



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-T
IT-04-84-T
Date: 23 October 2007
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 23 October 2007

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

**DECISION ON MOTIONS ON BEHALF OF RAMUSH HARADINAJ, LAHI BRAHIMAJ,
AND IDRIZ BALAJ FOR ACCESS TO CONFIDENTIAL MATERIALS IN
THE MILUTINOVIĆ ET AL. CASE**

Prosecutor v. Milutinović et al.

Office of the Prosecutor

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Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

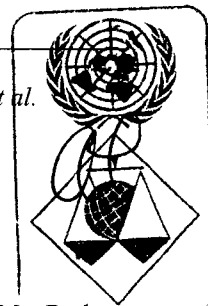
Prosecutor v. Haradinaj et al.

Office of the Prosecutor

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Mr. Gregor Guy-Smith for Mr. Idriz
Balaj
Mr. Richard Harvey and Mr. Paul
Troop for Mr. Lahi Brahimaj



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 seised of the “Defence Motion on Behalf of Ramush Haradinaj for Access to Confidential Materials in the *Milutinović et al.* Case”, filed confidentially on 18 September 2007 (“*Haradinaj* Motion”), “Lahi Brahimaj’s Motion for Access to Confidential Materials in the *Milutinović et al.* Case”, filed confidentially on 3 October 2007 (“*Brahimaj* Motion”), and “Idriz Balaj’s Joinder to ‘Defence Motion on Behalf of Ramush Haradinaj for Access to Confidential Materials in the *Milutinović et al.* Case,’ filed on 18 September 2007”, filed publicly on 4 October 2007 (“*Balaj* Motion”), and hereby renders its decisions thereon.

1. In *Haradinaj* Motion, Ramush Haradinaj (“Applicant”) seeks disclosure of the confidential materials that the Trial Chamber ordered to be disclosed to his co-Accused, Idriz Balaj and Lahi Brahimaj, in its decisions of 8 March 2007 (“*Balaj* Decision”)¹ and 4 May 2007 (“*Brahimaj* Decision”),² respectively.

2. The Applicant seeks access on the same terms as those ordered in the *Balaj* and *Brahimaj* Decisions:³ (a) all materials limited to the Dukadın Operational Zone of Kosovo in the period from 1 March 1998 to 30 September 1998⁴ and (b) all materials related to “the membership of the KLA General Staff Headquarters, the locations in which this Staff was situated and the physical conditions under which it operated for the same period.” Access to such materials was granted by the *Brahimaj* decision up to and including materials in the case on 26 April 2007. The Applicant requests that he be granted access up to and including the date of the *Haradinaj* Motion, *i.e.*, 18 September 2007. Furthermore, the Applicant seeks access to “all confidential transcripts, exhibits, filings from 1 November 1998 until 1 July 1999 that concern the activities of all Serbian forces (VJ, RDB, MUP, PJP, SAJ, and JSO) operating within Dukadın Operational Zone during this period, including the VJ brigades stationed and operating in this area, such as the 549th Brigade and the 125th Brigade.”⁵

¹ Confidential Decision on Confidential Motion by Idriz Balaj for Access to Confidential Materials in the *Milutinović et al.* Case, 8 March 2007 (“*Balaj* Decision”).

² Confidential Decision on Confidential Motion by Lahi Brahimaj for Access to Confidential Materials in the *Milutinović et al.* Case, 4 May 2007 (“*Brahimaj* Decision”).

³ Motion, paras. 1–2.

⁴ *Balaj* Decision, Disposition, para. (c); *Brahimaj* Decision, Disposition para. (c). Both decisions withheld the disclosure to *Balaj* and *Brahimaj* of *ex parte* material and of material subject to Rule 70 “until such time as the Prosecution informs the Registry that consent for disclosure has been obtained” from the provider of that material. *Balaj* Decision, Disposition, paras. (a), (b); *Brahimaj* Decision, Disposition, paras. (a), (b).

⁵ *Haradinaj* Motion, para. 4.

