



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-98-30/1-A  
Date: 13 January 2003  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Mohamed Shahabuddeen, Presiding  
Judge David Hunt  
Judge Mehmet Güney  
Judge Asoka de Zoysa Gunawardana  
Judge Theodor Meron

**Registrar:** Mr Hans Holthuis

**Decision of:** 13 January 2003

**PROSECUTOR**  
v  
**Miroslav KVOČKA**  
**Mlađo RADIĆ**  
**Zoran ŽIGIĆ**  
**Dragoljub PRCAĆ**

**DECISION ON MOMČILO GRUBAN'S MOTION FOR ACCESS TO MATERIAL**

**Counsel for the Prosecutor:**

Mr Christopher Staker  
Ms Susan L Somers

**Counsel for the Defence in the *Kvočka et al* case:**

Mr Krstan Simić for Miroslav Kvočka  
Mr Toma Fila for Mlađo Radić  
Mr Slobodan Stojanović for Zoran Žigić  
Mr Jovan Simić for Dragoljub Prcać

**Counsel for Momčilo Gruban:**

Ms Sanja Turlakov

### Procedural Background

1. On 6 June 2002, Momčilo Gruban (“Gruban” or “the Applicant”) filed a “Defence Motion for Disclosure”, whereby he seeks access to “unredacted transcripts, Trial Chambers Orders and Decisions, Prosecution and Defence exhibits, admitted documentary evidence and all motions filed by the parties during the pre-trial and trial phase” in the *Kvočka et al* case.<sup>1</sup> Gruban has been charged with wilful killing (as a grave breach of the Geneva Conventions), murder (as both a violation of the laws or customs of war and a crime against humanity), torture (as a grave breach of the Geneva Conventions, a violation of the laws or customs of war and a crime against humanity), rape (as a crime against humanity), wilfully causing great suffering (as a grave breach of the Geneva Conventions), outrages upon personal dignity (as a violation of the laws or customs of war), unlawful confinement of civilians (as a grave breach of the Geneva Conventions) and unlawful imprisonment (as a crime against humanity) in relation to crimes he is alleged to have committed or otherwise participated in as a shift commander in the Omarska camp in the opština of Prijedor between 24 May and 30 August 1992.<sup>2</sup> Miroslav Kvočka, Mlađo Radić, Zoran Žigić and Dragoljub Prać, all accused in the *Kvočka et al* case, were also charged and convicted, *inter alia*, for similar crimes committed in the Omarska camp during the same period.<sup>3</sup>

2. On 17 June, the Prosecution filed its “Prosecution Response to the ‘Defence Motion on Disclosure’ Filed on Behalf of Momčilo Gruban” (“Prosecution’s Response”), in which it conceded that Gruban had identified the material to which access is sought and had shown a legitimate forensic purpose in relation to some of the non-public material in the *Kvočka et al* case. In its Response, the Prosecution requested that, before access is granted, it be given leave to file a Notice: (a) identifying material which it considers has no relevance to the *Gruban* case; (b) identifying material to which for other valid reasons it considers Gruban should not be granted access; and (c) identifying material which it submits falls under Rule 70. On 20 June, the Pre-Appeal Judge in this case rendered a “Decision on Defence Motion for Disclosure” suspending the Notice which the Prosecution wishes to file until the nature of the response which is required is determined.

3. On the same day, the Senior Legal Officer sent a confidential letter (“SLO’s letter”) on behalf of the Appeals Chamber to counsel for the Prosecution as well as counsel for Gruban,

<sup>1</sup> The Motion was originally filed before the Appeals Chamber in the case of *Prosecutor v Momčilo Gruban*, Case IT-95-4-PT (“*Gruban* case”), a case of which the Appeals Chamber is not seized, but was subsequently re-filed in the *Kvočka et al* case (“Refiled Defence Motion for Disclosure”, 25 June 2002).

<sup>2</sup> IT-95-4-I, confirmed on 19 July 2001.

<sup>3</sup> IT-98-30/1-I, filed on 26 October 2000; *Prosecutor v Kvočka et al*, Judgement, 2 November 2001. Zoran Žigić was also charged and convicted in relation to crimes committed in the Trnopolje and Keraterm camps.

Miroslav Kvočka, Mlađo Radić, Zoran Žigić and Dragoljub Prcać requesting them to comment upon proposed courses by which Gruban could gain access to the material in question and to suggest alternative courses of conduct. By letter of 28 June, the Prosecution stated that, because the first method suggested in the SLO's letter, whereby it would have to redact the material to which access is given, would impose too great a demand upon the resources available to the Prosecution, it favoured the second course, whereby it would file an *inter partes* document identifying the nature of the material which the Prosecution seeks to have excluded together with a clear statement as to the test applied in selecting what is to be excluded. The Prosecution went on to list a number of criteria which it claimed were relevant in identifying the material to which access should or should not be granted. In his letter of 1 July,<sup>4</sup> counsel for Zoran Žigić wrote that he could not see how material relating to the Keraterm and Trnopolje camp could be of relevance to Gruban, but he did not object to material relating to the Omarska camp being released to him. By letter of 2 July, counsel for Mlađo Radić said that he favoured the first course mentioned in the SLO's letter, namely, "that the non-public confidential material should be redacted by the Prosecution, whereby it would remove any identifying feature and hence provide it to the Defense in redacted form, after which Mr. Gruban could identify the material not otherwise reasonably available to him". On 4 July, both counsel for Dragoljub Prcać and counsel for Gruban wrote that they also favoured the first course described above. On 12 July, the Appeals Chamber invited counsel for Gruban to respond to the confidential letter of the Prosecution of 28 June and to state her position vis-à-vis the suggestions made by the Prosecution therein. By letter of 16 July, counsel for Gruban informed the Appeals Chamber that she had no further comment to make.

