



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-03-66-A

Date: 3 November 2006

Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision of: 3 November 2006

THE PROSECUTOR

v.

**FATMIR LIMAJ
HARADIN BALAJ
ISAK MUSLIU**

**DECISION ON OJDANIĆ'S APPLICATION FOR ACCESS TO
EXHIBIT P92**

The Office of the Prosecutor:

Ms. Helen Brady
Mr. Thomas Hannis

Counsel for the Defence:

For Fatmir Limaj: Mr. Michael Mansfield Q.C.
Mr. Karim Khan
For Haradin Bala: Mr. Gregor Guy-Smith
Mr. Richard Harvey
For Isak Musliu: Mr. Michael Topolski Q.C.
Mr. Steven Powles

Counsel for Applicant Dragoljub Ojdanić:

Mr. Tomislav Višnjić
Mr. Norman Sepenuk

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1. The Appeals 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 (“Appeals Chamber” and “International Tribunal”, respectively) is seized of appeals against the Judgement of Trial Chamber II in this case, rendered on 30 November 2005. The Appeals Chamber is also presently seized of “General Ojdanić’s Application for Access to Exhibit P92 Filed Under Seal”, filed 10 October 2006 (“Application”).

2. Dragoljub Ojdanić is an accused in *Prosecutor v. Milutinović et al.*, Case No. IT-05-87 (“*Milutinović*”). This case is currently in trial. In the Application, Ojdanić seeks access to Exhibit P92 from *Prosecutor v. Limaj et al.*, Case No. IT-03-66 (“*Limaj*”), which was filed under seal. Exhibit P92 was admitted and discussed during the testimony of *Limaj* Witness John Crosland, a military officer of the United Kingdom serving in Kosovo in 1998.¹ Exhibit P92 consists of a series of telegrams (with some information redacted) related to Crosland’s service in Kosovo, about which Crosland testified in *Limaj*.

3. Ojdanić states that the Prosecution is scheduled to call Crosland as a witness in *Milutinović* in early November.² Ojdanić believes that Crosland will testify about his assessment of events in Kosovo in 1998.³ Ojdanić seeks access to Exhibit P92 because he “believes that disclosure of this exhibit will assist him in his cross examination of Colonel Crosland, both in eliciting useful information concerning the activities of the Kosovo Liberation Army and in impeaching Colonel Crosland’s testimony as to his alleged contacts with General Ojdanić in August and September 1998.”⁴ He agrees to be bound by the protective measures adopted in *Limaj* as to this Exhibit.⁵

4. On 25 October 2006, the Prosecutor filed the “Prosecution’s Response to General Ojdanić’s Application for Access to Exhibit P92 Filed under Seal” (“Response”). This Response is untimely, as it was not filed within ten days of the Application.⁶ In the interests of justice, however, the Appeals Chamber will admit this Response, as it has the benefit of clarifying the applicability of Rule 70 to Exhibit P92. Specifically, the Response explains that Exhibit P92 is Rule 70 material;

¹ See *Limaj*, T. 2047.

² Application, para. 5.

³ *Ibid.*, para. 6.

⁴ *Ibid.*, para. 7.

⁵ *Ibid.*, para. 9 (under a correct numbering).

⁶ See *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005, para. 3 (noting that the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal governs in place of the default time limits set by Rule 126bis of the Rules of Procedure and Evidence (“Rules”).

that the Prosecution has applied for consent from the provider to release this Exhibit to the *Milutinović* defendants; and that the provider has not yet responded.⁷

5. Ojdanić has not filed a reply.

6. “[A]n accused seeking *inter partes* confidential material in another case may receive that material if it is likely to assist the applicant’s case materially, or there is a good chance that it would”.⁸ Here, there is a good chance that the material sought will assist Ojdanić in preparing for cross-examination of Witness Crosland. As Ojdanić points out, this material could help him impeach Witness Crosland should Witness Crosland’s testimony differ from the contents of the Exhibit. Accordingly, disclosure would be appropriate except that Exhibit P92 is Rule 70 material. For disclosure of Rule 70 material, consent of the relevant provider must be obtained before disclosure can occur.⁹

7. The Appeals Chamber accordingly **GRANTS** the Application, subject to consent being obtained from the Rule 70 provider. If the Rule 70 provider authorizes disclosure of Exhibit P92, the Appeals Chamber **ORDERS** that the Prosecution shall immediately inform the Registry. If this occurs, the Appeals Chamber further **REQUESTS** the Registry to release Exhibit P92 to Ojdanić – and, in the interests of justice, to his co-accused as well – as expeditiously as possible.

8. The Appeals Chamber further **ORDERS** that, in the event that Ojdanić and his co-accused are provided with Exhibit P92, they are to abide by the existing protective measures as to that Exhibit (save as modified in this order). In particular, absent further leave from the Appeals Chamber, Ojdanić and his co-accused, their Counsel, and any employees who have been instructed or authorized by Counsel to have access to Exhibit P92 shall not disclose the Exhibit or its contents, in whole or in part, to any third parties. For the purposes of this paragraph, third parties exclude: i) Ojdanić and his co-accused; ii) their 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.

⁷ Response, paras 2, 5.

⁸ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision on Ljube Bošković’s Motion for Access to Confidential Materials, 8 June 2006, para. 2 (internal quotation marks omitted), 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.

⁹ *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Materials in the Galić Case, 16 February 2006, para. 12.

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

Dated this 3rd day of November 2006,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]