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UNITED NATIONS

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 Nos.	IT-05-87/1-PT & IT-03-66
	Date:	6 February 2008
	Original:	English

IN TRIAL CHAMBER III

Before: **Judge Patrick Robinson, Presiding**
Judge Tsvetlana Kamenova
Judge Frederik Harhoff, Pre-Trial Judge

Registrar: **Mr Hans Holthuis**

Decision of: **6 February 2008**

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

DECISION ON VLASTIMIR ĐORĐEVIĆ'S MOTION FOR ACCESS TO ALL MATERIAL IN *PROSECUTOR V. LIMAJ ET AL.*, CASE NO. IT-03-66

The Office of the Prosecutor:

Mr Thomas Hannis
Mr Chester Stamp

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

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") is seized of "Vlastimir Đorđević's Motion for Access to Transcripts, Exhibits and Documents in the Case Prosecutor v. Limaj et al., Case No. IT-03-66", filed publicly on 29 October 2007 ("Motion"), and hereby renders its decision thereon.

I. Competency to Decide Motion

1. The Trial Chamber notes that there is no longer any Chamber seized of the *Limaj et al.* case. Therefore, this Trial Chamber considers that it is competent, in the particular circumstances of the matter before it, to decide whether it is appropriate to grant access to Vlastimir Đorđević ("Accused") to certain materials that are confidential in the *Limaj et al.* case.

II. Submissions

2. In the Motion, the Accused seeks the disclosure of the following material from the *Limaj et al.* case: (a) all public and non-public transcripts of the proceedings; (b) all public and non-public exhibits; and (c) all documentary evidence and motions submitted by the parties.[1] The Accused argues that there is a significant geographical and temporal overlap between his case and the *Limaj et al.* case.[2] Consequently the Accused argues that he has a right to fully access the trial record in the *Limaj et al.* case based on (a) the possible significance of such material to the facilitation and preparation of his case; and (b) his right to a fair and expeditious trial.[3]

3. The Accused assures the Trial Chamber that he will respect all protective measures ordered by the Trial Chamber in the *Limaj et al.* case.[4]

4. The Prosecution did not file a response.

III. Access to Public Material

5. With regard to the Accused's request for access to transcripts of open session testimony, public exhibits, filings, and motions in the *Limaj et al.* case, the Trial Chamber notes that these materials are already available to the public and suggests that the Accused contact the Registry directly in relation thereto. It is not necessary for a Party to move a Chamber for access to material which is publicly available.

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[1] Motion, paras. 3, 10.
[2] Motion, para. 5.
[3] Motion, paras. 5–6.
[4] Motion, para. 9.

IV. Access to Confidential Material

6 Initially, the Chamber notes the well-established principle of the Tribunal that proceedings should be conducted in a public manner to the extent possible.[5] In exceptional circumstances, however, a Chamber may restrict the access of the public, as well as the access of a Party, to certain material under the provisions of the Rules of Procedure and Evidence ("Rules"). Confidential material can be categorised into three types: *inter partes*, *ex parte*, and Rule 70. Each will be dealt with separately, as the standards for access are different for each type.

7. Confidential *inter partes* material. In respect of confidential (*i.e.* non-public) *inter partes* material, the legal standard that has developed in this Tribunal is that a Party may obtain such material from another case to assist it in the preparation of its case *if* the material sought has been identified or described by its general nature and *if* a legitimate forensic purpose for such access has been shown, *i.e.* if it is relevant and essential.[6] The relevance of such material may be determined by showing the existence of a nexus between the applicant's case and the original case from which the material is sought and the applicant is therefore required to demonstrate a "geographical, temporal or otherwise material overlap" between the two proceedings.[7] The essential nature of the material, in turn, means that the Party seeking it must demonstrate "a good chance that access to this evidence will materially assist the applicant in preparing his case."[8] The incumbent Party need not, however, establish that the material sought would likely be admissible evidence or that it is an applicable legal precedent in the Party's own case.[9]

8. *Ex parte* material. With respect to *ex parte* material, a different standard has been applied because the reasons for which the material was not afforded to the opposing Party during the original proceedings must be exhausted or at least dispensable in the second proceedings. This different standard has generally been referred to as being a "higher standard" with respect to

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[5] Rule 78 provides, "All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided."

