



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-02-54-T  
IT-03-66-T  
Date: 1 March 2005  
Original: English

**IN THE TRIAL CHAMBER**

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

**Registrar:** Mr. Hans Holthuis

**Decision of:** 1 March 2005

**PROSECUTOR**

v.

**SLOBODAN MILOŠEVIĆ**

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**DECISION ON JOINT MOTION OF THE DEFENCE IN  
*PROSECUTOR v LIMAJ, BALA AND MUSLIU* FOR ACCESS TO CERTAIN  
CONFIDENTIAL MATERIAL**

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**The Office of the Prosecutor**

Ms. Carla Del Ponte  
Mr. Geoffrey Nice

**The Accused**

Mr. Slobodan Milošević

**Amicus Curiae**

Prof. Timothy L.H. McCormack

**Assigned Counsel**

Mr. Steven Kay  
Ms. Gillian Higgins

**Counsel for the Accused in *Limaj et al.***

Mr. Michael Mansfield and Mr. Karim A.A. Khan for Fatmir Limaj  
Mr. Gregory Guy-Smith and Mr. Richard Harvey for Haradin Bala  
Mr. Michael Topolski QC and Mr. Steven Powles for Isak Musliu

**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 (“the International Tribunal”),

**BEING SEISED** of a “Defence Motion Requesting Access to Certain Confidential Material in the Case of the Prosecutor v. Slobodan Milošević on Behalf of the Defence of Fatmir Limaj, Haradin Bala and Isak Musliu”, filed jointly by the Defence teams of Fatmir Limaj, Haradin Bala, and Isak Musliu (“Defence”) on 17 December 2004 (“Motion”),

**NOTING** the response filed on behalf of the Office of the Prosecutor (“Prosecution”) on 1 February 2005 in which the Prosecution applies for leave to file the Response (“Prosecution Response”),<sup>1</sup>

**NOTING** that the Defence seeks access to three categories of confidential documents in the case of the *Prosecutor v. Slobodan Milošević* (the “*Milošević* case”), namely (1) confidential annexes 1 and 2 to the *Amici Curiae Motion for Judgement of Acquittal Pursuant to Rule 98 bis*, filed on 3 March 2004 (“Annexes to the 98 bis Motion”); (2) confidential *Response by the Prosecution to the Amici Curiae Motion for Judgement of Acquittal Pursuant to Rule 98 bis* insofar as it relates to the Kosovo part of the *Milošević* case (“98 bis Response”); and (3) transcripts of all confidential testimony and copies of all confidential exhibits pertaining to Kosovo in 1998,

**CONSIDERING** that:

- (i) the Annexes to the 98 bis Motion consist of extracts of evidence produced in the *Milošević* case by way of transcript and exhibits respectively;
- (ii) the Prosecution asserts that the Defence have a legitimate forensic purpose in seeking access to the Annexes to the 98 bis Motion,<sup>2</sup> and that the Prosecution does not object to the disclosure of versions which redact information relating to material that was

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<sup>1</sup> “Prosecution Response to “Defence Motion Requesting Access to Certain Confidential Material in the Case of the Prosecutor v. Slobodan Milošević on Behalf of the Defence of Fatmir Limaj, Haradin Bala and Isak Musliu”, 1 February 2005.

<sup>2</sup> “Prosecution Response to “Defence Motion Requesting Access to Certain Confidential Material in the Case of the Prosecutor v. Slobodan Milošević on Behalf of the Defence of Fatmir Limaj, Haradin Bala and Isak Musliu”, 1 February 2005, para. 5.

adduced in closed or private session or that is currently under seal and which may identify protected witnesses,<sup>3</sup>

- (iii) the Prosecution concedes that the Defence would have a legitimate forensic purpose in seeking material contained in the 98 *bis* Response as it relates to the question of whether an armed conflict existed in Kosovo from early 1998, and that the Prosecution does not object to the disclosure of the confidential portions of the 98 *bis* Response relating to Kosovo (pages 1-45 of the document),<sup>4</sup>
- (iv) the Prosecution objects to the disclosure of confidential transcripts and confidential exhibits as the Defence has not shown a legitimate forensic interest in seeking the requested material and, in the alternative, that disclosure would reveal the identities of protected witnesses,<sup>5</sup>

**CONSIDERING** that a party may not engage in a fishing expedition, but that access to confidential material from another case shall be granted if the party seeking it has identified or described it by its general nature and if a legitimate forensic interest for such access has been shown,<sup>6</sup>

**CONSIDERING** that the relevance of the material sought by a party may be determined by showing a nexus between the Applicant's case and the case from which such material is sought, *i.e.*, where a geographical, temporal or other overlap between the cases exist and the material

<sup>3</sup> "Prosecution Response to "Defence Motion Requesting Access to Certain Confidential Material in the Case of the Prosecutor v. Slobodan Milošević on Behalf of the Defence of Fatmir Limaj, Haradin Bala and Isak Musliu", 1 February 2005, paras. 7-8.

