



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: IT-95-14-A
Date: 4 December 2002
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 4 December 2002

PROSECUTOR
v.
TIHOMIR BLAŠKIĆ

**DECISION ON PAŠKO LJUBIČIĆ'S MOTION FOR ACCESS TO CONFIDENTIAL
MATERIAL, TRANSCRIPTS AND EXHIBITS**

Prosecutor v. Blaškić

Counsel for the Prosecutor:
Mr. Norman Farrell

Counsel for the Appellant:
Mr. Anto Nobile
Mr. Russell Hayman
Mr. Andrew Paley

Prosecutor v. Paško Ljubičić

Counsel for the Prosecutor:
Mr. Mark Harmon

Counsel for the Defence:
Mr. Tomislav Jonjić

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 ("International Tribunal"),

BEING SEISED of the "Motion for Access to Confidential Supporting Material, Transcripts and Exhibits" ("Motion") filed by Paško Ljubičić ("Applicant") on 3 June 2002, whereby the Applicant requests access to all confidential supporting material, trial transcripts, and exhibits as well as to the post-trial confidential material from the *Blaškić* case;

PURSUANT TO the Statute and the Rules of Procedure and Evidence of the International Tribunal ("Statute" and "Rules" respectively);

HEREBY RENDERS its Decision.

I. BACKGROUND

1. The Motion is submitted pursuant to Articles 21 and 22 of the Statute and Rules 66, 68 and 75(D) of the Rules. The Motion asserts that the Second Amended Indictment and the Judgement against Tihomir Blaškić (“Appellant”) are directly connected to the charges contained in the Amended Indictment against the Applicant.¹ All counts in the indictment against the Applicant are related to acts committed by the members of the Croatian Defence Council (“HVO”) forces between May 1992 and January 1994 in several municipalities in Central Bosnia. The Applicant was an officer of the HVO military police in the territory of the Central Bosnia Operative zone, in the very area where the Appellant was the commander of the HVO forces. In the supporting material of the indictment against the Applicant there are parts of witness testimonies from the *Blaškić* trial, including parts of the testimony of the Appellant himself.² The Applicant submitted in his Motion that he had met the test for the granting of access to confidential material as set forth in the *Blaškić* case by the Appeals Chamber. He also submitted that the principle of equality of arms implied the need to grant the Applicant access to the confidential material sought and that failure to do that would seriously jeopardise his right to a fair trial.³

2. On 13 June 2002, the Prosecution filed “Prosecution’s Response to Paško Ljubičić’s Motion for Access to Confidential Supporting Material, Transcripts and Exhibits of 3 June 2002 and Request for Extension of Time” (“Prosecution’s Response”), whereby the Prosecution:

- (a) submitted that subject to the imposition of protective measures, and to the provider’s consent in accordance with Rule 70 (C) of the Rules, it did not object to the Motion in so far as the Motion sought access to confidential material from the *Blaškić* trial relevant to the Applicant’s case;
- (b) requested an extension of time in order to review fully the record in the *Blaškić* case and identify confidential material of no relevance to the Applicant’s case;
- (c) sought leave to file *inter partes* in the *Blaškić* case (but *ex parte* in relation to the Applicant) a notice setting out the identity of confidential witnesses and confidential material from the *Blaškić* case in respect of which the Prosecution did not consent to grant access, and relevant confidential material subject to Rule 70 (C) by 21 June 2002 (“Notice”);
- (d) objected to access to post-trial material on the ground that the Applicant had not described the documents by their general nature as clearly as possible and had not demonstrated how access to that material would likely assist him in his case materially; and
- (e) submitted that the Motion was not specific enough to permit the Prosecution to frame its response regarding the “post-trial materials” at that stage.

¹ Motion, at para. 5.
² *Blaškić*, paras 3-4.

3. The Prosecution submitted that there is a geographical, temporal and substantive overlap *in part* between the *Ljubičić* case and the *Blaškić* case. However, it asserted that the *Blaškić* case is broader in geographical and temporal terms and concerns a far greater range of crimes. It further submitted that the Applicant's case is considerably narrower temporally, geographically and substantively since: a) the indictment against the Appellant unlike the indictment against the Applicant contains charges under Article 2, and b) the Applicant is alleged to have held a command position considerably more restricted than that held by the Appellant.⁴ Thus, the Prosecution submitted that the Applicant is entitled to be granted access to *some* of the confidential material from the *Blaškić* case but has no entitlement to access to confidential material which is not likely to assist his case materially.

