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27 MARCH 2003

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**UNITED
NATIONS**



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-00-41-PT
Date: 27 March 2003
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 27 March 2003

PROSECUTOR

v.

PAŠKO LJUBIČIĆ

**DECISION ON PROSECUTOR'S MOTIONS FOR CLARIFICATION AND
VARIATION OF ORDERS GRANTING PAŠKO LJUBIČIĆ ACCESS TO
CONFIDENTIAL MATERIALS FROM OTHER CASES**

Office of the Prosecutor

Mr Norman Farrell
Mr Mark Harmon

Counsel for Paško Ljubičić

Mr Tomislav Jonjić

1. This Trial Chamber (“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”) is seized of three Prosecution motions (“the Motions”) requesting clarification and variation of an order and two decisions (collectively, “the Orders”) of this Chamber granting Paško Ljubičić access to confidential materials from the cases *Prosecutor v. Kupreškić et al.*, *Prosecutor v. Furundžija*, and *Prosecutor v. Aleksovski*.

2. The following submissions were filed:

In respect of the Chamber’s “order” of 27 November 2002:

- “Prosecution’s Preliminary Response and Motion for Clarification to ‘Order Concerning Motion Filed by Paško Ljubičić for Access to Confidential Supporting Material, Transcripts and Exhibits in Prosecutor v. Kupreškić et al.’”, filed on 20 February 2003;

- “Defence Response to Prosecution’s Preliminary Response and Motion for Clarification to ‘Order Concerning Motion Filed by Paško Ljubičić for Access to Confidential Supporting Material, Transcripts and Exhibits in Prosecutor v. Kupreškić et al.’”, filed on 5 March 2003;

In respect of the Chamber’s “decision”, also of 27 November 2002:

- “Prosecution’s Preliminary Response and Motion for Clarification to ‘Decision on Paško Ljubičić’s Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in Prosecutor v. Anto Furundžija’”, filed on 21 February 2003;

- “Defence Response to Prosecution’s Preliminary Response and Motion for Clarification to ‘Order Concerning Motion Filed by Paško Ljubičić for Access to Confidential Supporting Material, Transcripts and Exhibits in Prosecutor v. Anto Furundžija’”, filed on 6 March 2003;

In respect of the Chamber’s decision of 2 December 2002:

- “Prosecution’s Preliminary Response and Motion for Clarification to ‘Decision on Paško Ljubičić’s Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in Prosecutor v. Zlatko Aleksovski’”, filed on 21 February 2003;

- “Defence Response to Prosecution’s Preliminary Response and Motion for Clarification to ‘Order Concerning Motion Filed by Paško Ljubičić for Access to Confidential Supporting Material, Transcripts and Exhibits in Prosecutor v. Zlatko Aleksovski”, filed on 6 March 2003.

3. The three Motions are virtually identical. So are the responses by the Defence, which uniformly oppose the Motions on the ground that the Orders make adequate provision for continued protection of confidential information rendering the request for further enhancement unnecessary. The Chamber finds it appropriate to address the Motions in a single decision.

4. The Prosecution draws attention to the fact that, at the time the Motions were filed, the Prosecution had not had formal contact with the Registry setting out its position in relation to the Orders. Further, the Prosecution had not ascertained whether the Registry had already acted upon the Orders.¹ The Chamber observes that almost three months elapsed from the filing of the Orders to the filing of the Motions. The Prosecution had ample time to make inquiries and to inform the Chamber of the status of implementation of the Orders and of any difficulties that might have been encountered.

5. The Motions request clarification of the second point common to the dispositions in the Orders. The Prosecution states that it has concluded that none of its own materials identified in the Orders comes under Rule 70 of the Tribunal’s Rules of Procedure and Evidence (“the Rules”). However, the Prosecution observes that it is not, itself, in a position to contact the providers of Rule 70 material on behalf of the persons who were the accused in the three cases in question.²

6. The Prosecution is correct to point out that the disposition on access to Rule 70 material common to the Orders – namely that such material “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” – refers specifically to Rule 70 material originating from Prosecution sources and not to any such material originating from Defence sources, access to which would need to be appropriately authorized. This matter is dealt with by the Chamber in the disposition of the present Decision.

¹ Motions, para. 6.

² Id., paras 10-11.

