



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-95-14/2-A

Date: 19 July 2002

Original: English

IN THE APPEALS CHAMBER

Before: Judge David Hunt, Presiding
Judge Mehmet Güney
Judge Asoka de Zoysa Gunawardana
Judge Fausto Pocar
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Order of: 19 July 2002

PROSECUTOR

v.

**DARIO KORDIĆ
MARIO ČERKEZ**

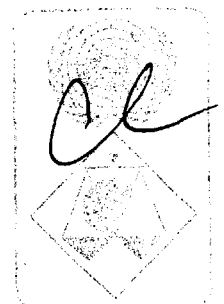
**ORDER ON PAŠKO LJUBIČIĆ'S MOTION FOR ACCESS TO CONFIDENTIAL
SUPPORTING MATERIAL, TRANSCRIPTS AND EXHIBITS IN THE *KORDIĆ AND
ČERKEZ* CASE**

Counsel for the Prosecutor
Mr Norman Farrell

Counsel for Paško Ljubičić
Mr Tomislav Jonjić

Counsel for Dario Kordić
Mr Božidar Kovačić

Counsel for Mario Čerkez
Mr Mitko Naumovski



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,

BEING SEISED OF “Paško Ljubičić’s Motion for Access to Confidential Supporting Material, Transcripts and Exhibits”, dated 3 June 2002 but filed on 4 June 2002, whereby Paško Ljubičić (“Ljubičić”) seeks access to confidential supporting material, transcripts and exhibits in the *Kordić and Čerkez* case;

NOTING the “Prosecution’s Response to ‘Paško Ljubičić’s Motion for Access to Confidential Supporting Material, Transcripts and Exhibits’ of 4 June 2002 and Request for Extension of Time”, dated 13 June 2002, whereby the Prosecution does not object to Ljubičić’s request in relation to material, transcripts and exhibits which relates to the *Kordić and Čerkez* trial to the extent that these documents are relevant to Ljubičić’s case, but objects to Ljubičić’s request to have access to material which is not relevant to his case and states that he should also be denied access to “post-trial materials” on the ground that he failed to describe the material for which he seeks access by its general nature as clearly as possible and because he failed to demonstrate how access to that material is likely to assist him;

NOTING the letter of the Senior Legal Officer of the Appeals Chamber, filed confidentially on 19 June 2002, in which the Senior Legal Officer invites Counsel for Kordić, Čerkez, Ljubičić and the Prosecutor to make submissions concerning appropriate courses of action to grant Ljubičić access to relevant material from the *Kordić and Čerkez* case;

NOTING the letter of the Prosecution in response to the Senior Legal Officer’s letter, filed confidentially on 28 June 2002, in which the Prosecution proposes to file an *inter partes* document identifying the nature of the material which the Prosecution seeks to have excluded as irrelevant to the Ljubičić case, together with a clear statement as to the test applied in selecting what is to be excluded;¹

NOTING that the Prosecution further submits that: (i) in relation to Rule 70 material, adequate time will be needed to contact providers of such material in order to ascertain their readiness to disclose it to the Ljubičić’s Defence; and (ii) in relation to some other non-public material, access should only be granted subject to adequate redaction and, in relation to certain confidential witnesses, the

Prosecution should be given some time to ascertain the views of those witnesses and the views of the government or entity that may have consented to the confidential witness testimony;²

NOTING that Counsel for Čerkez submits that the Prosecution should not be allowed to control access to material for which access is sought by a defendant in another case and suggests that disclosure of all the material in a redacted form (“as a first step”) would be more in accordance with the principle of public and transparent trial;³

NOTING that Čerkez did not file any document under seal nor requested closed session or any other protective measures for any of his witnesses;⁴

NOTING that Counsel for Kordić states that, provided appropriate protective measures are put into place, he has no objection to Ljubičić having access to all of the material filed in the *Kordić and Čerkez* at trial, but that, considering the volume of material and the practical difficulties that would ensue if the parties were requested to redact it, he submits that the parties should instead be requested to describe in some detail, in an *inter partes* document, the nature of the material which the Prosecution seeks to have excluded;⁵

