



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-04-84-PT

Date: 27 September 2006

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost

Registrar: Mr. Hans Holthuis

Order of: 27 September 2006

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

**ORDER ON MOTIONS FOR ACCESS TO
CONFIDENTIAL MATERIAL**

Office of the Prosecutor

Mr. Gilles Dutertre
Ms. Patricia Sellers
Mr. Gramsci di Fazio
Mr. Phillippe Vallieres-Rolland
Mr. Anees Ahmed

Counsel for Ramush Haradinaj

Mr. Ben Emmerson
Mr. Rodney Dixon
Mr. Michael O'Reilly

Counsel for Idriz Balaj

Mr. Gregor Guy-Smith

Counsel for Lahi Brahimaj

Mr. Richard Harvey
Mr. Paul Troop

Case No.: IT-04-84-PT

27 September 2006

TRIAL CHAMBER II 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 SEISED OF the “Confidential Motion on behalf of Ramush Haradinaj for Access to Confidential Materials in the *Milosevic* Case”, filed on 2 August 2006 (“Motion”), in which Ramush Haradinaj seeks access to all transcripts of closed and private trial sessions, confidential filings, and confidential exhibits in the case of *Prosecutor v. Milošević* “relating to the events described in the Kosovo Indictment against Slobodan Milosevic”;¹ and claims that access to these confidential materials is justified because there exists a “temporal, material and geographical overlap” between his case and *Milošević*, as both cases concern alleged crimes committed in Kosovo during an armed conflict between the Kosovo Liberation Army (“KLA”) and Serbian forces;²

BEING ALSO SEISED OF the “Motion by the Defence for Idriz Balaj requesting Leave to Join the ‘Confidential Motion on behalf of Ramush Haradinaj for Access to Confidential Materials in the *Milosevic* Case’”, and the “Motion by the Defence for Lahi Brahimaj requesting Leave to Join the ‘Confidential Motion on behalf of Ramush Haradinaj for Access to Confidential Materials in the *Milosevic* Case’”, both filed on 10 August 2006, in which Idriz Balaj and Lahi Brahimaj (together with Haradinaj, “Applicants”) seek leave to join the Motion and adopt all arguments set forth therein to the extent such arguments are applicable to them;

NOTING the confidential “Prosecution Response to Confidential Motion on behalf of Ramush Haradinaj for Access to Confidential Material in the Milošević Case, and Confidential Motions on behalf of Lahi Brahimaj and Idriz Balaj to Join the Confidential Motion of Ramush Haradinaj”, filed on 16 August 2006 (“Response”),³ in which the Prosecution does not oppose the relief sought in the Motion, but submits that certain restrictions should be imposed on the granting of such access, including the following:

¹ Motion, para. 1.

² *Ibid.* paras. 4–7 (quotation at para. 7).

³ On 18 August 2006, the Prosecution also filed a confidential “Corrigendum to Prosecution Response to Confidential Motion on behalf of Ramush Haradinaj for Access to Confidential Material in the Milošević Case, and Confidential Motions on Behalf of Lahi Brahimaj and Idriz Balaj to Join the Confidential Motion of Ramush Haradinaj” (“Prosecution Corrigendum”), in which it seeks leave to correct the case title on the cover page of the Response to read “Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj” instead of “Prosecutor v. Slobodan Milošević”. The Trial Chamber is of the view that such a correction is unnecessary, as the Response was filed simultaneously under the respective case numbers of each case, and thus has properly been placed in the case file of *Prosecutor v. Haradinaj, Balaj, and Brahimaj*.

- a. all applicable protective measures should remain in force;
- b. the Prosecution should be given a period of 28 days to ascertain whether any of the material for which access is granted was obtained pursuant to Rule 70 and, if so, to consult the Rule 70 provider to obtain consent to disclose the material to the Applicants;
- c. the Prosecution should be granted leave to apply to the Trial Chamber for additional protective measures and redaction of the material within 28 working days;
- d. the Applicants should not be granted access to any *ex parte* Prosecution filings, exhibits, or materials from *Milošević*; and
- e. the Trial Chamber should allow 28 days after the issuance of its order before any confidential material is disclosed to the Applicants;