[6] See *Prosecutor v Tihomir 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*", filed 16 May 2002, para. 14; and *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, "Decision on Motions for Access to Confidential Material" of 16 November 2005, para. 11. See also *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*", filed on 7 December 2005, at page 6.

[7] *See Prosecutor v. Blaškić,* supra, at para. 15; and *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

[8] *Prosecutor v. Blagojević and Jokić*, supra.

[9] *Prosecutor v. Blagojević and Jokić*, supra; and *Prosecutor v. Delić*, supra, at pp. 6–7.

establishing a legitimate forensic purpose.[10] What this "higher standard" is, however, has not been clearly defined in previous decisions addressing access to these materials. Moreover, *ex parte* submissions can be either public or confidential with different standards applicable to each of these two categorizations.

9 Public *ex parte* submissions are normally made to a Chamber on matters in which the opposing Party to the proceeding does not have a legal standing and therefore is not required to respond. For instance, a request made by one Party under Rule 54 *bis* for the production of certain documents from a State may be filed *ex parte* where the opposing Party has no interest in the matter and therefore enjoys no legal standing.

10. Confidential *ex parte* submissions, in contrast, may be filed for two different reasons. First, a Party may wish to keep an *ex parte* filing confidential because of security or sovereignty or similar concerns of a third party, such as a State or an international organization. This is customarily done pursuant to Rule 54 *bis* or Rule 70, which is dealt with later in this decision. Thus, access to such material is often subject to the consent of the third party concerned, while at the same time the Chamber must ensure that the accused's right to a fair and public trial is maintained.

11. Secondly, however, an *ex parte* submission may also be filed confidentially because the opposing Party is not supposed to be informed at all of the submission (or a part thereof); it must remain secret to that Party, at least for the time being.[11] In such instances, the *ex parte* filing is made with the understanding that the other Party to the proceeding will not be afforded access to that material. This is done for a specific purpose, which may be one authorized under the Rules, such as where such a submission is filed confidentially and *ex parte* under Rule 69(A) for the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. In any case, it is to be presumed that confidential *ex parte* material which was originally withheld from the other Party was of a nature that would not have impacted upon the fairness of the trial of the original proceedings.

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[10] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Motion by Mićo Stanišić for Access to All Confidential Material in the Krajišnik Case, 21 February 2007, p. 5; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić's Motion for Access to All Confidential Material in the *Brđanin* Case, 24 January 2007, para. 14; *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 17; *Prosecutor v. Blagoje 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, 12 April 2005, p. 4.

[11] The Chamber notes that it uses the term "*ex parte*" here, as is often the case in the Tribunal's jurisprudence, to mean material that is both *ex parte and* confidential, rather than material that is *ex parte* and public

12. The Trial Chamber reaffirms in this respect that the Prosecution's primary obligation under Rule 68 to disclose exculpatory material is not in any way restricted by an *ex parte* classification of material.

13. Where, in the original proceedings, a matter was not disclosed to a Party for reasons unrelated to concerns of sovereignty or security or similar interests, it is necessary for a subsequent moving Party to meet not only the threshold requirements for access to confidential *inter partes* material, but also to provide a good faith basis for why the interest it has in the confidential *ex parte* material is such that the original conditions which resulted in the barring of access to that material for the opposing Party, should now be set aside.

