



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-98-32/1-PT

Date: 9 May 2006

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Order of: 9 May 2006

PROSECUTOR

v.

MILAN LUKIĆ
SREDOJE LUKIĆ

**ORDER ON SREDOJE LUKIĆ'S MOTION FOR ACCESS TO
CONFIDENTIAL INFORMATION IN THE *VASILJEVIĆ* CASE**

Office of the Prosecutor

Mr. Mark B. Harmon

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Counsel for Milan Lukić

Mr. Alan Yatvin

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Mr. Vladimir Domazet

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”);

BEING SEIZED, pursuant to Rule 75(G)(ii) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), of “Sredoje Lukić’s Defence Motion for Access to All Confidential & Under Seal Material in the *Vasiljević* Case”, filed on 30 March 2006 (“Motion”), in which the Defence of Sredoje Lukić (“Applicant”) requests access, on an ongoing basis where applicable,¹ to all confidential material in the case against Mitar Vasiljević as contained in four categories of documents:

- i. all confidential supporting material to the Indictment against the Accused;
- ii. all closed and private session transcripts produced in the pre-trial, trial, post-trial, and the appellate proceedings (“all stages of the proceedings”);
- iii. all confidential and under seal trial and appeal exhibits; and
- iv. all confidential and under seal filings by the parties at all stages of the proceedings;²

NOTING the “Prosecution’s Response to Sredoje Lukić’s Motion for Access to Confidential Material in the *Vasiljević* Case”, filed on 13 April 2006 (“Response”), in which the Office of the Prosecutor (“Prosecution”), *inter alia*:

- i. opposes as unnecessary the Applicant’s request in relation to supporting material;³
- ii. notes that the Motion does not specify whether access to material that is confidential and *ex parte* is sought, but confirms nevertheless that the Prosecution opposes such access;⁴ and
- iii. opposes the Applicant’s request for access “on an ongoing basis” to material from a case in which all trial and appellate proceedings have been completed, because such access is inconsistent with the jurisprudence of the Tribunal;⁵
- iv. states that subject to these and other observations, it does not oppose the Motion;⁶

NOTING that the Prosecution requests that “if the Trial Chamber is minded to grant the Motion, it should order adequate protective measures to maintain the confidentiality of the material in question”;⁷

¹ Motion, para. 19(2).

² *Ibid.*, paras. 1, 19(1).

³ Response, para. 2.

⁴ *Ibid.*, para. 3.

⁵ *Ibid.*, paras. 5–10.

⁶ *Ibid.*, para. 1.

NOTING that the Defence of Mitar Vasiljević did not file a response to the Motion within the time specified in the Rules;⁸

NOTING that the Applicant did not seek to reply to the Response within the time specified in the Rules;⁹

NOTING the “Submission of the Registrar pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding the Defence Motion Seeking Access to Confidential Material”, filed on 28 April 2006;

CONSIDERING that the Applicant, his current co-accused Milan Lukić, and Mitar Vasiljević were originally charged together pursuant to a single indictment (“Initial Indictment”), which arose from the same set of facts and course of conduct in the municipality of Višegrad in Bosnia and Herzegovina between June 1992 and October 1994; and that trial and appellate proceedings against Mitar Vasiljević, pursuant to an amended version of that indictment (“Amended Indictment”),¹⁰ were completed before either of the remaining co-accused were remanded to the custody of the Tribunal;¹¹

NOTING that, after the rendition of the Applicant to the Tribunal, the Prosecution successfully sought leave for further amendments to the Amended Indictment, including the removal of any charges against Mitar Vasiljević;¹² and that the operative indictment against the Applicant and

⁷ *Ibid.*, para. 11.

⁸ See Rule 126 *bis* (requiring a response to be filed within fourteen days).

⁹ See *ibid.* (requiring a reply, if any, to be filed within seven days of the response).

¹⁰ See *Prosecutor v. Vasiljević*, Case No. IT-98-32-PT, Amended Indictment, 12 July 2001, *motion to amend granted, ibid.*, Transcript of Pre-Trial Conference, T. 60 (20 July 2001) (Judge Hunt, Presiding):

I grant leave to the Prosecution to file an amended indictment, the one which is attached to the motion of the 12th of July. ... And I think that I should, for a matter of more abundant precaution, pursuant to Rule 82(B), order that Mr. Vasiljevic be tried separately on that indictment.

¹¹ See *Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004; *Prosecutor v. Sredoje Lukić*, Case No. IT-98-32/1-I, Scheduling Order for Initial Appearance, 19 September 2005, p. 2 (noting the transfer of the Applicant to the Tribunal on 16 September 2005); *Prosecutor v. Milan Lukić*, Case No. IT-98-32/1-I, Scheduling Order for Initial Appearance, 21 February 2006, p.2 (noting the transfer of the Applicant’s co-accused to the Tribunal on 21 February 2006).