NOTING that the Indictment against the Applicants charges them with one or more of the following crimes allegedly committed during an armed conflict in Kosovo between the KLA and Serbian forces between 1 March 1998 and 30 September 1998:⁴ persecution,⁵ murder,⁶ inhumane acts,⁷ imprisonment,⁸ rape,⁹ and deportation¹⁰ as crimes against humanity; and murder,¹¹ rape,¹² and cruel treatment¹³ as violations of the laws or customs of war;

NOTING that the 16 October 2001 Second Amended Indictment against Milošević (“*Milošević Kosovo Indictment*”) charged him with the following crimes allegedly committed as part of a “deliberate and widespread or systematic campaign of terror and violence directed at Kosovo Albanian civilians living in Kosovo”, beginning on or about 1 January 1999 and continuing until 20 June 1999:¹⁴ deportation,¹⁵ inhumane acts,¹⁶ murder,¹⁷ and persecution¹⁸ as crimes against humanity; and murder as a violation of the laws or customs of war;¹⁹ and that this campaign was alleged to have occurred during an armed conflict between the KLA, on the one hand, and forces of

⁴ *Prosecutor v. Haradinaj, Balaj, and Brahimaj*, Case No. IT-04-84-I, Indictment, 4 March 2005, paras. 14–19, 24

⁵ *Ibid.* paras. 44, 49–51, 54, 56, 59, 61, 63–64, 70, 73–74, 76, 87, 89, and 93.

⁶ *Ibid.* paras. 51, 54, 56, 59, 61, 63, 64, 70, 73–74, and 87.

⁷ *Ibid.* paras. 44, 50, 63–64, 73, 76, 87, 89, and 93.

⁸ *Ibid.* para. 50.

⁹ *Ibid.* para. 93.

¹⁰ *Ibid.* para. 49.

¹¹ *Ibid.* paras. 51, 54, 56, 59, 61, 63–64, 70, 73–74, 79, and 87.

¹² *Ibid.* para. 93.

¹³ *Ibid.* paras. 44, 49–50, 76, 79, 87, and 93.

¹⁴ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Second Amended Indictment, 16 October 2001, para. 53. *See also* *ibid.* paras. 54–61.

¹⁵ *Ibid.* para. 63.

¹⁶ *Ibid.* para. 65.

¹⁷ *Ibid.* para. 66.

¹⁸ *Ibid.* para. 68.

¹⁹ *Ibid.* para. 66.

the Federal Republic of Yugoslavia and Serbia, on the other, which intensified beginning in late February 1998;²⁰

CONSIDERING that a party is always entitled to seek material from any source to assist in the preparation of its case if the item sought has been identified or described by its general nature, and if a legitimate forensic purpose for such access has been established;²¹

CONSIDERING that a legitimate forensic purpose for access to confidential material may be established by showing the existence of a nexus between the applicant's case and the case from which such material is sought;²² that access to material may therefore be granted if the party seeking it demonstrates a general "geographical, temporal or otherwise material overlap" between the two proceedings;²³ and that the respective charges in the two cases need not be identical;²⁴

CONSIDERING that access to *inter partes* confidential material from another case is granted if the party seeking it can demonstrate that the material "is likely to assist the applicant's case materially, or ... there is a good chance that it would";²⁵ and the party seeking the material need not establish that it would likely be admissible evidence or applicable legal precedent in the party's own case;²⁶

CONSIDERING that, if the material sought is covered by Rule 70, the party that obtained such material in the earlier proceedings must seek the consent of the Rule 70 provider or providers

²⁰ *Ibid.* para. 95.

²¹ *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 ("Blaškić May 2002 Appeal Decision"), para. 14; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Order on Motions for Access to Confidential Material, 12 May 2006 ("Stanišić and Simatović May 2006 Pre-Trial Decision"), p. 6; *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Order on Motion for Access to Confidential Material in the *Perišić* Case, 12 April 2006 ("Perišić April 2006 Pre-Trial Decision"), p. 4.

²² *Prosecutor v. Limaj, Bala, and Musliu*, Case No. IT-03-66-A, Decision on Ljube Bošković's Motion for Access to Confidential Materials, 8 June 2006 ("Limaj et al. June 2006 Appeal Decision"), para. 2; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case, 18 January 2006 ("Blagojević and Jokić January 2006 Appeal Decision"), para. 4; *Blaškić* May 2002 Appeal Decision, *supra* note 21, para. 15; *Perišić* April 2006 Pre-Trial Decision, *supra* note 21, p. 4.

