



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-00-41-PT
Date: 27 November 2002
Original: English

IN THE TRIAL CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Amin El Mahdi
Judge Alphons Orie

Registrar: Mr. Hans Holthuis

Decision of: 27 November 2002

THE PROSECUTOR

v.

PAŠKO LJUBIČIĆ

**DECISION ON PASKO LJUBIČIĆ'S MOTION FOR ACCESS TO CONFIDENTIAL
SUPPORTING MATERIAL, TRANSCRIPTS AND EXHIBITS IN *PROSECUTOR V.
ZLATKO ALEVSOVSKI***

The Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. William Fenrick
Mr. Norman Farrell
Mr. Mark Harmon

Counsel for Paško Ljubičić:

Mr. Tomislav Jonjić

Counsel for Zlatko Alevsovski:

Mr. Srdjan Joka

TRIAL CHAMBER I (“the 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 (“the Tribunal”);

NOTING the “Paško Ljubičić’s Motion for Access to Confidential Supporting Material, Transcripts and Exhibits”, filed by the Accused Paško Ljubičić (“the Accused”) on 27 June 2002 before the President of the Tribunal (“the Motion”);

NOTING the “Prosecution’s Response to Paško Ljubičić’s Motion for Access to Confidential Supporting Material, Transcripts and Exhibits”, filed by the Prosecution on 11 July 2002 (“the Response”);

NOTING further the “Prosecution Motion to Suspend Consideration of Paško Ljubičić’s Motion for Access to Confidential Supporting Material, Transcripts and Exhibits” filed on 30 July 2002 (“the Prosecution’s Motion”), in which it requests that, in the interests of consistency, the President defer the consideration of the Motion pending the outcome of similar requests before the Appeals Chamber in the cases of *Prosecutor v. Tihomir Blaškić* and *Prosecutor v. Dario Kordić and Mario Čerkez*;

NOTING the “Order on Paško Ljubičić’s Request for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* case” rendered by the Appeals Chamber on 19 July 2002, and the “Decision on Prosecution’s Request for Reconsideration” rendered by the Appeals Chamber on 31 October 2002;

NOTING the “Order of the President on the Request of Paško Ljubičić for Access to Confidential Supporting Material, Hearing Transcripts and Exhibits in the case *The Prosecutor v. Zlatko Aleksovski*” dated 1 November 2002 (“the President’s Order”), that referred the consideration of the Motion to this Trial Chamber, in accordance with Rule 75 F (ii) of the Rules of Procedure and Evidence (“the Rules”);¹

CONSIDERING that, in view of the President’s Order, the Trial Chamber finds that this matter should be dealt with without any further delay; that it therefore denies the Prosecution’s Motion;

¹ Rule 75 (F) states that : “A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply: ... (ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.”

CONSIDERING that the Accused requests access to all confidential supporting material, transcripts and exhibits, including post-trial materials, in the *Prosecutor v. Zlatko Aleksovski* on the grounds, *inter alia*, that: the Amended Indictment and the Judgement against the accused Aleksovski deal with events and facts closely related to the Accused's case;² the disclosure of the material sought is justifiable and necessary for the preparation of his defence, in that it will assist in providing him with exculpatory material;³ the principle of equality of arms implies that such access should be granted and lack of access would seriously jeopardise his right to a fair trial;⁴ the Trial Chamber determine appropriate, necessary and reasonable protective measures to be imposed;⁵

CONSIDERING that a party may not engage in a fishing expedition, but that, provided it does not do so, it is entitled to seek material from any source to assist in the preparation of his or her case on certain conditions being satisfied, namely: (1) if material sought has been identified or described by its general nature as clearly as possible; and (2) if a legitimate forensic purpose for such access has been shown;⁶

CONSIDERING that the relevance of the material sought by a party may be determined by showing the existence of a nexus between the applicant's case and the case from which such material is sought, i.e., if the cases stem from events alleged to have occurred in the same geographic area and at the same time;⁷ that it is sufficient if the material sought is likely to be of assistance to the Accused's case or, at least, that there is a good chance that it may assist the defence;⁸

² The Motions, paras 5-7. The Accused submits that both cases refer to events that occurred at approximately the same period in the Lašva Valley, Central Bosnia, during the armed conflict between the Army of Bosnia Herzegovina (ABiH) and the Croatian Defence Council (HVO). It further argues that the *Aleksovski* case refers to the Kaonik Detention Center and to the presence of the HVO at this detention center, while the Amended Indictment against the Accused contains direct references to the Accused's participation in the HVO and to crimes that occurred at this detention center.

³ The Motion, para. 8.

⁴ The Motion, para.10.

⁵ The Motion, para. 15.

⁶ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3.

⁷ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appelants 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, para. 15.

⁸ See *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3.

CONSIDERING that, in the Response, the Prosecution concedes that there is a geographical, temporal and substantive overlap between in the *Aleksovski* case and the *Ljubičić* case⁹ and does not oppose the Motion, subject to the imposition of protective measures and to compliance with Rule 70 (C), insofar as the Accused seeks access to confidential material relevant to the his case;¹⁰

CONSIDERING that the Prosecution objects to access to confidential material not relevant to the present case and to “post-trial materials”;¹¹ that it further requests leave to file within a reasonable time a notice in order to identify: (1) confidential material not relevant to the Accused’s case; (2) any other non-public material which, for other valid reasons, the Defence should not be given access or should only be given access subject to redactions; and (3) any non-public material which falls under Rule 70;¹²

CONSIDERING that the Trial Chamber finds it unnecessary for the Prosecution to file such notice at this stage;