4. The Prosecution expressed concern regarding the risk of disclosure of witness identities to the public by persons to whom the Applicant's defence might speak in the course of investigating the case. It submitted that: "it is axiomatic that the greater the number of persons who have access to the identity of a confidential witness or an item of confidential information, the greater the possibility that the identity of the confidential witness and the confidential information will enter the public domain."⁵ For the above reasons, it requested the Appeals Chamber to deny the Applicant access to the identities of confidential witnesses and confidential information which does not concern his case.⁶

5. With respect to confidential supporting material, transcripts and exhibits proffered at trial in the *Blaškić* case, the Prosecution admitted that the Applicant had satisfied the test for access to confidential material which is relevant to his case. However, it submitted that the Applicant had not established a right of access to post-trial materials, as he had not described the documents by their general nature as clearly as possible.⁷

6. On 14 June 2002, the Appellant filed the "Appellant's Response to Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits", in which he opposed the release of any filing or transcript relating to the individuals who are the subject of the "Appellant's Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115" filed confidentially on 10 June 2002. The Appellant also opposed the release of any *ex parte* pleading filed by the Appellant.

⁴ Prosecution's Response at para. 7.

⁵ Prosecution's Response at para. 25.

⁶ Prosecution's Response at paras 23-26.

7. On 18 June 2002, the Prosecution filed the "Prosecution's Request for Extension of Time for Review of Confidential Material Pursuant to Paško Ljubičić's Request" where it sought an extension of time of 7 days and authorisation to file its Notice on 28 June 2002.

8. On 20 June 2002, the Pre-Appeal Judge issued an Order suspending the filing of the Notice until the parties had responded to a letter filed confidentially by the Senior Legal Officer on that same date whereby the parties were requested to consider courses for access by the Applicant to confidential material in the *Blaškić* case suggested by the Appeals Chamber and to recommend alternative courses.

9. On 28 June 2002, the Prosecution filed confidentially its letter in response, stating that it would file an *inter partes* document describing in detail the nature of the material which the Prosecution sought to have excluded, together with a clear statement as to the test applied in selecting what was to be excluded, sufficient to enable the Appeals Chamber to determine whether the selection was appropriate. The Prosecution pointed out that the issue was whether the Registry should be ordered to grant the Applicant access to the documents to which the motion related. The Prosecution did not consider that it was obliged physically to provide this material to the Applicant. Rather, it asserted that its role was to make submissions to the Appeals Chamber on what material should be excluded from any order for disclosure.

10. With respect to the criteria to be adopted by the Prosecution in identifying the material to which access should not be granted, the Prosecution submitted: first, in determining whether the material was relevant to the Applicant's defence, considerations included not only the temporal and geographical overlap between the two cases, but also the charges in the indictments in the two cases; second, the Prosecution's assessment of what material may be of material assistance to the Applicant's case could only be based on the Prosecution's understanding of the issues in the case. The Prosecution further submitted that it might have been of greater assistance to the Applicant's case if he had provided the details of the nature of his defence, and stated that there was other non-public material to which, "for other valid reasons", the Applicant should not be given access or should only be given access subject to redactions.

11. On 1 July 2002, Applicant's Counsel filed a letter in which he pointed out that, since the *Blaškić* and *Ljubičić* cases refer to the same factual basis, the Applicant should be entitled to access all confidential and public supporting material, transcripts and exhibits, including post-trial materials. He submitted that: a) the Applicant could not undermine his request by agreeing to a grant of "partial" access to the material; thus the Defence should be allowed to review all the confidential material and decide on the possible relevance to the Applicant's case;

b) however, if the Appeals Chamber were to grant the request only partially, it would be inappropriate for the Prosecution to make the selection of the material to be disclosed to the Applicant without the full participation of the Defence; and c) the Prosecution should issue a list of all relevant and confidential material and declare that no other relevant material exists, particularly exculpatory material.

12. On 2 July 2002, Appellant's Counsel filed a letter whereby he reiterated that the Appellant objected to the disclosure of any transcript, exhibit or pleading relating to the "Appellant's Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115", any *ex parte* submission filed by the Appellant, or any Rule 70 material, without the consent of the provider. Counsel for the Appellant submitted that: a) the Prosecution should not be the sole arbiter of what material might be relevant to an accused's defense; b) if the Prosecution believed that certain material should be excluded on the basis of relevance (not upon the basis that the material is covered by Rule 70), the Prosecution should file an *inter partes* document describing in detail the nature of such material, together with a statement as to the test applied in selecting the material to be excluded; and c) the Prosecution should provide to the Applicant some basic information about the selected material such as the witness pseudonyms and a general description of the topics of the witnesses testimony, since such information would enable the Applicant to set forth a *prima facie* challenge to the exclusion if he believed that the material might be relevant to his defense.