<sup>4</sup> "Prosecution Response to "Defence Motion Requesting Access to Certain Confidential Material in the Case of the Prosecutor v. Slobodan Milošević on Behalf of the Defence of Fatmir Limaj, Haradin Bala and Isak Musliu", 1 February 2005, para. 11.

<sup>5</sup> "Prosecution Response to "Defence Motion Requesting Access to Certain Confidential Material in the Case of the Prosecutor v. Slobodan Milošević on Behalf of the Defence of Fatmir Limaj, Haradin Bala and Isak Musliu", 1 February 2005, paras. 12-14.

<sup>6</sup> "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", *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, 7 November 2003, p. 3; "Decision on Defence Motion Filed by the Defence of Franko Simatović (IT-03-69-PT) for Access to Transcripts and Documents", *Prosecutor v. Milošević*, IT-02-54-T, 20 October 2003, p. 3; Decision on Momočilo Gruban's Motion for Access to Material", *Prosecutor v. Kovčeka et al.*, IT-98-30/1-A, 13 January 2003, para. 5; "Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić and Čerkez Case", *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, 19 July 2002, p. 4; "Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case", *Prosecutor v. Enver Hadžihasanović et al.*, IT-01-47-AR73, 23 April 2002, p. 3; "Decision on Appellant's 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", *Prosecutor v. Blaškić*, IT-95-14-A, 16 May 2002, para. 14; "Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material", *Prosecutor v. Enver Hadžihasanović et al.*, IT-01-47-PT, 10 October 2001, para 10.

sought is likely to be of material assistance to the Applicant's case or, at least, there is a good chance that it may give the Applicant such assistance,<sup>7</sup>

**CONSIDERING** that the Defence has identified the requested material by its general nature, and that the Defence has demonstrated a legitimate forensic interest to access the parts of the material that pertain to the existence of an armed conflict in Kosovo between early January 1998 and August 1998,

**CONSIDERING HOWEVER** that, in respect of the material sought which goes to matters other than the existence of an armed conflict in Kosovo between early January 1998 and August 1998, the Defence has not demonstrated a legitimate forensic interest,

**CONSIDERING FURTHER** that, in respect of confidential material for which a legitimate forensic interest has been demonstrated and which is currently not publicly available, the burden of redacting that material so that it may be disclosed to the Defence is for the Prosecution, and not for Assigned Counsel who (as *Amici Curiae*) included such material in a confidential annex in a filing in these proceedings; this being because the protection was granted on the request of the Prosecution, or at least in respect of Prosecution witnesses or exhibits, and where it is the responsibility of the Prosecution to produce that material to the defence under the terms of the Rules, it must ensure that the material is properly redacted to protect the relevant interests,

**PURSUANT TO** Rules 54, 75, and 127 of the Rules of Procedure and Evidence,

**HEREBY DECIDES** and **ORDERS** as follows:

- (i) The Prosecution's application for leave to file a response is **GRANTED**.
- (ii) The Registry shall provide the Defence with copies of the 98 *bis* Response insofar as it relates to the Kosovo part of the *Milošević* case, pages 1-45 only.

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<sup>7</sup> "Decision on Motion by Hadžihasanović, Alagić, and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić & Čerkez* Case", *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, 23 January 2003, p. 3; "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", *Prosecutor v. Blaškić*, IT-95-14-A, 24 January 2003, p. 4; "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*", *Prosecutor v. Blaškić*, IT-95-14-A, 16 May 2002, para. 15;

- (iii) The Defence shall have access to the requested transcripts of confidential testimony and copies of confidential exhibits relating to the existence of an armed conflict in Kosovo between early January 1998 and August 1998, only after the Prosecution, within 30 days, has redacted those parts that may reveal the identity of any protected witness. This order includes reference to any material made in the Annexes to the 98 *bis* Motion.
- (iv) The protective measures which have already been ordered in relation to material to be made accessible to the Defence shall remain in place, and the Defence shall not disclose to the public any confidential or non-public material disclosed to it from the *Milošević* case. For the purpose of this decision, “the public” means and includes, all persons, governments, organisations, 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 accused and their defence teams. “The public” also includes, without limitation, families, friends, and associates of the accused, 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 Patrick Robinson  
Presiding

Dated this first day of March 2005  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

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“Decision on Appellant’s Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits from the Aleksovski Case”, *Prosecutor v. Blaškić*, IT-95-14-A, 10 March 2002, p. 3.