

UNITED
NATIONS



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-01-47-PT
Date: 1 August 2002
Original: ENGLISH

IN TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Carmel Agius

Registrar: Mr. Hans Holthuis

Decision of: 1 August 2002

PROSECUTOR

v.

**ENVER HADŽIHASANOVIĆ
MEHMED ALAGIĆ
AMIR KUBURA**

**DECISION ON VIDOJE BLAGOJEVIĆ'S APPLICATION FOR
ACCESS TO CONFIDENTIAL DOCUMENTS**

The Office of the Prosecutor:

Mr. Peter McCloskey
Mr. Ekkehard Withopf

Counsel for the Accused Hadžihasanović et al:

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović
Ms. Vasvija Vidović and Mr. John Jones for Mehmed Alagić
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

Counsel for the Accused Blagojević et al:

Mr. Michael Karnavas, for Vidoje Blagojević
Mr. David Wilson and Mr. Dušan Slijepčević, for Dragan Obrenović
Mr. Miodrag Stojanović and Ms. Cynthia Sinatra for Dragan Jokić
Mr. Veselin Londrović and Mr. Stephan Kirsch for Momir Nikolić

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 (“International Tribunal”),

BEING SEIZED of the “Application for Access from *Hadžihasanović et al.*, to Confidential Documents Necessary to Support Leave to Appeal the Trial Chamber’s Decision on Vidoje Blagojević’s Application for Provisional Release”, filed on 29 July 2002, in which the Defence for Vidoje Blagojević (“Defence”) seeks an order from the Trial Chamber granting access to documents filed confidentially in the case of *Prosecutor v. Hadžihasanović et al.*,

NOTING that the Defence argues that the material is relevant for the purposes of its appeal of the Trial Chamber’s decision denying Mr. Blagojević’s (“Applicant”) application for provisional release¹ for the following reasons:

1. The Trial Chamber in *Prosecutor v. Blagojević* rejected the guarantees of the Republika Srpska for Mr. Blagojević on the basis that the Tribunal cannot accept guarantees from an Entity as distinct from a State as recognised under international law;
2. In *Prosecutor v. Hadžihasanović et al.*, the Trial Chamber may have accepted guarantees from the Entity of the Federation of Bosnia and Herzegovina, believing that it had guarantees from the Republic of Bosnia and Herzegovina; and
3. For the purposes of the appeal, the Defence should be granted access to the confidential guarantees offered by the Federation of Bosnia and Herzegovina (and/or the Republic of Bosnia and Herzegovina) so as to “have a full and fair opportunity to compare the guarantees offered by the Federation vis-à-vis those offered by the Republika Srpska”, particularly in view of the fact that in the *Hadžihasanović* case the Trial Chamber relied upon the guarantees that were provided, and granted the application for provisional release in that case,

NOTING that a decision relating to deprivation of liberty has absolute priority, and that, consequently, neither the Prosecution in the *Blagojević* case, nor the parties in this case have had the opportunity to be heard on this application, and considering, in any event, that this Decision does not touch upon any of these parties’ rights,

¹ *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-PT, Decision on Vidoje Blagojević’s Application for Provisional Release, 22 July 2002 (“Blagojević Provisional Release Decision”).

NOTING that the Defence argues that the relevant test to be applied where a party seeks access to non-public materials in another case was set forth in *Prosecutor v. Blaškić*,²

CONSIDERING that where a party seeks access to non-public materials in another case, the relevant standard to be applied is the following. The applicant must:

- (i) identify the documents sought or describe them by their general nature; and
- (ii) show a legitimate forensic purpose for such access,³

CONSIDERING FURTHER that, in order to meet the second limb of this test, a party need only show “that such access would be likely to assist his case materially, or that there is at least a good chance that it will give that assistance”,⁴

CONSIDERING that the Decision in which the Trial Chamber denied provisional release states, as regards guarantees offered by Republika Srpska (emphasis added):

34. The Trial Chamber next turns to the guarantees given in support of this application for provisional release, which have been provided by the government of the Republika Srpska in Bosnia and Herzegovina. **Even though this is not the decisive element of the conclusions**, the Trial Chamber is of the opinion that it is not possible for this United Nations Tribunal to accept these guarantees.

[...]

52. It must, however, **be re-emphasised that the final basis for the conclusion reached** in this decision on the accused’s application for provisional release **is not the Trial Chamber’s finding that it cannot accept guarantees from the Entity of the Republika Srpska** in connection with such an application under Rule 65 of the Rules.

[...]

54. While, in light of the circumstances and for the purposes of this application, no adverse inferences can be drawn from the fact that the accused Blagojević failed to surrender himself voluntarily to the jurisdiction of this Tribunal, in considering the grave nature of the offences with which he is charged (complicity in genocide) and **having reasonable doubts whether the guarantees offered can eliminate or significantly minimise the risk of flight**, the Trial Chamber is not satisfied that, if released, Mr. Blagojević would appear for trial.

FINDING that, based on the highlighted quotations, guarantees (especially those offered in another case) are not relevant at all for the appellate proceedings,

² *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision Granting Access to Non-Public Materials, 20 Feb. 2002.

³ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 Oct. 2001, para. 10. See also *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision Granting Access to Non-Public Materials, 20 Feb. 2002, para. 7.

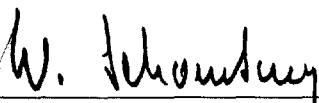
⁴ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 Oct. 2001, para. 11.

CONSIDERING, therefore, that the question whether there are indeed any confidential documents requested by the Applicant “which would be likely to assist” the Applicant’s case is left open,

HEREBY DISMISSES the Defence Application of 29 July 2002.

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

Dated this first day of August 2002,
At The Hague
The Netherlands



Judge Wolfgang Schomburg
Presiding

[Seal of the Tribunal]