¹² See *Prosecutor v. Sredoje Lukić*, Case No. IT-98-32/1-I, Prosecution’s Motion to Amend Indictment, 17 November 2005; *ibid.*, (Proposed) Second Amended Indictment, 17 November 2005; *ibid.*, Decision Granting Prosecution’s Motion to Amend Indictment and Scheduling Further Appearance, 1 February 2006. See also *Prosecutor v. Milan Lukic and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision Granting Prosecution’s Motion to Amend Indictment with regard to Milan Lukić, 22 March 2006 (noting the Prosecution’s request that the Second Amended Indictment replace the Amended Indictment, upon which Mitar Vasiljević was tried and convicted, as the operative indictment against Milan Lukić, so that it will apply to both Milan and Sredoje Lukić; and granting that request).

his current co-accused Milan Lukić is therefore the Second Amended Indictment filed on 27 February 2006;¹³

CONSIDERING that, like the Initial Indictment, the Second Amended Indictment charges the Applicant and his co-accused with persecutions, murder, inhumane acts, and extermination as crimes against humanity; and murder and cruel treatment as violations of the laws or customs of war;¹⁴ all crimes allegedly arising from the same course of conduct, in the same geographic area, and over the same period, that was the focus of the proceedings against Mitar Vasiljević;

CONSIDERING that a party is always entitled to seek material from any source to assist in the preparation of its case if the document sought has been identified or described by its general nature, and if a legitimate forensic purpose for such access has been shown; and that access to confidential material from another case is granted if the party seeking it can establish that it may be of material assistance to its case;¹⁵

CONSIDERING that, taking into account the Applicant's lack of knowledge about the nature of the confidential material in this case, the general nature of the material sought has been adequately identified in the Motion;

CONSIDERING that a legitimate forensic purpose for access to confidential material may be established by showing the existence of a nexus between an applicant's case and the case from which such material is sought,¹⁶ and therefore that access to material may be granted if the party seeking it demonstrates a "geographical, temporal or otherwise material overlap" between the two proceedings;¹⁷

CONSIDERING that, in light of the procedural history outlined above, the nexus between the two proceedings is evident, and it is clear that the standard for access to confidential material has been satisfied;

¹³ *Prosecutor v. Milan Lukic and Sredoje Lukić*, Case No. IT-98-32/1-PT, Second Amended Indictment, 27 February 2006.

¹⁴ Indeed, the only difference between the two indictments insofar as the types of crimes charged are concerned is that, instead of "cruel treatment", the Amended Indictment charges "violence to life and person" as the other violation of the laws or customs of war apart from murder.

¹⁵ See *Prosecutor v. Blaškić*, Case No. IT-95-14-A, 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* [Case], 16 May 2002, para. 14.

¹⁶ See *ibid.*, para. 15.

¹⁷ See *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić and Čerkez Case, 23 January 2003, p. 4.

CONSIDERING, however, that the *Simić* Appeals Chamber ruled 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”, and that, like the applicant in *Simić*, the Applicant in this matter “cannot demonstrate a legitimate forensic purpose in relation to such *ex parte* material”,¹⁸ even if his request could be interpreted to include such material;

CONSIDERING the Prosecution’s explanation that, in light of the procedural history of this case, it is unnecessary to grant access to the confidential supporting material that accompanied the Amended Indictment in the proceedings against Mitar Vasiljević, because it has already been disclosed to the Applicant;

CONSIDERING that nothing in this Order affects the disclosure obligations of the Prosecution under Rules 66 and 68; and that it is the responsibility of the Prosecution to determine whether there is additional material related to the *Vasiljević* proceedings that should be disclosed to the Applicant, but which is not covered by the terms of this Order;

CONSIDERING that some of the material to which access is sought contains information that may identify protected witnesses, and that the Applicant have undertaken “to fully comply and abide by any and all limitations, redactions and protective measures regarding identity of any protected person”,¹⁹ as well as to comply with “any and all orders of this Trial Chamber regarding non-disclos[ure] to the public [of] any confidential or non-public material disclosed”;²⁰

CONSIDERING that, pursuant to Rule 75(F)(i) of the Rules, any protective measures that have been ordered in respect of a witness in the *Vasiljević* case continue to have effect in the case against the Applicant and his co-accused, except as they have been varied in accordance with this Order;

CONSIDERING that the Chamber is of the view that the existing protective measures, as well as the Applicant’s acknowledgement of his obligation to comply with those measures, are

¹⁸ *Prosecutor v. Simić*, Case No. IT-95-9-A, Decision on Defence Motion by Franko Simatovic for Access to Transcripts, Exhibits, Documentary Evidence and Motions Filed by the Parties in the *Simić et al.* Case, 13 April 2005, p. 4.

