

UNITED
NATIONS

IT-04-74-A
D 16322 - D 16312
13 June 2005

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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-98-34-A
Date: 13 June 2005
Original: English

IN THE APPEALS CHAMBER

Before:
Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Date: 13 June 2005

PROSECUTOR

v.

Mladen NALETILIĆ, aka "TUTA"
Vinko MARTINOVIĆ, aka "ŠTELA"

**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"**

Prosecutor v. Prlić et al.

Office of the Prosecutor:

Mr. Kenneth Scott

Counsel for the Defence:

Mr. Čamil Salahović for Jadranko Prlić
Mr. Berislav Zivković for Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Slobodan
Praljak
Ms. Vesna Alaburić for Milivoj Petković
Mr. Tomislav Jonjić for Valentin Čorić
Mr. Marinko Škobić for Berislav Pušić

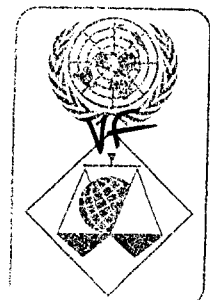
Prosecutor v. Naletilić and Martinović

Office of the Prosecutor:

Mr. Norman Farrell

Counsel for the Appellants:

Mr. Matthew Hennessy and Mr. Christopher Y.
Meek for Mladen Naletilić
Mr. Želimir Par and Mr. Kurt Kerns for Vinko
Martinović



VF

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the former Yugoslavia since 1991 (“International Tribunal”);

BEING SEIZED of the “Accused Slobodan Praljak’s Motion for Access to Confidential Testimony and Documents in Prosecutor v. Naletilić and Martinović Case,” filed on 8 February 2005 (“Motion”) by Slobodan Praljak (“Applicant”), whereby the Applicant requests access to 1) transcripts of all closed session testimony and related exhibits and 2) all non-public documents, materials and exhibits, including non-public, pre-trial and trial submissions and motions filed confidentially and/or *ex parte* as well as decisions regarding such submissions in the *Prosecutor v. Naletilić and Martinović* case¹ that relate to the conflict between Bosnian Muslims and Bosnian Croats and/or between the Army of BiH and the HVO on the territory of BiH in 1992/93;²

NOTING that in support of his request, the Applicant argues that the material sought will materially assist his defence in the *Prosecutor v. Prlić et al.* case³ and that this material is not that which the Prosecution is otherwise required to disclose;⁴

NOTING that the Applicant submits that he has a legitimate forensic purpose for seeking access to said material on grounds that the *Prosecutor v. Naletilić and Martinović* case, like the Applicant’s case, relates to the conflict between Bosnian Muslims and Bosnian Croats and/or between the Army of BiH and the HVO on the territory of BiH in 1992/93; the crimes charged in the Applicant’s case are geographically and temporally related to the crimes charged in *Prosecutor v. Naletilić and Martinović*; and much of the evidence submitted in *Prosecutor v. Naletilić and Martinović* relates specifically or at least generally to the Applicant;⁵

NOTING that the Applicant, based upon his review of public materials in the *Prosecutor v. Naletilić and Martinović* case, argues that there is good reason to believe that the non-public

¹ Case Nos. IT-98-34-T and IT-98-34-A.

² Motion, paras. 3-4.

³ Case No. IT-04-74-PT.

⁴ Motion, paras. 5, 8, 10.

⁵ *Id.*, para. 7.

materials in that case will almost certainly include information and/or evidence for his case on the following issues:

- a. Political and military plans and intentions of the participants in the conflict;
- b. Engagement and disposition of the warring parties' troops in 1992/93 on the territories defined by the indictments;
- c. Formation, subsequent functioning, command relationships and operations of the Patriotic League and Army of BiH from 1 January 1991 through March 1994;
- d. Formation, subsequent functioning, command relationships and operations of the HVO in 1992/93;
- e. Activities that relate to disciplinary or criminal proceedings against officers, soldiers, or other personnel of the Army of the Republic of Bosnia-Herzegovina or the Territorial Defence (collectively "ABiH") for acts of ethnic cleansing, other violations of international humanitarian law or the laws of war, or violations of military law generally from 1 January 1993 through 31 March 1994;
- f. Activities that relate to disciplinary or criminal proceedings against officers, soldiers, or other personnel of the HVO from 1992 through March 1994;
- g. Military and humanitarian aid provided by the Government of the Republic of Croatia to both the ABiH and the HVO; and
- h. Legality of the formation and subsequent functioning of the BiH Presidency, ABiH, HZ-HB/HR-HB and HVO in 1992/93.⁶