3. The Applicant argues that the Prosecution in the *Haradinaj et al.* case intends to summon certain high-ranking VJ and RDB officials in the forthcoming weeks. Thus, it is imperative that the Applicant is able to explore with these witnesses the activities of their forces in 1998 and 1999, in particular the allegations of commission of war crimes by these forces. The Applicant contends that such issues are “highly relevant to credibility of these witnesses and the evidence that they will be giving about the KLA and its activities.”⁶ In particular, the Applicant notes that one of the VJ witnesses scheduled to testify in the forthcoming weeks is General Branko Gajić, who recently testified during the defence case of Dragoljub Ojdanić.⁷ Another witness expected to be summoned is General Dragan Živanović, commander of the 125th Brigade, which was operating in areas where, “according to the Prosecution’s Pre-Trial Brief in the *Milutinović et al.* case, widespread crimes were committed against civilians in March and April 1999.”⁸ The Applicant explains that the evidence of officials of the VJ, RDB, and MUP is directly related to the events in the *Haradinaj et al.* case. As an example, the Applicant recalls that General Vlastimir Đorđević is recorded as being present at the alleged burial site in the *Haradinaj et al.* case, the integrity of which has been challenged by the Applicant. Thus, the alleged involvement of General Đorđević—as well as other persons named in the *Milutinović et al.* Indictment—“in war crimes, the removal of bodies, and tampering with grave sites in 1999” is directly relevant to the case against the Applicant.⁹

4. The Prosecution filed its Response publicly on 28 September 2007,¹⁰ in which it does not oppose the *Haradinaj* Motion for access to the extent that it is subject to the imposition of the same restrictions on the use and circulation of the materials as were granted to his co-Accused Balaj and Brahimaj in the *Balaj* and *Brahimaj* Decisions.¹¹

5. On 3 October 2007, Lahi Brahimaj adopted and joined the submissions of the Applicant and requested access to confidential materials in *Milutinović et al.* case, on the same terms and conditions as those laid out in the *Haradinaj* Motion.¹²

6. On 4 October 2007, Idriz Balaj joined the submissions of the Applicant, and, in addition, requested additional relief.¹³ First, the Balaj Defence notes that, thus far, following the *Brahimaj*

⁶ *Haradinaj* Motion, para. 5.

⁷ *Haradinaj* Motion, para. 6.

⁸ *Haradinaj* Motion, para. 6.

⁹ *Haradinaj* Motion, para. 8.

¹⁰ Prosecution Response to Motion by Ramush Haradinaj for Access to Confidential Materials in the *Milutinović et al.* Case, 28 September 2007 (“Response”).

¹¹ Response, para. 3.

¹² *Brahimaj* Motion, paras. 1, 9.

and *Balaj* Decisions, both Defence teams have received from the Prosecution only a limited amount of material. Consequently, the *Balaj* Defence requests that the Prosecution confirm that it has identified and disclosed all materials subject to the *Brahimaj* and *Balaj* Decisions. On 15 October 2007, the Prosecution confirmed that it has disclosed all confidential materials covered by the *Brahimaj* and *Balaj* Decisions, as well as all relevant Rule 70 materials.¹⁴

7. Second, the *Balaj* Defence requests that the Trial Chamber order the Registry, in consultation with the Prosecution, to identify and provide the *Brahimaj*, *Balaj*, and *Haradinaj* Defences (collectively “Applicants”) with access to all confidential *inter partes* materials, excluding Rule 70 materials where no consent has been obtained.¹⁵ The *Balaj* Defence argues that such an order will ensure an expeditious receipt of the materials, because there will be no need to await the Prosecution’s identification of materials to be disclosed.¹⁶ What the *Balaj* Defence seems to be seeking is an order from the Chamber (a) directing the Prosecution to identify all the *inter partes*, confidential, non-Rule 70 material; (b) then directing the Registry to disclose this material to the Applicants; and (c) then directing the Prosecution to seek the permission from the Rule 70 providers for material subject to Rule 70 material to be disclosed to the Applicants. This two-stage process will prevent the disclosure of the *inter partes*, confidential, non-Rule 70 material from being delayed by the Prosecution seeking permission for the disclosure of the *inter partes*, confidential, Rule 70 material and then accomplishing all the disclosure in a one-stage process. The Trial Chamber considers that the method proposed above is consistent with the manner in which the Prosecution has previously accomplished the disclosure in this case and that therefore the request for relief is unnecessary. The Chamber also notes that a joint filing by the Applicants may expedite any future Motions for access to confidential materials in *Milutinović et al.*