¹⁹ Motion, para. 17.

²⁰ *Ibid.*

“adequate ... to maintain the confidentiality of the material”,²¹ and that it is therefore unnecessary to order any redactions to that material;

CONSIDERING that other Chambers have refused to order access to confidential material on an ongoing basis, because “a request for disclosure of future material is premature and should only be made when such material actually exists to enable the Chamber to decide on the basis of the circumstances at that time”,²²

PURSUANT TO Rules 54 and 75 of the Rules,

HEREBY GRANTS THE MOTION IN PART, AND ORDERS AS FOLLOWS:

- (1) The Registry shall give the Applicant access to the following categories of *inter partes* confidential material in the case of *Prosecutor v. Vasiljević*, Case No. IT-98-32:
 - (a) all closed and private session transcripts produced in the pre-trial, trial, post-trial, and the appellate proceedings (“all stages of the proceedings”);
 - (b) all confidential and under seal trial and appeal exhibits; and
 - (c) all confidential and under seal filings by the parties at all stages of the proceedings .
- (2) The Applicant’s request for access on an ongoing basis to this material is denied without prejudice to future periodic requests for access to material corresponding to the geographical and temporal specifications in the Motion, should any additional proceedings in the *Vasiljević* case occur.
- (3) The Registry shall give the Applicant access to *inter partes* confidential material in this case that was acquired pursuant to Rule 70 only if and when the consent of the providers has been obtained by the parties. The Registry shall contact the Prosecution and the Defence to determine which confidential material in the case, if any, is covered by Rule 70, and shall withhold disclosure of such material until such time as the relevant party informs

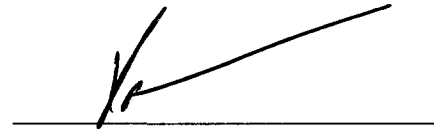
²¹ Response, para. 11.

²² *Prosecutor v. Rajić*, Case No. IT-95-12-PT, Decision on Joint Defence Motion for Access to Confidential Supporting Materials, Filings, Transcripts and Exhibits in the Rajić Case, 15 September 2003, p. 4; *see also Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on Todović Defence Motion for Access to Confidential and Under Seal Material in the *Krajišnik* Case relating to the Foča Penitentiary and Correction Facility, 14 July 2005, p. 4 (holding that “extending the reach of the order beyond the date of this Decision, as has been requested by the Applicant, would be inappropriate as it would impose a constraint upon the Trial Chamber's flexibility in responding appropriately to protection issues which may arise in respect of future material in this case”).

the Registry that consent for disclosure has been obtained. The relevant party shall determine as expeditiously as possible whether any of the requested material falls under Rule 70, and shall contact the providers of such material without delay to seek their consent for disclosure of that material, even in respect of those providers who have consented to the use of the relevant material in a prior case. The parties shall be responsible for informing the Registry as appropriate.

- (4) The Registry shall give the Applicant access to the non-Rule 70 *inter partes* confidential material identified in paragraph (1), above, without awaiting the parties' responses in respect of permission to disclose the Rule 70 material identified by them.
- (5) The Applicant and his defence counsel shall not contact any witness whose identity was subject to protective measures in this case.
- (6) The Applicant and his defence counsel shall not disclose to the public any confidential or non-public material disclosed to it from this case, except to the limited extent that disclosure to members of the public is directly and specifically necessary for the preparation and presentation his defence. If any confidential or non-public material is disclosed to the public, any person to whom disclosure is made shall be informed that he is forbidden to copy, reproduce, or publicise confidential or non-public information or to disclose it to any person, and that he must return the material to the Applicant as soon as it is no longer needed for the preparation of the Applicant's case. For the purpose of this Order, "the public" means and includes all persons, governments, organisations, entities, clients, associations, and groups, other than the Judges of the Tribunal, the staff of the Registry, the Prosecutor and her representatives, and the Applicant, his counsel, and any employees who have been instructed or authorised by the Applicant's counsel to have access to the confidential material. "The public" also includes, without limitation, families, friends, and associates of the Applicant; accused and defence counsel in other cases or proceedings before the Tribunal; the media; and journalists.
- (7) The Motion is otherwise denied.

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



Judge Robinson
Presiding

Dated this ninth day of May 2006
At The Hague
The Netherlands

[Seal of the Tribunal]