NOTING that the Applicant confirms that he is ready to accept and fully respect all protective measures attached to the material to which he is seeking access as well as any additional protective measures that the Appeals Chamber deems it necessary to impose prior to granting him access;⁷

NOTING the "Prosecution's Response to the Accused Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in Prosecutor v. Naletilić and Martinović Case, Filed on 8 February 2005" filed on 22 February 2005 ("Response"), in which the Prosecution 1) "does not, in broad principle, oppose the Applicant's position that the non-public testimony and related exhibits being sought may, within some degree of reason, potentially assist in the preparation" of the Applicant's case and 2) submits that although not all of the crimes charged in *Prosecutor v. Naletilić and Martinović* are specifically charged in the Applicant's case, they "are relevant in terms of demonstrating the general plan and criminal

⁶ *Id.*, para. 9.

⁷ *Id.*, para. 11.

enterprise, indicating the knowledge, notice and intent of the Bosnian Croat leadership and authorities, and showing the full scope of the pattern and scheme of the crimes committed against the Bosnian Muslims and the widespread and systematic nature of these crimes;⁸

NOTING that the Prosecution does not oppose the Applicant's Motion provided that the following conditions are met:

- a. the disclosed materials are limited to those that relate to the "conflict between Bosnian Muslims and Bosnian Croats and/or between Army of BiH and HVO on the territory of BiH in 1992/93;"
- b. the disclosure of such materials is subject to both the protective measures in the original case and the protective measures entered in the *Prlić* case, with the Registry providing the Applicant with a complete set of the protective measures entered in the original cases;
- c. there is no disclosure of Rule 70 material except on the provider's consent specifically given in the *Prlić* case;
- d. the Prosecution and Defence in the original cases be afforded a reasonable opportunity to identify "sensitive witnesses" which should not be disclosed in connection with the *Prlić* case; and
- e. that no *ex parte* pleading or submission from another case is disclosed, unless the Applicant is able to make a specific showing of a legitimate need for the disclosure of a particular pleading or submission, in which case the Prosecution, Defence and/or other interested person in the original case should be provided an opportunity to respond to the Applicant's showing before any determination is made to allow such disclosure.⁹

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

BEING FURTHER SEIZED OF "Jadranko Prlić's Notice of Joinder to Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in Prosecutor v. Naletilić and Martinović Case Filed on 8 February 2005" filed on 4 March 2005 ("Notice"), whereby the Applicant's co-accused in *Prosecutor v. Prlić et al.*, Jadranko Prlić ("the Accused Prlić"), moves to join the Applicant's Motion, incorporating the reasoning found in said Motion;¹⁰

NOTING the "Prosecution's Response to Jadranko Prlić's Notice of Joinder to the Accused Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in Prosecutor v. Naletilić and Martinović Case Filed on 8 February 2005" filed on 14 March

⁸ Response, paras. 9, 10.

⁹ *Id.*, para. 25; *see also* paras. 11-24.

¹⁰ Notice, p. 1.

2005 (“Response to the Accused Prlić’s Notice”), in which the Prosecution submits that its Response to the Applicant’s Motion filed on 22 February 2005 is applicable *mutatis mutandis* with respect to the Accused Prlić’s Notice and requests that the Appeals Chamber consider all of the arguments and requests made therein with regard to the Applicant as also being made with regard to the Accused Prlić’s Notice;¹¹

NOTING that no reply was filed to the Prosecution’s Response to the Accused Prlić’s Notice;

NOTING the decisions of Trial Chamber I on 9 March 2005 and Trial Chamber II on 11 April 2005¹² disposing of motions by the Accused Slobodan Praljak for access to confidential testimony and documents in other cases before the International Tribunal and notices of joinder by the Accused Jadranko Prlić to said motions, which are identical to the Motion and Notice in the instant case;

CONSIDERING that a party is always entitled to seek material from any source, including from another case before the International 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;¹³

¹¹ Response to the Accused Prlić’s Notice, para. 4.

¹² *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Defence’s Motion for Access to Confidential Material, 9 March 2005; *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Decision on the Accused Slobodan Praljak’s Motion for Access to Confidential Testimony and Documents, 11 April 2005.