II. DISCUSSION

13. As stated in a previous decision issued by the Appeals Chamber with respect to a similar application for access to confidential trial and post-trial materials in the present case, the test applied in decisions granting access is the "materiality" test, whereby access to confidential material shall be granted if the party seeking access can establish that it may be of material assistance to its case.⁸ A party is always entitled to seek material from *any* source to assist in the preparation of its case if the documents sought have been identified or described by their general nature and if a legitimate forensic purpose for such access has been shown.⁹ 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 cases 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.¹⁰ It is sufficient that access to the

⁸ *Prosecutor v. Blaškić*, Decision on Appellant's Dario Kordić and Mario Čerkez Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Trial Pleadings and Hearing Transcripts filed in the Prosecutor v. Blaškić, 16 May 2002, at para. 14.

⁹ *Prosecutor v. Enver Hadžihasanović, et al*, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, Case No. IT-01-47-PT, 10 October 2001, at para. 10.

¹⁰ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Appellant's Dario Kordić and Mario Čerkez Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Trial Pleadings and

material sought is likely to assist the applicant's case materially, or that there is at least a good chance that it would.¹¹

14. The indictment against the Applicant charges him with individual criminal responsibility for crimes against humanity, and violations of the laws or customs of war committed in the municipalities of Vitez and Busovača, in "villages and towns in the Lašva Valley", more specifically, Ahmići, Nadioci, Pirići, Šantići, Lončari, Gaciče, and Očenići, from January 1993 until July 1993. The Trial Chamber found the Appellant guilty of having ordered crimes against humanity, grave breaches under Article 2 of the Statute of the International Tribunal, and violations of the laws or customs of war against the Muslim civilians of Bosnia, in the municipalities of Vitez, Busovača and Kiseljak and, in particular, in the towns and villages of Ahmići, Nadioci, Pirići, Šantići, and Očehnići, between 1 May 1992 and 31 January 1994.¹²

15. The Applicant was charged in his capacity as the commander of the 4th Military Police Battalion - the highest-ranking member of all HVO Military Police units - in the Central Bosnia Operative Zone, which was under the Appellant's command and control. The Trial Chamber found that the Appellant as commander for the Central Bosnia Operative Zone had *de jure* and *de facto* control over the Military Police, and reviewed orders issued by the Appellant and addressed to the Applicant. The Applicant is also indicted for the attack perpetrated on the village of Ahmići on 16 April 1993, which the Trial Chamber found the Appellant to have ordered.

16. A number of documents proffered pursuant to Rule 115 of the Rules by the Appellant are related to the Trial Chamber's finding that the Appellant had effective control over the 4th Military Police Battalion, and have been offered in support of the argument that the Applicant and others were able to carry out military operations without consulting the Appellant. Some of the evidence proffered purports to show that the Applicant enjoyed relative independence in leading military units and planning and ordering operations.

17. For the foregoing reasons, the Appeals Chamber is satisfied that in this instance the geographical, temporal and substantive overlap between the *Ljubičić* and the *Blaškić* cases is sufficient to conclude that the Applicant has a legitimate forensic purpose. The Appeals Chamber considers that the Applicant has: (a) described the materials sought by their general nature, and (b) shown a legitimate forensic purpose for access. The Applicant is entitled to be informed about the

Hearing Transcripts filed in the Prosecutor v. Blaškić, 16 May 2002, at para. 15 referring to *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Motion by Momir Talić for Access to Confidential Documents, 31 July 2000, at para 8.

¹¹ See *The Prosecutor v. Blaškić*, Decision on Appellant's Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits From the Aleksovski Case, 8 March 2002, at page 3.

arguments advanced in the present appeal as well as the evidence proffered since they touch upon issues concerning the case against him, and therefore access to the post-trial materials in the present case may be of material assistance to his case.