²³ *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 & Čerkez* Case, 23 January 2003, p. 4. *Accord Blagojević and Jokić* January 2006 Appeal Decision, *supra* note 22, para. 4 (holding that such a nexus exists, for example, "if the cases stem from events alleged to have occurred in the same geographical area at the same time").

²⁴ *Stanišić and Simatović* May 2006 Pre-Trial Decision, *supra* note 21, p. 7.

²⁵ *Limaj et al.* June 2006 Appeal Decision, *supra* note 22, para. 2 (quoting *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Galić Case, 16 February 2006, para. 3). *Accord Blagojević and Jokić* January 2006 Appeal Decision, *supra* note 22, para. 4.

²⁶ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005, para. 11. *See also Blaškić* May 2002 Appeal Decision, *supra* note 21, para. 15.

before disclosing such material,²⁷ even in respect of a Rule 70 provider who consented to the use of the relevant material in a prior case;²⁸

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

CONSIDERING that, although the temporal overlap between the current proceedings and those in *Milošević* is not identical, the similarities in the facts giving rise to the charges against the Applicants, on the one hand, and Milošević, on the other, with regard to events in Kosovo in 1998 and the first half of 1999 constitute a sufficient geographical, temporal, and material overlap between the two cases, and that the Applicants have demonstrated a good chance that access to the requested material will materially assist them in preparing their respective defences;

CONSIDERING, therefore, that the Applicants have demonstrated the existence of a nexus between their case and *Milošević*, and that they have consequently established a legitimate forensic purpose justifying access to *inter partes* confidential material from *Milošević* pertaining to the charges contained in the *Milošević* Kosovo Indictment;

CONSIDERING that, because the Registry is the formal keeper of the record, it is the material in its possession and under its control to which the Applicants seek access, and to which access may be granted by this Chamber pursuant to Rule 75(G),²⁹

CONSIDERING that some of the material for which access is sought contains information that may identify protected witnesses, and that the Applicants have undertaken "to comply with all protective measures applicable in the *Milosevic* case and any additional protective measures which the Trial Chamber may order";³⁰

²⁷ See *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on "Prosecution's Preliminary Response and Motion for Clarification Regarding Decision on Joint Motion of Hadžihasanović, Alagić and Kubura of 24 January 2003", 23 May 2003, paras. 11–12. *Accord Blaškić* May 2002 Appeal Decision, *supra* note 21, para. 26, *Stanišić and Simatović* May 2006 Pre-Trial Decision, *supra* note 21, p. 7.

²⁸ *Ibid.*; *Prosecutor v. Delić*, Case No. IT-04-83-PT, Order on Defence Motions for Access to All Confidential Material in *Prosecutor v. Blaškić* and *Prosecutor v. Kordić and Čerkez*, 7 December 2005, p. 7; *Prosecutor v. Delić*, Case No. IT-04-83-PT, Order on Jadranko Prlić's Motion for Access to All Confidential Materials in *Prosecutor v. Rasim Delić*, 2 December 2005, p. 4.

²⁹ *Stanišić and Simatović* May 2006 Pre-Trial Decision, *supra* note 21, p. 8.

³⁰ Motion, para. 8.

CONSIDERING that, pursuant to Rule 75(F)(i) , any protective measures that have been ordered in respect of a witness in *Milošević* continue to have effect in the Applicants' case, except as they have been or may in the future be varied in accordance with an order of a Chamber of this Tribunal;

CONSIDERING that the Trial Chamber is of the view that the existing protective measures in *Milošević*, as well as the Applicants' acknowledgement of their obligation to comply with those measures, are adequate to maintain the confidentiality of the material, and that it is therefore unnecessary to order any redactions to that material or any additional protective measures;

CONSIDERING that, although the Registry is the formal keeper of the record and a neutral non-party to the proceedings, it is often the parties that are in the best position to identify certain categories of material with efficiency and particularity;³¹

CONSIDERING that neither the Motion nor the Response contains any information of a sensitive nature, and that no good cause has been shown for filing these submissions confidentially;³²

³¹ See *Stanišić and Simatović* May 2006 Pre-Trial Decision, *supra* note 21, p. 10; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, Order on Sredoje Lukić's Motion for Access to Confidential Information in the *Milošević* Case, 9 May 2006, p. 5; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Order on Applicant's Motion Seeking Access to Confidential Material in the *Milošević* Case, 22 February 2006, p. 5.