NOTING that Ljubičić re-iterates that he should be granted access to all confidential and non-confidential supporting material, transcripts and exhibits, including post-trial material, and that, should the Appeals Chamber only grant him access to part of that material, the Prosecution should not be left to determine the extent of that access, but that, instead, the Defence should have the possibility to review the material and evaluate its relevance itself;⁶

NOTING that Trial Chamber III called a witness who testified confidentially on 13 and 14 November 2000 and in relation to whom various protective measures were granted, including an order that, before the record and transcript of his testimony is released, the parties and the government of Croatia may make representations in relation any such release;⁷

¹ Letter of the Prosecution (confidential), 28 June 2002.

² Ibid.

³ Letter of Božidar Kovačić, 1 July 2002.

⁴ Ibid.

⁵ Letter of Mitko Naumovski, 1 July 2002.

⁶ Letter of Tomislav Jonjić, 1 July 2002.

⁷ Order for Protective Measures, 13 November 2000. See also, Transcript of hearing, pp 26669-26673 (13 November 2000).

CONSIDERING that the present issue relates to the Accused's access to material from another trial relevant to his case and the manner in which such access should be granted, and that it is *not* a matter of disclosure;

CONSIDERING that a party is always entitled to seek material from any source to assist in the preparation of his 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;⁸

CONSIDERING that, in view of the partial geographical, temporal and substantive overlap between the present case and the *Kordić and Čerkez* case, some of the material sought is likely to be of material assistance to the Defence's case or, at least, there is a good chance that it may give the Defence such assistance;

CONSIDERING, however, that the geographical, temporal and substantive overlap between these two cases is only partial, and that the Defence failed to establish how the material relating to incidents or events which did not occur at a time or in a place relevant to the Ljubičić's Indictment could otherwise materially assist the Defence's case;

CONSIDERING also that a party may not engage in a fishing expedition, but that it must describe the documents sought by their general nature as clearly as possible even though it cannot describe them in detail;⁹

CONSIDERING that, in relation to material related to the *Kordić and Čerkez* appeal, the Defence has failed to describe the documents for which access was sought even in the broadest terms, thereby engaging in a fishing expedition;

HEREBY REJECTS Ljubičić's motion in relation to "post-trial materials" to the extent that he was unable to describe it by its general nature as clearly as possible;

CONSIDERING, however, that if, at a later stage, he is able to describe such material by its general nature as clearly as possible, Ljubičić may file a fresh motion seeking access thereto;

⁸ *The Prosecutor v. Blaškić*, 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, 16 May 2002, par 14.

CONSIDERING that, in relation to confidential supporting material, transcripts and exhibits from the *Kordić and Čerkez* trial for which there is sufficient geographical, temporal or substantive overlap with his case, Ljubičić has (a) described the material sought by its general nature and (b) shown a legitimate forensic purpose for such access;

CONSIDERING that, although the documents are in the possession of the Registry, it would be necessary for the Prosecution to make submissions as to what redaction should be made and accordingly it would be more efficient and appropriate for the Prosecution to make the redaction directly;

HEREBY GRANTS the motion in part and **ORDERS** as follows:

1. In relation to witnesses who were called on a confidential basis as well as in relation to supporting material and exhibits filed confidentially, the Prosecution shall file, no later than 20 September 2002, a document identifying
 - (i) The confidential supporting material, transcripts and exhibits from the *Kordić and Čerkez* trial which it considers to be relevant to the Ljubičić's case.
 - (ii) The material which it considers not to be relevant to Ljubičić, and state in some detail the reasons and criteria which led to its conclusion in that regard.
2. No later than 12 August 2002 or such further time which may be seen during that period to be required upon further application being made, the Prosecution shall review the *Kordić and Čerkez* record and identify any confidential material which is relevant to Ljubičić's case but which is subject to provider's consent in accordance with Rule 70(C) and seek consent of the provider of that material. Access to that material shall be granted only if and when the consent of the providers has been obtained by the Prosecution and subject to the protective measures mentioned below.
3. Within the same timeframe, the Prosecution shall contact witnesses who testified confidentially as well as any government or other entity which may have consented to their confidential testimony to hear their views upon the matter.
4. Concerning material which the Prosecution consider to be relevant to Ljubičić's case, as soon as practicable, but no later than 20 September 2002, the Prosecution shall redact that material and provide it to him subject to the following conditions:
 - (i) Not to disclose to any third party, the names of witnesses, their whereabouts, copies of witness statements, the contents of the witness statements, transcripts of witness testimonies,