¹³ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chambers in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Tihomir Blaškić*, 16 May 2002 (“*Blaškić Decision*”), para. 14; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Order on Paško Ljubičić’s Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez Case*, 19 July 2002, (“*Kordić and Čerkez Order*”), p. 4; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Momčilo Gruban’s Motion for Access to Material, 13 January 2003 (“*Kvočka et al. Decision*”), para. 5; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the Case *Prosecutor v. Tihomir Blaškić*, 24 January 2003, p. 4; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Decision on Joint Defence Motion by Enver Hadžihasanović and Amir Kubura for Access to All Confidential Material, Filings, Transcripts and Exhibits in the *Naletilić and Martinović case*, 7 November 2003, p. 3; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Dario Kordić and Mario Čerkez’s Request for Access to Tihomir Blaškić’s Fourth Rule 115 Motion and Associated Documents, 28 January 2004, p. 4; *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Emergency Motion for Access to Confidential Document, 4 February 2005, p. 4; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, 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*, 12 April 2005 (“*Simić Decision*”), p. 3.

CONSIDERING that “access to confidential material [from another case] may be granted wherever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case”¹⁴ and that “it is sufficient that access to the material sought is likely to assist the applicant’s case materially, or that there is at least good chance that it would;”¹⁵

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, for example, if the cases stem from events alleged to have occurred in the same geographical area at the same time”;¹⁶

FINDING that the Applicant has sufficiently identified and described by its general nature the confidential material to which he seeks access;

FINDING FURTHER that there is substantive geographical and temporal overlap between the *Prosecutor v. Prlić et al.* and *Prosecutor v. Naletilić and Martinović* cases such that the *inter partes* confidential transcripts of witness testimony and related exhibits as well as the *inter partes* confidential documents, material and exhibits, including pre-trial and trial submissions and decisions regarding such submissions filed in the *Prosecutor v. Naletilić and Martinović* case are likely to be of material assistance in the preparation of the defence in the *Prosecutor v. Prlić et al.* case and that, therefore, the Applicant has demonstrated a legitimate forensic purpose in relation to said confidential material;

CONSIDERING, however, 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;¹⁷

¹⁴ *Blaškić* Decision, para. 14; *Kordić and Čerkez* Order, p. 4.

¹⁵ *Kvočka et al.* Decision, para. 5.

¹⁶ *Blaškić* Decision, para. 15.

¹⁷ *Simić* Decision, p. 4.

CONSIDERING that the party on whose behalf *ex parte* status has been granted enjoys a protected degree of trust that the *ex parte* material will not be disclosed;¹⁸

CONSIDERING that the Applicant has not demonstrated a legitimate forensic purpose in relation to such *ex parte* material;¹⁹

FINDING that it is in the interests of justice in granting access to *inter partes* confidential material in this case to the Applicant and the Accused Prlić, to grant similar access to the other co-accused in the *Prosecutor v. Prlić et al.* case;

RECALLING that once an Appeals Chamber determines that confidential material filed in another case may materially assist an applicant, the Appeals Chamber shall determine which protective measures shall apply to said material as it is within the Appeals Chamber's discretionary power to strike a balance between the rights of a party to have access to material to prepare its case and guaranteeing the protection and the integrity of confidential information;²⁰

FOR THE FOREGOING REASONS, the Appeals Chamber, Judge Pocar dissenting in part,

GRANTS IN PART the Motion and allows access, subject to the conditions set forth below, to the co-accused in the *Prlić et al.* case to all *inter partes* confidential transcripts of all closed session testimony and related exhibits as well as all documents, material and exhibits, including pre-trial and trial submissions and motions as well as decisions regarding such submissions filed confidentially and *inter partes* in the *Prosecutor v. Naletilić and Martinović* case that relate to the conflict between Bosnian Muslims and Bosnian Croats and/or between the Army of BiH and the HVO on the territory of BiH in 1992/93 and **ORDERS** that:

- (a) the Prosecution, Mladen Naletilić and Vinko Martinović apply to the Appeals Chamber for additional protective measures or redactions, if required, within fifteen

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Blaškić* Decision, para. 29.

working days from this decision and identify 1) which, if any, of the material falls under Rule 70 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), and therefore, should not be disclosed unless prior consent is obtained from the relevant sources; and 2) which, if any, evidence or information concerns “sensitive witnesses” and therefore, should not be disclosed;²¹