CONSIDERING that, in relation to the Accused’s argument regarding the principle of the equality of arms, the Chamber notes that the purpose of this principle is to give each party equal access to the processes of the Tribunal, or an equal opportunity to seek procedural relief where relief is needed;¹³ that, however, this principle does not guarantee equality in relief and cannot be understood to imply that, if the Prosecution has access to confidential material from another case, the Accused is entitled to the same;

CONSIDERING that, in relation to access to “post-trial materials”, the Trial Chamber is not satisfied that that Accused has described the material it seeks by its general nature as clearly as possible, and does therefore not consider that access should be granted;

CONSIDERING that, in view of the geographical, temporal and substantive overlap between the present case and the *Aleksovski* case, the Trial Chamber finds that access to confidential supporting material, transcripts and exhibits is likely to be of material assistance to the Accused or at least, that there is a good chance that it may give his defence such assistance;

⁹ The Response, para. 6.

¹⁰ The Response, para.2.

¹¹ The Response, paras 2,3, 5 and 7.

¹² The Response, para. 10.

¹³ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, paras 48, 50 and 51.

CONSIDERING that, regarding the material referred to in Rule 70 of the Rules, it is necessary to obtain the express consent from the providers of such material for its disclosure;¹⁴

CONSIDERING that it falls within the Trial Chamber's discretion to strike a balance between the right of a party to have access to material to prepare his case and guaranteeing the protection and the integrity of confidential information;¹⁵ that it thus considers that the protective measures granted in this decision are appropriate measures for the protection of the victims and witnesses and would not impact on the ability of the Accused to prepare his case;

PURSUANT TO Articles 20, 21 and 22 of the Statute and Rules 54 and 75 of the Rules;

HEREBY GRANTS the Motion and **ORDERS** that the Registry grant access to the Accused to the confidential supporting material, transcripts and exhibits in the *Aleksovski* case, subject to the following orders and protective measures:

1. For the purposes of this disposition:
 - (a) the "Prosecution" means the Prosecutor of the Tribunal and her staff;
 - (b) the "Accused" means and includes only the accused Paško Ljubičić's, his defence counsel and his immediate legal assistants and staff, and any others specifically assigned by the Tribunal to the accused Paško Ljubičić's trial defence team and identified in a list to be maintained by the lead counsel and filed with the Trial Chamber *ex parte* and under seal within ten days of the entry of this order. Any and all additions and deletions to the initial list in respect of any of the above categories of persons who are necessarily identified and properly involved in the preparation of the defence shall be notified to the Trial Chamber in similar fashion within seven days of such additions or deletions;
 - (c) the "public" means all persons, governments, organisations, entities, clients, associations and groups, other than the judges of the Tribunal and the staff of the Registry (assigned to either Chambers or the Registry), the Prosecution and the Accused, as defined above. The "public" specifically includes, without limitation, family, friends and associates of the Accused, the accused in other cases or proceedings before the Tribunal and defence counsel in other cases or proceedings before the Tribunal;

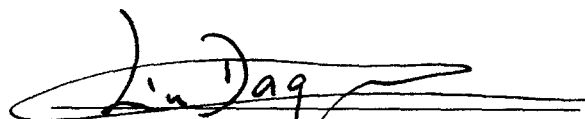
¹⁴ Rule 70 (C).

¹⁵ *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, 16 May 2002, para.29.

- (d) the “media” means all video, audio and print media personnel, including journalists, authors, television and radio personnel, their agents and representatives;
2. Rule 70 material, if any, shall not be disclosed unless prior authorization is obtained by the Prosecution from the relevant providers; the Prosecution shall be responsible for informing the Registry as appropriate;
 3. The Accused shall not disclose to the media any confidential or non-public materials provided by the Prosecution;
 4. Save as is directly and specifically necessary for the preparation and presentation of his case and only on leave being first granted by the Trial Chamber, the Accused shall not disclose to the public, to the media or to the family members and associates:
 - (a) the names, identifying information or whereabouts of any witness or potential witness identified by the Prosecution, the transcripts of witness testimonies, the contents thereof, or any other 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 the Accused’s case and always with the leave of the Trial Chamber; or
 - (b) any evidence (including documentary, audio-visual, physical or other evidence) or any written statement of a witness or the contents, in whole or in part, of any such non-public evidence, statement or prior testimony disclosed to the Accused;
 5. If the Accused finds it directly and specifically necessary to disclose such information for the preparation and presentation of his case and having obtained leave from the Trial Chamber to do so, he shall inform each person among the public to whom non-public material or information (such as witness statements, transcripts of testimonies, exhibits, prior testimony, videos, or the contents thereof), is shown or disclosed, that such a person is not to copy, reproduce or publicise such statement or evidence, and is not to show or disclose it to any other person. If provided with the original or any copy or duplicate of such material, such person shall return it to the Accused when such material is no longer necessary for the preparation and presentation of his case;
 6. If a member of the defence teams concerned withdraws from the case, all material in his or her possession shall be returned to the lead defence counsel of the Accused;

7. The Accused shall have no contact with the witnesses concerned with the material to be disclosed, unless otherwise decided by this Trial Chamber under the conditions set by the latter;
8. New pseudonyms shall be given to those protected witnesses that gave evidence as protected witnesses in the *Aleksovski* case whenever reference is made to those witnesses in the *Ljubičić* case, or any other proceedings or in discussions between the parties. 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 *Aleksovski* case.
9. Subject to the protective measures and orders prescribed above, the protective measures that are already in place in relation to the material disclosed should remain in place.

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



Judge Liu Daqun

Presiding Judge

Dated this 27th day of November 2002
At The Hague,
The Netherlands.

[Seal of the Tribunal]