and the Decision Lifting Confidentiality to exclude this portion,[12] and argues that there is no reason for the discussion contained in the Portion Marked as Confidential to remain confidential since: (i) the *Krajišnik* Trial Chamber has already lifted the protective measures in relation to Babić's testimony; (ii) the Portion Marked as Confidential does not relate to the reasons for which confidentiality was originally sought for the testimony, although it deals with a procedural matter rather than Babić's testimony

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[7] Motion, para. 2.
[8] Motion, para. 3, referring to Decision on Admission of Evidence, paras 29, 50.
[9] Motion, para. 3.
[10] Motion, para. 4, referring to Milan Babić, T. 3415, lines 5-25, 3 June 2004 in the *Krajišnik* case and stating that this portion corresponds to Exhibit P01879, p. 36 in the e-Court system in the present case.
[11] Motion, para. 4, referring to Oral Decision, Decision Lifting Confidentiality. The Appeals Chamber notes that the Prosecution wrongly refers to the "Appeals Chamber" as having issued the Decision Lifting Confidentiality, instead of Trial Chamber II.
[12] Motion, para. 4. See also Motion, fn. 7, referring to Motion, Annex B (confidential). According to the Prosecution, the Registry has interpreted the Oral Decision and the Decision Lifting Confidentiality this way because the Portion Marked as Confidential does not contain Babić's testimony but a procedural discussion, and this interpretation apparently resulted from the *Krajišnik* Trial Chamber's statement in the Oral Decision that only the confidentiality of Babić's closed-session testimony would be lifted and not the discussions on the reasons underlying the initial request for protective measures. See Motion, para. 4, referring to Oral Decision, T. 10276-10277.

itself; and (iii) it is in the interest of a fair and public trial for Exhibit P01879 – which contains the Portion Marked as Confidential – to be public;[13]

NOTING that the Prosecution asserts that, pursuant to Rules 75(G)(ii) and 107 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), as the chamber seised of the second proceedings, the Appeals Chamber has the authority to vary the protective measures applicable to the Portion Marked as Confidential since no chamber remains seised of the *Krajišnik* case;[14]

NOTING FURTHER that neither Jovica Stanišić nor Franko Simatović responded to the Motion;

CONSIDERING that, in the Decision on Admission of Evidence, the Trial Chamber admitted the Transcript Excerpts of Babić's testimony in the *Martić*, *Milošević*, and *Krajišnik* cases, which it specifically identified, as well as "the accompanying DVDs containing audiovisuals of Babić's testimony",[15] and that the Appeals Chamber understands this to mean that only the identified portions of the transcripts and the corresponding audiovisual files were to be admitted, and not the audiovisuals of the entire testimony of Babić in the *Martić*, *Milošević*, and *Krajišnik* cases;

CONSIDERING that, upon verification of the audiovisual files of the DVDs attached as confidential Annex A to the Motion, the Appeals Chamber is satisfied that they correspond to the Transcript Excerpts of Exhibits P01877, P01878, and P01879;

FINDING therefore that, under these circumstances, it is appropriate to replace the Audiovisual Files with the audiovisual files of the DVDs attached as confidential Annex A to the Motion;

CONSIDERING that, with respect to the status of the Portion Marked as Confidential in the transcript of Babić's testimony in the *Krajišnik* case contained in Exhibit P01879, no chamber is currently seised of the *Krajišnik* case and that the Appeals Chamber in the present case is the chamber "seised of the second proceedings" within the meaning of Rule 75(G)(ii) of the Rules and has therefore jurisdiction to rule on the Motion;

CONSIDERING FURTHER that the Portion Marked as Confidential deals with a procedural matter regarding the commencement of the cross-examination stage of Babić's testimony, which does not pertain to the reasons for which the Prosecution initially applied for protective measures for the testimony, nor does it contain any other sensitive information;

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[13] Motion, para. 5. See also Motion, para. 4.
[14] Motion, para. 6.
[15] Decision on Admission of Evidence, para. 50, referring to Decision on Admission of Evidence, para. 29. See also Decision on Admission of Evidence, fn. 66.

FINDING therefore that there are no reasons for keeping the identified material confidential;

PURSUANT TO Rules 54, 75, and 107 of the Rules;

HEREBY GRANTS the Motion; and

ORDERS as follows:

1. (a) The Prosecution shall provide the Registry with three separate DVDs, each containing the audiovisual files of the DVDs attached as confidential Annex A to the Motion corresponding to the Transcript Excerpts of Babić's testimony in the *Martić* case (Exhibit P01877), the *Milošević* case (Exhibit P01878), and the *Krajišnik* case (Exhibit P01879), respectively; and (b) the Registry shall replace the Audiovisual Files currently in evidence with these three DVDs; and

2. The Registry shall lift the confidentiality of the Portion Marked as Confidential (*i.e.* transcript page 3415, lines 5-25) in the transcript of Babić's testimony in the *Krajišnik* case and the corresponding audiovisual recording.

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

Dated this twenty-fifth day of June 2015,
at The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the Tribunal]