- (b) where no additional protective measures or redactions are requested either by the Prosecution, Mladen Naletilić or Vinko Martinović within fifteen working days, the Registry shall provide the co-accused in the *Prlić et al.* case, their Counsel and any employees who have been instructed or authorized by their Counsel, with all *inter partes* confidential material described above, in electronic format where possible;
- (c) where additional protective measures or redactions are requested for any of the *inter partes* confidential material described above, either by the Prosecution, Mladen Naletilić or Vinko Martinović within fifteen working days, the Registry shall withhold that material until the Appeals Chamber has issued a decision on the request(s):
 - (i) if the Appeals Chamber denies the request(s), the Registry shall be ordered to provide the co-accused in the *Prlić et al.* case, their Counsel, and any employees who have been instructed or authorized by their Counsel, with the *inter partes* confidential material to which the Appeals Chamber grants access, in electronic format where possible;
 - (ii) if the Appeals Chamber grants the request(s), the party or parties applying for redactions shall be ordered to proceed with the authorized redactions and, thereafter, shall provide the redacted *inter partes* confidential material to the Registry for provision to the co-accused in the *Prlić et al.* case, their Counsel and any employees who have been instructed or authorized by their Counsel in electronic format where possible.
- (d) save as otherwise required by this decision, the *inter partes* confidential material provided by the Registry shall remain subject to any protective measures previously imposed by the Trial Chamber.

²¹The Appeals Chamber understands a “sensitive witness” to indicate “not every witness for whom some protective measure was previously given, but is meant to indicate a previously protected witness in a situation involving particular sensitivity where the evidence or information regarding that witness is so disconnected from the *Prlić* case that disclosure in these circumstances is not warranted.” See Prosecution’s Response, paras. 18-19.

The co-accused in the *Prlić et al.* case, their Counsel and any employees who have been instructed or authorized by their Counsel to have access to the *inter partes* confidential material described above shall not, without express leave of the Appeals Chamber finding that it has been sufficiently demonstrated that third-party disclosure is absolutely necessary for the preparation of the defence of the co-accused in the *Prlić et al.* case:

- (a) disclose to any third party, the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;
- (b) disclose to any third party, any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony; or
- (c) contact any witness whose identity was subject to protective measures.

If, for the purposes of preparing the defence of the co-accused in the *Prlić et al.* case, non-public material is disclosed to third parties – pursuant to authorization by the Appeals Chamber – 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 further that, if any such person has been provided with such information, he or she must return it to the co-accused in the *Prlić et al.* case or their respective Counsel or any authorized employees of their Counsel as soon as it is no longer needed for the preparation of their defence.


For the purposes of the above paragraphs, third parties exclude: (i) the co-accused in the *Prlić et al.* case; (ii) their respective Counsel; (iii) any employees who have been instructed or authorized by their Counsel to have access to confidential material; and (iv) personnel from the International Tribunal, including members of the Prosecution.

If Counsel for the co-accused in the *Prlić et al.* case or any members of their Defence teams who are authorized to have access to confidential material should withdraw from the *Prlić et*

al. case, any confidential material to which access is granted in this decision that is in their possession shall be returned to the Registry of the International Tribunal.

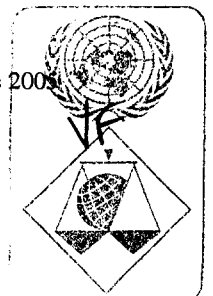
Done in both English and French, the English text being authoritative.

Done this 13th day of June 2005,
At The Hague,
The Netherlands.



Fausto Pocar
Presiding Judge

[Seal of the Tribunal]



PARTIAL DISSENTING OPINION OF JUDGE POCAR

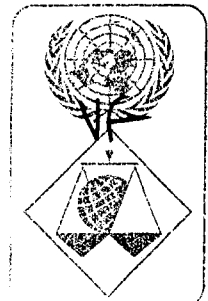
I write to dissent from this decision's denial of the Applicant's request for access to *ex parte* materials for reasons expressed in my Dissenting Opinion in the *Simić* case.²²

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

Done this 13th day of June 2005,
At The Hague,
The Netherlands



Fausto Pocar
Appeals Judge



²² See *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, 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, 12 April 2005, Dissenting Opinion of Judge Pocar.