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13 July 2009

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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-06-90-T
Date: 13 July 2009
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Ķinis
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 13 July 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON IVAN ČERMAK'S MOTION FOR ACCESS TO CONFIDENTIAL
MATERIALS IN THE MILAN MARTIĆ CASE

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Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović



I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 20 May 2009, the Accused Ivan Čermak (“Applicant”) filed a motion, requesting access to confidential material from the *Martić* case, specifically access to the non-redacted transcripts, accompanying exhibits, and any statements relating to witnesses MM-036, MM-038, MM-078, and MM-083 in that case.¹ The Applicant submits that the requested material is relevant and essential in order to assist him in the preparation of his case.² According to the Applicant, evidence of crimes committed by Serbs against Croatian civilians prior to Operation Storm will show that the crimes perpetrated by Croatian civilians and other groups after the operation were committed out of revenge which significantly undermines the possibility that the crimes were committed as part of a planned joint criminal enterprise as alleged in the Indictment.³ Further, the Applicant submits that he has clearly identified the material he is seeking.⁴ The Applicant recognizes that the protective measures ordered in the *Martić* case will continue to have effect.⁵ Finally, the Applicant argues that access to the material is necessary to ensure equality of arms.⁶

2. On 3 June 2009, the Prosecution filed a response raising no objection to the Motion, provided that the Chamber orders the same protective measures as those ordered in respect to witnesses and evidence in the *Martić* case.⁷

II. APPLICABLE LAW

3. Under Rule 75 (G) (ii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), where no Chamber remains seised of a proceeding, a party in a second proceeding may seek to rescind, vary, or augment protective measures ordered in that proceeding by applying to the Chamber seised of the second proceeding.

4. When requesting access to confidential *inter partes* material, the applicant must identify or describe the material it seeks by its general nature and show a legitimate forensic purpose for gaining access to it.⁸ Such purpose may be established by showing the existence of a

¹ Ivan Čermak’s Motion for Access to Confidential Materials in the Milan Martić Case, 20 May 2009 (“Motion”), paras 1, 4, 13.

² Motion, paras 6-7, 10.

³ Motion, para. 7.

⁴ Motion, para. 5.

⁵ Motion, para. 11.

⁶ Motion, para. 12.

⁷ Prosecution’s Response to Ivan Čermak’s Motion for Access to Confidential Materials in the Milan Martić Case, 3 June 2009, para. 2.

⁸ *Prosecutor v. Mrkšić et al.*, Appeals Chamber, Decision on Veselin Šljivančanin’s Motion Seeking Access to Confidential Material in the *Kordić and Čerkez* Case, 22 April 2008 (“*Mrkšić* Decision”), para. 7; *Prosecutor v.*

geographical and temporal nexus between the applicant's case and the case from which the material is sought.⁹ A Chamber may also be satisfied that a legitimate forensic purpose exists if there is a good chance that access to the material would materially assist the applicant in his case.¹⁰

5. Pursuant to Rule 75 (F) (i) of the Rules, protective measures that have been ordered for a witness or victim in any proceedings before the Tribunal shall continue to have effect *mutatis mutandis* in any other proceedings, unless and until they are rescinded, varied or augmented.

III. DISCUSSION

6. The Appeals Chamber Judgement in the *Martić* case was rendered on 8 October 2008 and no Chamber is currently seised of that case. Therefore, this Chamber is seised of the Motion.

7. The Chamber finds that the Applicant has described the material that he seeks in sufficient terms and has clearly identified it. The requested material from the *Martić* case and the Indictment in the present case both concern crimes allegedly committed in the geographical area of the former UN Sector South in Croatia. However, the requested material concerns events which occurred in 1991 and 1992, whereas the Applicant is charged with crimes that are alleged to have occurred during and after Operation Storm in the second half of 1995.¹¹ Nonetheless, the requested material may assist the Applicant as the material is relevant for his argument that crimes which occurred after Operation Storm were committed out of revenge and in retaliation to the crimes perpetrated by Serb forces prior to Operation Storm undermining the alleged joint criminal enterprise as pleaded in the present case. Finally, as noted above, the Prosecution does not object to the Applicant's access to the requested material. The Chamber therefore finds that there is a good chance that the requested material will assist the Applicant's case and that the Applicant has shown a legitimate forensic purpose for gaining access to it.

Krajišnik, Appeals Chamber, Decision on "Motion by Mićo Stanišić for Access to All Confidential Materials in the *Krajišnik* Case" ("*Krajišnik* Decision"), 21 February 2007, p. 4.

⁹ *Mrkšić* Decision, para. 7; *Krajišnik* Decision, p. 4.

¹⁰ *Mrkšić* Decision, para. 7; *Krajišnik* Decision, p. 4.

¹¹ Amended Joinder Indictment, 12 March 2008.

IV. DISPOSITION

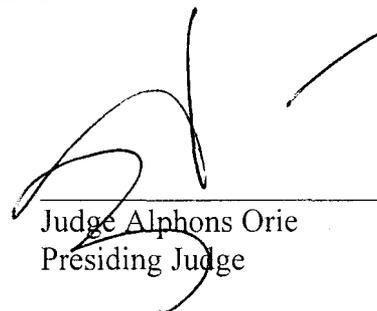
8. For the foregoing reasons, pursuant to Rules 54 and 75 of the Rules, the Chamber **GRANTS** the Motion and **ORDERS**

- (i) the Prosecution to identify for the Registry, without undue delay, the following confidential *inter partes* material in the *Martić* case, IT-95-11, for disclosure to the Applicant:
 - i. All closed and private session transcripts relating to witnesses MM-036, MM-038, MM-078, and MM-083;
 - ii. All confidential exhibits and exhibits admitted under seal relating to witnesses MM-036, MM-038, MM-078, and MM-083; and
 - iii. All witness statements of witnesses MM-036, MM-038, MM-078, and MM-083;
- (ii) the Registry to disclose to the Applicant, without undue delay, the confidential *inter partes* material as and once it has been identified by the Prosecution;
- (iii) that the Applicant, his Defence team, and any employees who have been instructed or authorized by the Applicant to have access to the confidential material, shall not, without express leave of a Chamber finding that it has been sufficiently demonstrated that third party disclosure is absolutely necessary for the preparation of the defence of the Applicant, disclose to the public or to any third party any confidential material from the *Martić* case. Such confidential material includes but is not limited to the identities and whereabouts of protected witnesses;
- (iv) that the Applicant, his Defence team, and any employees who have been instructed or authorized by the Applicant to have access to the confidential material, shall inform any person to whom disclosure is made pursuant to the procedure set out above that he or she is forbidden to copy, reproduce, publicise or disclose such material to any person, and that he or she must return it to the Applicant as soon as his or her possession of the material is no longer needed for the preparation of the Applicant's case; and

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AFFIRMS that, pursuant to Rule 75 (F) (i) of the Rules, any protective measures that have been ordered in respect of the requested material in the *Martić* case shall continue to have effect, except insofar as they have been varied in accordance with this decision.

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



Judge Alphons Orié
Presiding Judge

Dated this 13th day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