8. Third, the *Balaj* Defence requests that the Trial Chamber order the Registry, in consultation with the Prosecution, to provide the Applicants with all the public exhibits tendered in *Milutinović et al.* case, because the Applicants currently do not have access to such public exhibits.¹⁷ On 15 October 2007, the Prosecution suggested that the *Balaj* Defence contact the Registry directly to obtain access to such materials. The Chamber will order below that the Registry facilitate the *Balaj* Defence’s access to the public record of the proceedings.

¹³ *Balaj* Motion, para. 5.

¹⁴ Prosecution’s Response to Motions by Lahi *Brahimaj* and Idriz *Balaj* for Access to Confidential Materials in the *Milutinović et al.* case (“Response to Joinders”), 15 October 2007.

¹⁵ *Balaj* Motion, para. 10.

¹⁶ *Balaj* Motion, paras. 10–11.

¹⁷ *Balaj* Motion, para. 12.

9. The Trial Chamber notes that, notwithstanding the above, the Prosecution responded on 15 October 2007 to the *Brahimaj* and *Balaj* Motions, stating that it has no objection to the requests for relief therein, provided that the same restrictions on the circulation and use of material as those included in *Brahimaj* and *Balaj* Decisions apply.¹⁸ Specifically, the Prosecution therefore did not object to the following: (a) that the Applicants are granted access to confidential materials in the *Milutinović et al.* case, to the extent that it is identical to that of his co-Accused Balaj and Brahimaj; (b) that the Applicants are granted access to those confidential materials in the *Milutinović et al.* case relating to the KLA General Staff Headquarters *outside* the Dukadın zone during the Indictment period of 1 March 1998 to 30 September 1998, subject to the necessary redactions being made to protect the identity of protected witnesses; (c) that the Applicants are granted access to confidential materials in the *Milutinović et al.* case relating to the activities of all Serbian forces operating within Dukadın Operational Zone during the period of 1 November 1998 until 1 July 1999. The Chamber therefore finds it appropriate to grant access to the Applicants, both along the same lines as previously granted and updated temporally until the date of this Decision.

10. The Trial Chamber notes that the *Haradinaj* and *Brahimaj* Motions were filed confidentially without an explanation therefor and that there is no immediately apparent reason why the Motions should have been filed as such.¹⁹ The Chamber will therefore instruct the Registry to alter the status of these Motions from confidential to public, unless adequate reasons are given for withholding the contents of the Motions from the public.

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

- a. **ORDERS** the Prosecution, due to its familiarity with the material concerned and subject to paragraph (b) below, to identify for the Registry the following *inter partes* material in the case of *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, for disclosure to the Applicants:

¹⁸ Response to Joinders.

¹⁹ See, e.g., Decision on Ojdanić Fifth Motion to Amend Rule 65 *ter* Exhibit List, 28 September 2007; Decision on Lukić Motion to Bar Prosecution from Contacting Witnesses, 7 August 2007 (denying without prejudice motion because it was filed confidentially without adequate explanation); Decision on Prosecution Motion for Reconsideration of Decision on Prosecution Motion for Additional Trial-Related Protective Measure for Witness K56, 9 November 2006, para. 4 (“The Prosecution must justify filing documents in a confidential and/or *ex parte* manner, if it deems it necessary and appropriate to do so.”); confidential Order Lifting *Ex Parte* Status of Prosecution Ninth Motion for Protective Measures, 19 October 2006; *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision Regarding the Prosecution Motion for Protective Measures and Delayed Disclosure, 8 November 2006; *Prosecutor v. Perišić*, Decision on Prosecution’s Motion for Protective Measures, 10 October 2006; Rule 78 (“All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.”).