4. On 20 August, the Prosecution filed its "Prosecution Motion to Suspend Consideration of the 'Refiled Defence Motion for Disclosure' Filed on Behalf of Momčilo Gruban" ("Prosecution's Motion to Suspend Consideration"), requesting that consideration of the refiled Motion be postponed until such time as proceedings relating to the applications by Paško Ljubičić ("Ljubičić") for access to confidential material in the *Blaškić* case and *Kordić and Čerkez* case have been finally disposed of by the Appeals Chamber and that the affected parties then be allowed to make submissions in the present case. Ljubičić's applications for access to confidential material in the *Blaškić* case and the *Kordić and Čerkez* case have now been dealt with.<sup>5</sup> In the *Kordić and Čerkez* case, the Prosecution was ordered to identify the confidential supporting material, transcripts and exhibits from the *Kordić and Čerkez* trial which it considered to be relevant to the *Ljubičić* case as

<sup>4</sup> The letter was actually filed the next day on 2 July 2002.

<sup>5</sup> See *Prosecutor v Blaškić*, Decision on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits, 4 December 2002; *Prosecutor v Kordić and Čerkez*, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 19 July 2002.

well as material which it considered not to be relevant to Ljubičić, and to state in some detail the reasons and criteria which led to its conclusion in that regard. The Prosecution was further required to review the *Kordić and Čerkez* record and identify any confidential material which is relevant to Ljubičić's case but which is subject to its provider's consent in accordance with Rule 70(C), and to seek the consent of the providers as well as contact witnesses who testified confidentially and any government or other entity which may have consented to their confidential testimony to hear their views upon the matter. In the *Blaškić* case, the Prosecution was ordered to simply release the material in an un-redacted form subject to prior consent of the provider in relation to Rule 70 material. In light of the Prosecution's Motion to Suspend Consideration, the Appeals Chamber invited the parties in this case by letter of 6 September to comment on issues raised by the Prosecution for the first time in its "Prosecutor's Request for Reconsideration of the Appeals Chamber's 19 July 2002 'Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case' And Request for an Extension of Time", dated 12 August 2002 and filed in the *Kordić and Čerkez* case. Counsel for Gruban did not avail herself of that opportunity.

### Discussion

5. Access to confidential material from another case shall be granted if the party seeking it can establish that it may be of material assistance to its case.<sup>6</sup> A party is always entitled to seek material from any source to assist in the preparation of its case if the document sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown.<sup>7</sup> 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, for example, if the cases stem from events alleged to have occurred in the same geographic area and at the same time.<sup>8</sup> It is sufficient that access to the material sought is likely to assist the applicant's case materially, or that there is at least a good chance that it would.<sup>9</sup>

<sup>6</sup> *Prosecutor v Kordić and Čerkez*, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 19 July 2002, p 4; *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, par 14.

<sup>7</sup> *Prosecutor v Enver Hadžihasanović et al.*, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 October 2001, par 10.

<sup>8</sup> *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, par 15 referring to *Prosecutor v Radoslav Brđanin and Momir Talić*, Decision on Motion by Momir Talić for Access to Confidential Documents, 31 July 2000, par 8.

7. Because there is, as conceded by the Prosecution, a large geographical, temporal or otherwise material overlap between the *Gruban* case and the *Kvočka et al* case, the material from the latter case is likely to assist Gruban's case or, at least, there is a good chance that it would, and the Appeals Chamber is therefore satisfied that the Applicant has demonstrated a legitimate forensic purpose in relation to that material, as conceded by the Prosecution.<sup>10</sup> Although it suggested that "there may be reasons" why some of the non-public material may have to be redacted, the Prosecution failed to identify what those reasons may be *in the present case* other than by mentioning in the most general terms "the interest of fairness towards third persons, or the need to ensure the safety of individuals".<sup>11</sup> Because there may indeed be good reasons why some of the material should be redacted, the Appeals Chamber will grant to the Prosecution and the Defence in the *Kvočka et al* case fourteen (14) days from this day to file a fresh application for redaction if it can be demonstrated that such cogent reasons exist. The protective measures imposed by the Trial Chamber in relation to that material shall remain in place.

8. To conclude, the Appeals Chamber considers that the Applicant has (a) described the material sought by its general nature as required, and (b) shown a legitimate forensic purpose for access.

### Disposition

9. The Motion is hereby granted, and the Appeals Chamber orders as follows:

- (a) the Prosecution and the Defence in the *Kvočka et al* case 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;
- (b) subject to any application by either party in the *Kvočka et al* case for redaction within 14 days, the Registry to grant the Applicant access to all non-public documents, materials and exhibits from the pre-trial and trial phase in the *Kvočka et al* case.

10. The material to which access is granted shall remain subject to the same protective measures as were imposed by the Trial Chamber. In addition, 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 shall:

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<sup>9</sup> 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, p 3.

<sup>10</sup> See par 2, *supra*. See also Prosecution's Response, par 7.

<sup>11</sup> Prosecution's Response, par 9.

- (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 from the *Kvočka et al* case whose identity was subject to protective measures 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.

11. 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.

12. 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.

13. If it decides to do so, the Prosecution or the Defence in the *Kvočka et al* case may file a fresh application for redaction within 14 days from the date of this decision. Passed that timeframe, the material will be released in un-redacted form to Gruban.

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

Dated this 13<sup>th</sup> day of 2003,  
At The Hague,  
The Netherlands.



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Mohamed Shahabuddeen  
Presiding

**[Seal of the Tribunal]**