14. Given that information about this material, let alone the material itself, is not available to the subsequent moving Party, it will necessarily be difficult for this Party to meet this burden. In addition, it must be borne in mind that this extraordinary protection had been bestowed on the material in the original proceedings for the reason that a previous Chamber or Judge had ruled that the material should *not* be provided to the Party to the proceeding; this suggests that access to such *ex parte* material should be granted only exceptionally. The Chamber finds that the subsequent moving Party must establish that the following standards have been met:

(a) Access to the material which was formerly filed *ex parte* for the purpose of concealing it from the opposing Party, is now *required* to ensure the fundamental right to a fair trial. For instance, this could be the case where the material would unfairly limit the subsequent moving Party's right to access exculpatory material as set out in Rule 68, or where failure to lift the previous *ex parte* status would substantially prejudice a Party's ability to cross-examine a witness.

(b) The reasons for which the material was kept *ex parte* in the original proceedings are no longer applicable to the subsequent moving Party's request in the second proceedings. For instance, information about a witness underpinning a request for protective measures may no longer be necessary if the witness has subsequently died since the original proceeding.

(c) The *ex parte* status of the material in the original proceedings has been or could be lifted without prejudice to the parties in those (first) proceedings.

V. Access to Confidential Rule 70 Material

15. Finally, material can be deemed confidential by virtue of the fact that it has been provided by a State pursuant to Rule 70 restrictions on its use. In such cases, where an applicant has satisfied the legal standard in paragraph 7 of the present decision, the State that has provided the material must still be consulted before the material can be given to another accused before the Tribunal, and the material must remain confidential.[12] This is the case even where the Rule 70 provider(s) consented to the use of the material in one or more prior cases.[13]

VI. Deliberation

16. Applying these legal standards to the Motion, the Trial Chamber finds that the Accused has made no real effort to discharge his burden for access to confidential *inter partes* materials, but rather makes a blanket, general request for all such material in the *Limaj et al.* case. However, the Prosecution has decided not to oppose the Motion. Under these circumstances, the Trial Chamber will independently determine whether the test in paragraph 7 is met. The *Limaj et al.* indictment concerned events that transpired from May to July 1998. The Accused is charged with crimes that are alleged to have occurred in 1999; however, events in 1998 are also pleaded as material facts in the *Đorđević* Indictment. Therefore, the Trial Chamber finds it appropriate to grant access to the Accused to confidential and *inter partes* materials in the *Limaj et al.* case from May to July 1998, to be determined by the Prosecution.

17. With respect to the confidential *ex parte* material, the Trial Chamber finds that the Accused has not demonstrated that access to the material which was formerly filed *ex parte* for the purpose of concealing it from the opposing Party, is now *required* to ensure his fundamental right to a fair trial. Further, the Trial Chamber finds that the Accused has not demonstrated that the reasons for which the material was kept *ex parte* in the original proceedings are no longer applicable to him. Thus, the Trial Chamber concludes that the higher standard for access to confidential *ex parte* material in respect of the opposing Party in the original proceedings has not been met, and that it is not necessary for the Chamber to consider the third factor set forth earlier in this decision.

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[12] *See Prosecutor v. Blaškić*, Case No. IT-95-14-A, "Decision on Prosecution's Preliminary Response and Motion for Clarification Regarding the Appeal Chamber's Decision dated 4 December 2002 on Paško Lubičić's Motion for Access to Confidential Material, Transcripts and Exhibits in the *Blaškić* Case", 8 March 2004. *See also Prosecutor v. Blaškić*, supra footnote 5, at para. 26; *Prosecutor v. Milošević*, Case Nos. IT-02-54-AR108bis & IT-02-54-AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 19; *Prosecutor v. Orić*, Case No. IT-03-68-AR73, Public Redacted Version of Decision on Interlocutory Appeal Concerning Rule 70, 26 March 2004, paras. 6–7; *Prosecutor v. Delić*, Case, supra footnote 5, at page 7.

[13] *Prosecutor v. Delić*, Case No. IT-04-83-PT, "Order on Jadranko Prlić's Motion for Access to All Confidential Material in Prosecutor v. Rasim Delić", 2 December 2005, p. 4; and *Prosecutor v. Delić*, Case, supra footnote 5, at p. 7.

18. Third, in respect of the Rule 70 material, the Chamber will order below that the Prosecution seek the consent of the Rule 70 provider(s) before it can be disclosed to the Accused.