- (i) all closed and private session transcripts produced in the pre-trial and trial proceedings up to and including the date of this Decision and not subject to Rule 70;
 - (ii) all confidential and under seal trial exhibits not subject to Rule 70; and
 - (iii) all confidential and under seal filings by the parties during the proceedings, not subject to Rule 70.
- b. **ORDERS** that no material from the *Milutinović et al.* case shall be disclosed to the Applicants unless:
- (i) it relates to the period from 1 March 1998 to 30 September 1998 and concerns:
 - (a) the Dukadin Operational Zone of Kosovo during that time; and/or
 - (b) the membership of the KLA General Staff Headquarters, the location(s) in which the KLA General Staff Headquarters was situated, or the physical conditions under which the KLA General Staff Headquarters operated during that time; and/or
 - (c) the activities of all Serbian forces, including the VJ, RDB, MUP, PJP, SAJ, and JSO operating within Dukadin Operational Zone during the period of 1 November 1998 until 1 July 1999.
- c. **ORDERS** the Prosecution to determine without delay which of the material requested is subject to the provisions of Rule 70, 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. The Registry shall 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. This order shall apply to materials in the case up to and including the date of this Decision.
- d. **ORDERS** that no *ex parte* material be disclosed from the case of *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T.
- e. **ORDERS** that the Applicants, their Defence teams, and any employees who have been instructed or authorised by the Applicants, shall not:

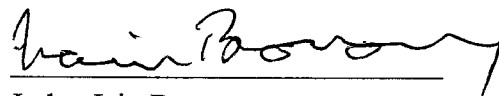
- (i) disclose to the public, or to any third party, any confidential or non-public material disclosed from the *Milutinović et al.* case, including witness identities, statements, or transcripts, except to the limited extent that disclosure to members of the public is directly and specifically necessary for the preparation and presentation his defence. If any confidential or non-public material is disclosed to the public where directly and specifically necessary, 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 or she must return the material to the Applicants as soon as it is no longer needed for the preparation of the Applicants' cases. 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 her representatives, and the Applicants, their counsel, and any employees who have been instructed or authorised by the Applicants' counsel to have access to the confidential material. "The public" also includes, without limitation, families, friends, and associates of the Applicants and their co-accused; accused and defence counsel in other cases or proceedings before the Tribunal; the media; and journalists;
- (ii) contact any witness whose identities are disclosed pursuant to this Order, or who are otherwise subject to protective measures, without first demonstrating to the Trial Chamber that contacting the witness(es) in question may materially assist the preparation of the Applicants' case, and that no reasonable alternative is available. Where authorisation for such contact is provided by the Trial Chamber, the Prosecution shall be entitled to be present during any contact or interview should the witness(es) so request.
- f. **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 *Milutinović et al.* proceedings that should be disclosed to the Applicants but which is not covered by the terms of this Decision.
- g. **RECALLS** that, pursuant to Rule 75(F)(i) of the Rules, any protective measures that have been ordered in respect of a witness in the *Milutinović et al.* case shall continue to

have effect in the case against the Applicants, except insofar as they have been varied in accordance with this Decision.

- h. **REQUESTS** the Registry to provide access to the Applicants to the non-Rule 70 *inter partes* confidential material, once it has been identified by the Prosecution in accordance with paragraphs (a) through (c).
- i. **REQUESTS** the Registry to facilitate the Applicants' access to public material in the *Milutinović et al.* case.

12. The Trial Chamber, pursuant to Rules 54 and 78, hereby **INSTRUCTS** the Registry to alter the status of the *Haradinaj* and *Brahimaj* Motions from confidential to public, unless a Motion is filed within seven days of the date of this Decision requesting that the Motions remain confidential.

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



Judge Iain Bonomy
Presiding

Dated this twenty-third day of October 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

