



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: 3 July 2006
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Krister Thelin
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Order of: 3 July 2006

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

**ORDER ON MILAN LUKIĆ'S MOTION FOR ACCESS TO
CONFIDENTIAL INFORMATION IN THE *MILOŠEVIĆ* CASE**

Office of the Prosecutor

Mr. Mark B. Harmon
Mr. Frédéric Ossogo
Mr. Fergal Gaynor

Counsel for Milan Lukić

Mr. Alan L. Yatvin

Counsel for Sredoje Lukić

Mr. Đuro J. Čepić

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 “Motion of Milan Lukić for Access to Confidential Information in *Milošević* Case”, filed on 31 May 2006 (“Motion”), in which the Defence of Milan Lukić (“Applicant”) requests access to confidential information in the case of Slobodan Milošević (“Accused”) relating to the Municipality of Višegrad;

NOTING that the Applicant in its Motion refers to “Sredoje Lukić’s Defence Motion for Access to All Confidential and Under Seal Material in the *Milošević* Case relating to the Municipality of Višegrad” (“Sredoje Lukić’s Motion”) and fully incorporates it therein;

NOTING that the Applicant requests access to four categories of confidential material in the case against Slobodan Milošević:

- i. all confidential supporting material to the relevant Indictment against the Accused;
- ii. all closed and private session transcripts;
- iii. all confidential and under seal trial exhibits; and
- iv. all confidential and under seal filings by the parties;¹

NOTING that the Motion specifies that it seeks only the material within those categories that conforms to certain geographic and temporal specifications, namely the material relating to the municipality of Višegrad in Bosnia and Herzegovina between March 1992 and October 1994;²

NOTING that on 9 May 2006, the Trial Chamber issued an “Order on Sredoje Lukić’s Motion for Access to Confidential Information in the *Milošević* case” (“Order of 9 May 2006”), in which it granted the Sredoje Lukić’s Motion;

NOTING that the Applicant seeks “an entry of an Order substantially in the form of the Order of 9 May 2006”;³

¹ Sredoje Lukić’s Motion, paras. 1, 17(1), incorporated in the Motion, para. 1.

² *Ibid.* The Sredoje Lukić’s Motion concedes, however, that the indictment against the Applicant alleges that the relevant time period in which the charged crimes are supposed to have occurred begins in June 1992, not March 1992. See *ibid.*, paras. 6, 8.

NOTING that the Prosecution did not challenge the motion and did not file a response to the Motion;

CONSIDERING that the Applicant, his current co-accused Sredoje 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”),⁴ were completed before either of the remaining co-accused were remanded to the custody of the Tribunal;⁵

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;⁶ and that the operative indictment against the Applicant and his current co-accused Sredoje Lukić is therefore the Second Amended Indictment filed on 27 February 2006;⁷

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;⁸

³ Motion, para. 4.

⁴ 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. Vasiljević be tried separately on that indictment.

⁵ 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).

⁶ See *Prosecutor v. Milan Lukić 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).

⁷ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Second Amended Indictment, 27 February 2006.

⁸ 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.

NOTING that the amended Bosnia indictment against Accused Milošević (“*Milošević* Bosnia Indictment”) charged him with the following statutory crimes arising from, *inter alia*, the persecution, extermination, murder, wilful killing, imprisonment, unlawful confinement, forced labour, torture, inhumane acts, wilfully causing great suffering, cruel treatment, and forcible transfer or deportation of civilians in, around, and from the municipality of Višegrad; and the destruction or plunder of public and private property in Višegrad: genocide or complicity in genocide, grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity;⁹

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;¹⁰

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,¹¹ 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;¹²

CONSIDERING that the significant similarities in the facts giving rise to the charges against the Applicant and the Accused Slobodan Milošević, with regard to events in and around

⁹ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Amended Indictment (Bosnia), 22 November 2002 (“*Milošević* Bosnia Indictment”), paras. 32, 33, 34, 35, 36, 40, 42 (Counts 1–22). It must be noted, however, that several charges with regard to Višegrad, including all charges of genocide or complicity in genocide, did not survive the Defence’s motion for judgement of acquittal in the *Milošević* case. See *ibid.*, Decision on Motion for Judgement of Acquittal, 16 June 2004, pp. 54, 120.

¹⁰ 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.

¹¹ See *ibid.*, para. 15.

¹² 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.

Višegrad during the period concerned in the respective indictments, constitute a clear material overlap between the two proceedings;

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”,¹³ even if his request could be interpreted to include such material;

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 *Milošević* 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 has undertaken “to fully comply and abide by any and all limitations, redactions and protective measures, in particular those set forth at paragraph (5) of the Trial Chamber Order of 9 May 2006”,¹⁴

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 *Milošević* 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 adequate to maintain the confidentiality of the material, and that it is therefore unnecessary to order any redactions to that material;¹⁵

CONSIDERING that the Chamber has acknowledged that “the Registry is the formal keeper of the record and ... a neutral non-party to the proceedings”,¹⁶ however, “it is often the parties

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

¹⁴ Motion, para. 3.

¹⁵ Order of 9 May 2006, p. 5.

¹⁶ *Ibid.*

which are in the best position to identify certain categories of material with efficiency and particularity”;¹⁷

CONSIDERING, nevertheless, 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 Applicant seeks access, and to which access may be granted by this Chamber;

CONSIDERING that in the Order of 9 May 2006 the Chamber granted the Applicant’s co-accused’s request for access to the four categories of confidential material in the case against Slobodan Milošević, and that the Applicant should be granted identical access on the same basis;

PURSUANT TO Rules 54 and 75 of the Rules,

HEREBY GRANTS THE MOTION, AND ORDERS AS FOLLOWS:

- (1) In consultation with the Prosecution, the Registry shall identify and give the Applicant access to the following categories of *inter partes* confidential material in the case of *Prosecutor v. Milošević*, Case No. IT-02-54:
 - (a) All confidential supporting material that accompanied the *Milošević* Bosnia Indictment, and which pertains to the charges related to Višegrad;
 - (b) all closed and private session transcripts pertaining to the charges related to Višegrad;
 - (c) all confidential and under seal trial exhibits pertaining to the charges related to Višegrad; and
 - (d) all confidential and under seal filings by the parties pertaining to the charges related to Višegrad.

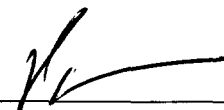
- (2) The Registry shall give the Applicant access to *inter partes* confidential material in this case that was acquired pursuant to Rule 70 only if and when the consent of the providers has been obtained by the parties. The Registry shall contact the Prosecution and the Defence to determine which confidential 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 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

¹⁷ See, e.g., *Milošević*, Order on Applicant’s Motion Seeking Access to Confidential Material in the *Milošević* Case,

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.

- (3) 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.
- (4) The Applicant and his defence counsel shall not contact any witness whose identity was subject to protective measures in *Milošević* case.
- (5) 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.

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



Judge Robinson
Presiding

Dated this third day of July 2006
At The Hague
The Netherlands

[Seal of the Tribunal]