18. Having found that the Applicant has a legitimate forensic purpose, the Appeals Chamber must nevertheless deny access to the Applicant to the “Appellant’s Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” (“Third Rule 115 Motion”), as well as to any submissions in relation to it. It has been emphasised in previous decisions concerning the Third Rule 115 Motion that the witnesses whose statements have been submitted as additional evidence have expressed significant concerns for their physical safety, as well as the safety of their families, if it becomes known that they have offered to testify before the International Tribunal.¹³ The witnesses have been assured that their identities and/or the fact that they have proffered testimony would not be disclosed. Protective measures have been granted upon the basis of fears of retaliation, which relate to the power that some of the persons named in their statements such as the Applicant himself still exert in Central Bosnia.¹⁴

19. Two of the statements proffered by the Appellant have been deemed “clearly admissible” under Rule 115¹⁵, and therefore, subject to the Prosecution’s arguments and evidence in rebuttal yet to be submitted, there is a possibility that these witnesses be called to testify. If the protective measures granted by the Appeals Chamber were to be lifted, the witnesses would rescind the authorisation given to the Appellant to submit their statements for admission under Rule 115, and refuse to testify were the Appeals Chamber to decide to call them.

III. DISPOSITION

FOR THE FOREGOING REASONS,

THE APPEALS CHAMBER HEREBY GRANTS the Motion IN PART and ORDERS:

¹² Corrected Amended Indictment, *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, 8 April 2002. See *Prosecutor v. Tihomir Blaškić*, Trial Chamber Judgement, Case No. IT-95-14-T, 3 March 2000.

¹³ See “Decision on the Appellant’s Motion for Protective Measures for New Witnesses on Appeal” (Confidential), Case No. IT-95-14-A, 27 May 2002 and “Decision on Appellants Dario Kordić and Mario Čerkez’s Supplemental Request for Assistance in Gaining Access to Non-Public Post-Trial Submissions, Appellate Briefs, and Hearings Transcripts filed in *The Prosecutor v. Blaškić*”, Case No. It-95-14-A, 16 October 2002.

¹⁴ “Decision on Appellants Dario Kordić and Mario Čerkez’s Supplemental Request for Assistance in Gaining Access to Non-Public Post-Trial Submissions, Appellate Briefs, and Hearings Transcripts filed in *The Prosecutor v. Blaškić*”, Case No. It-95-14-A, 16 October 2002, at para.8. See “Decision on the Appellant’s Motion for Protective Measures for New Witnesses on Appeal” (Confidential), Case No. IT-95-14-A, 27 May 2002, at para. 17.

¹⁵ “Decision on the Appellant’s Motion for Protective Measures for New Witnesses on Appeal” (Confidential), Case No. IT-95-14-A, 31 October 2002.

- (a) the Prosecution to seek the consent of the providers before disclosing to the Applicant the non-public material which falls under Rule 70(C) as identified by the Prosecution and the Appellant Blaškić in their confidential submissions filed before the Appeals Chamber¹⁶;
- (b) the Registry to grant the Applicant access to all non-public documents, materials and exhibits from the *Blaškić* case including non-public post-trial submissions, appellate briefs, and motions pursuant to Rule 115 filed in the *Blaškić* appeal until the date of the issuing of this decision, - with the exception of: (a) the “Appellant’s Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 10 June 2002, (b) any submissions related to the said motion, and (c) any *ex parte* motions and decisions which have been filed in the present appeal - only if and when the consent of the providers has been obtained by the Prosecution in accordance with the directions under paragraph (a) and subject to the following protective measures:

The Applicant, his Counsel and any employees who have been instructed or authorised by his Counsel to have access to the confidential material in the present case as described in paragraph (b) shall:

- (i) Not 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, 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 Applicant’s case, and always with leave of the Appeals Chamber;
- (ii) Not 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; and
- (iii) Not contact any witness without first demonstrating to the Appeals Chamber that the witness may materially assist the Applicant’s 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.

¹⁶ “Prosecution’s Submission on Access to Non-Public Material Falling within Rule 70” and the “Appellant’s Submission RE Rule 70 Material in Response to Decision of 16 May 2002 on Request for Access to Non-Public Appellate Briefings and Transcripts” filed confidentially on 3 June 2002.

If for the purposes of preparing the Applicant's case, 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 the Applicant or his Counsel as soon as it is no longer needed for the preparation of the case.

For the purposes of the above paragraphs third parties exclude: (i) the Applicant, (ii) persons authorised by the Registrar to assist Counsel for the Applicant, and (iii) personnel from the International Tribunal, including (iv) members of the Office of the Prosecutor.

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



Fausto Pocar
Presiding Judge

Done this fourth day of December 2002
At The Hague,
The Netherlands.

Seal of the Tribunal