³² See *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Order on Defence Motions for Reconsideration of Severance Decision and Time Extensions, 5 July 2006, p. 5 (ordering the Registry to lift the confidentiality of certain written submissions where no good cause had been shown for filing them confidentially); *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Stanišić Defence's Motion for Temporary Modification of Provisional Release Conditions, 8 February 2006, p. 3 (noting the Trial Chamber's previous holding that "submissions relating to the Accused's ill health and requesting substantive relief shall be made in public unless good cause is shown for filing them confidentially" and ordering the Registry to lift the confidentiality of a submission filed confidentially); *Prosecutor v. Simić, Tadić, and Zarić*, Case No. IT-95-9-T, Order, 24 September 2002, p. 2 (considering that "proceedings must be in public unless good cause is shown for filings to be made on a 'confidential' basis"); *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 54 (holding that "everything to do with proceedings before the Tribunal should be done in public unless good cause is shown to the contrary"). *Accord* Article 20(4) of the Statute; Rule 78.

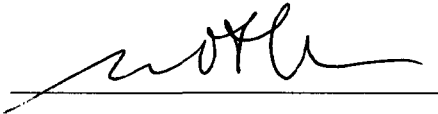
PURSUANT TO Rules 54 and 75(G) of the Rules, hereby grants the Motion **IN PART** and **ORDERS** as follows:

1. The Trial Chamber grants leave to Balaj and Brahimaj to join the Motion.
2. In consultation with the Prosecution, the Registry shall identify and give the Applicants access to all *inter partes* confidential material relating to the *Milošević* Kosovo Indictment.
3. If any of the material identified in paragraph 2 above was acquired pursuant to Rule 70, the Registry shall give the Applicants access to it only if and when the consent of the providers has been obtained by the Prosecution. The Registry shall contact the Prosecution to determine which part of this material, if any, is covered by Rule 70, and shall withhold disclosure of such material until such time as the Prosecution informs the Registry that consent for disclosure has been obtained. The Prosecution shall determine as expeditiously as possible whether any of the material in question falls under Rule 70, and shall contact the providers of such material without delay to seek their consent for disclosure, even in respect of those providers who have consented to the use of the relevant material in *Milošević*. The Prosecution shall be responsible for informing the Registry as appropriate.
4. The Registry shall give the Applicants access to the non-Rule 70 material identified in paragraph 2 above as expeditiously as possible, and without awaiting the Prosecution's response in respect of permission to disclose Rule 70 material.
5. The protective measures that have already been ordered in relation to the material to be made accessible to the Applicants shall remain in place.
6. The Applicants and their counsel shall not contact any witness whose identity is subject to protective measures in *Milošević*.
7. The Applicants and their counsel shall not disclose to the public any confidential or non-public material disclosed to it from *Milošević*, except to the limited extent that disclosure to members of the public is directly and specifically necessary for the preparation and presentation of the Applicants' respective defences. If any confidential or non-public material is disclosed to the public, any persons to whom disclosure is made shall be informed that they are forbidden to copy, reproduce, or publicise confidential or non-public information or to disclose it to any person, and that they must return the material to the Applicant in question as soon as it is no longer needed for the preparation of that 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 Applicants, their counsel, and any employees who have been instructed or authorised by the Applicants' respective counsel to have access to the confidential material. "The public" also includes, without limitation, families, friends, and associates of the Applicants; accused and defence counsel in other cases or proceedings before the Tribunal; the media; and journalists.

8. The Registry shall lift the confidentiality of the Motion, the Response, and the Prosecution Corrigendum.
9. In the future, the Prosecution and the Applicants shall file all motions and other submissions publicly, appending any sensitive information as confidential annexes, or they shall demonstrate good cause why a given motion is being filed confidentially.
10. All submissions contained in the Motion, the Response, and the Prosecution Corrigendum are denied in all other respects.

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



Carmel Agius
Presiding

Dated this twenty-seventh day of September 2006
At The Hague
The Netherlands

[Seal of the Tribunal]