VII. Disposition

19. Accordingly, the Trial Chamber, pursuant to Rules 54, 70, and 75 of the Rules of Procedure and Evidence of the Tribunal, hereby **GRANTS** the Motion, in part, and:

a. **ORDERS** the Prosecution, due to its familiarity with the material concerned, to identify for the Registry the following *inter partes* material in the case of *Prosecutor v. Limaj et al.*, Case No. IT-03-66, for disclosure to the Accused:

   (i) all closed and private session transcripts produced in the pre-trial and trial proceedings relating to events in Kosovo from May to July 1998 not subject to Rule 70;

   (ii) all confidential and under seal trial exhibits relating to events in Kosovo from May to July 1998 not subject to Rule 70; and

   (iii) all confidential and under seal filings by the parties during the proceedings relating to events in Kosovo from May to July 1998 not subject to Rule 70.

b. **ORDERS** the Prosecution to determine without delay which of the material requested is subject to the provisions of Rule 70, and immediately thereafter to contact the providers of such material to seek their consent for its disclosure, and immediately after that to inform the Registry whether consent for the disclosure of that material has been obtained or not, whichever is the case.

c. **ORDERS** the Registry to withhold disclosure of any material subject to Rule 70 until such time as the Prosecution informs the Registry that consent for disclosure has been obtained, even in respect of those providers who have consented to the use of the relevant material in a prior case. Where consent cannot be obtained from provider(s) of any material subject to Rule 70, the material shall not be disclosed.

d. **ORDERS** the Registry to disclose to the Accused

   (i) the confidential and *inter partes* and non-Rule 70 material once it has been identified by the Prosecution in accordance with paragraph (a); and

   (ii) the Rule 70 material once the Prosecution has identified such material and informed the Registry of the consent of the Rule 70 provider(s) in accordance with paragraphs (a), (b), and (c).

e. **ORDERS** that no *ex parte* material be disclosed from the case of *Prosecutor v. Limaj et al.*, Case No. IT-03-66, without prejudice to the Defence of the Accused Đorđević to submit a further application which meets the standards set out in paragraph 14 of this decision.

f. **ORDERS** that the Accused, his Defence team, and any employees who have been instructed or authorised by the Accused shall not disclose to the public, or to any third Party, any confidential or non-public material disclosed from the *Limaj et al.* case, including witness identities, statements, or transcripts, except to the limited extent that such disclosure to members of the public is directly and specifically necessary for the preparation and presentation of the Accused's case. If any confidential or non-public material is disclosed to the public where directly and specifically necessary, any person to whom disclosure is made shall be informed that he or she is forbidden to copy, reproduce, or publicise confidential or non-public information or to disclose it to any person, and that he or she must return the material to the Accused as soon as it is no longer needed for the preparation of the Accused's 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 Tribunal, the staff of the Registry, the Prosecutor and his representatives, and the Accused, his counsel, and any employees who have been instructed or authorised by the Accused's counsel to have access to the confidential material. "The public" also includes, without limitation, families, friends, and associates of the Accused; accused and defence counsel in other cases or proceedings before the Tribunal; the media; and journalists.

g. **ORDERS** that nothing in this Order shall affect the disclosure obligations of the Prosecution under Rules 66 and 68; and **RECALLS** that it is the responsibility of the Prosecution to determine whether there is additional material related to the *Limaj et al.* case that should be disclosed to the Accused but which is not covered by the terms of this Decision.

h. **RECALLS** that, pursuant to Rule 75(F)(i), any protective measures that have been ordered in respect of a witness in the *Limaj et al.* case shall continue to have effect in the case against the Accused, except insofar as they have been varied in accordance with this Decision.

i. **REQUESTS** the Registry to facilitate the Accused's access to public material in the *Limaj et al.* case.

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

Judge Patrick Robinson
Presiding

Dated this sixth day of February 2008
At The Hague
The Netherlands

[Seal of the Tribunal]