⁹ *The Prosecutor v. Hadžihasanović et al.*, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002.

the contents thereof, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place unless absolutely necessary for the preparation of Ljubičić's defence, and always with leave of the Appeals Chamber.

- (ii) Not to disclose to any third party, any documentary or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony.
 - (iii) Third parties shall exclude: (i) Ljubičić, his counsel and co-counsel, (ii) persons employed by the law firms to which counsel belong, (iii) Judges and officers of the International Tribunal working on the Ljubičić case, (iv) officers of the Office of the Prosecutor.
 - (iv) Not to contact any witness without first demonstrating to the Appeals Chamber that the witness may materially assist Applicants' case in some identified way and that such assistance is not otherwise reasonably available to them. If the Appeals Chamber authorizes such contact, the Prosecution will be given a right to be present during any contact or interview, if the witness requests such presence.
 - (v) If for the purposes of preparing his defence, confidential material is disclosed to third parties - provided that the conditions set out in paragraph (i) are met - any person to whom disclosure of the confidential material in this case is made should be informed that he or she is forbidden to copy, reproduce or publicise, in whole or in part, any non-public information or to disclose it to any other person, and further that, if any such person has been provided with such information, he or she must return it to Ljubičić or his counsel as soon as it is no longer needed for the preparation of his defence.
 - (vi) To inform any member of the defence of Ljubičić that, if he or she withdraws from the case, all material from the case in his or her possession must be returned to the lead defence counsel for Ljubičić.
 - (vii) No reference shall be made in a public hearing or in any public filing to the fact that the protected witnesses gave evidence in the *Kordić and Čerkez* case.¹⁰
 - (viii) New pseudonyms shall be given to those protected witnesses that gave evidence as protected witnesses in the *Kordić and Čerkez* case whenever referring to those witnesses in the *Ljubičić* case, or any other proceedings before the International Tribunal or in discussion between parties.
 - (ix) Subject to sub-paragraphs (i)-(viii), above, and appropriate redaction made by the Prosecution as ordered, the protective measures which are already in place in relation to that material should remain in place.
5. Once he has reviewed that material and determined that he needs all or part of it in a non-redacted form, Ljubičić shall identify those parts of the material which he claims may assist him in the conduct of his defence and which is not otherwise available to him and file a motion by

¹⁰ This order is not intended to prevent cross-examination of any of these witnesses on any prior statement by them provided that, where the source of that statement is the confidential material to which access is being granted, that source is not made public.

which he seeks to justify the removal of the redaction. Should the need arise, consideration will then be given to additional protective measures.

6. In relation to the material which the Prosecution consider not to be relevant to Ljubičić's case, to the extent that Ljubičić disagrees in whole or in part with the Prosecution's conclusion as to the relevancy of such material, he shall, no later than 8 October 2002, file a motion challenging the conclusion of the Prosecution giving the reasons why he thinks those parts or the whole of the material considered not to be relevant by the prosecution is or may in fact be relevant to his case. The Prosecution may, if it decides to do so, respond to such a motion no later than 22 October 2002.
7. The government of Croatia and the parties to the *Kordić and Čerkez* case are invited to make representations, no later than 12 August 2002, in relation to the release of the records and transcripts of the Trial Chamber's witness who testified confidentially on 13 and 14 November 2000.

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



David Hunt
Presiding Judge

Done this 19 July 2002,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