7. The Motions further seek the Chamber's "guidance" regarding the appropriate procedure governing the allegedly increasing number of access motions being filed before the Tribunal. While stating that it recognizes that each access motion must be dealt with on the basis of its own particular characteristics, the Prosecution proposes a uniform procedure to be followed when such motions are granted. This is to avoid, it is said, "potential inconsistencies" with regard to the treatment of protected witnesses.³ Where access has been granted to confidential witness transcripts, the Prosecution's proposed procedure would require (a) that the witnesses concerned be contacted to ascertain whether they have additional security concerns justifying additional protective measures, and (b) that any reference in the transcripts to the witnesses' identity which would reveal that they have testified before the Tribunal be redacted. In support of this procedure the Prosecution points to an order of the Appeals Chamber granting Paško Ljubičić access to materials in the *Kordić and Čerkez* case.⁴ In the Prosecution's opinion, the Appeals Chamber, by ordering contact with witnesses and other relevant parties in advance of access as well as the redaction of materials to remove any reference to a witness's identity, recognized that there may be unforeseen dangers to, or concerns held by, a witness whose identity is proposed to be revealed to an accused other than the one in relation to whom the witness agreed to testify.⁵

8. In its Orders, the Chamber observed that the temporal, geographical, and substantive overlap between the circumstances alleged in the case against Paško Ljubičić and those considered in *Kupreškić et al.*, *Furundžija*, and *Aleksovski*, justified the conclusion that there was at least a good chance that access to confidential supporting materials, transcripts, and exhibits from the latter cases would be of material assistance to Paško Ljubičić.⁶ The Chamber saw its task as striking a balance between, on the one hand, the entitlement of an accused to seek information from any source which might assist in the preparation of his or her defence, and, on the other hand, the need to protect witnesses and the integrity of information obtained confidentially. It thus granted access subject to the stringent protective measures detailed in the Orders.

³ Id., para. 14.

⁴ *Prosecutor v. Dario Kordić and Mario 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.

⁵ Motions, para. 20.

⁶ The wording of each of the Orders as to the applicable law conforms with the principles expressed by the Appeals Chamber, as for example in its order of 19 July 2002, cited above.

9. In reaching its decision the Chamber did take account of the order of the Appeals Chamber in the *Kordić and Čerkez* case, and this is explicitly stated in the Orders. The Chamber is not persuaded by the Prosecution's argument that the procedure tailored by the Appeals Chamber to the circumstances of that case,⁷ or the elaborated and relatively onerous version of that procedure put forth by the Prosecution in its Motions, should be the procedure imposed, uniformly, by access orders. As acknowledged by the Prosecution, a subsequent decision of the Appeals Chamber did not impose the same onerous procedure.⁸ As also acknowledged by the Prosecution, subparagraph (C) of Rule 75 of the Rules (added by decision of the 27th Plenary on 12 December 2002) assigns the Victims and Witnesses Section of the Tribunal the task of "ensur[ing] that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case", pursuant to subparagraph (F) of the same rule.

10. Therefore, the Prosecution's general request is rejected.

11. Moreover, as to the specific request, the Chamber is not persuaded that the measures found appropriate by the Appeals Chamber in the *Kordić and Čerkez* case are necessary to achieve the desirable level of protection of witnesses and information in the three cases that are the subject of the Orders. The Orders prohibit Paško Ljubičić and his counsel from, among other things, disclosing the information or contacting the witnesses in question without prior leave of the Chamber. Similar measures were deemed sufficient in other cases before this and other Trial Chambers.⁹ In opposing the Motions, counsel for Paško Ljubičić correctly and fully acknowledged his obligations in this respect.¹⁰ While protective procedures of greater complexity may occasionally be deemed appropriate, the Prosecution has not demonstrated that in the concrete circumstances of the cases under consideration here the level of protection imposed by the Orders is insufficient.

⁷ Those circumstances were significantly different from those in the present cases, as is evident from a reading of the Appeals Chamber's order.

⁸ See *Prosecutor v. Tihomir Blaškić*, "Decision on Paško Ljubičić's Motion for Access to Confidential Material, Transcripts and Exhibits", 4 December 2002.

⁹ See, for example, *Prosecutor v. Paško Ljubičić*, "Decision on 'Enver Hadžihasanović, Mehmed Alagić and Amir Kubura's Joint Motion for Access to Confidential Supporting Material, Transcripts and Exhibits'", 28 June 2002; and *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, "Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material", 30 May 2002.

¹⁰ Para. 4 of the Defence responses.

FOR THE FOREGOING REASONS, THE CHAMBER:

PURSUANT TO Article 21 of the Tribunal's Statute and Rules 54 and 75 of the Rules;

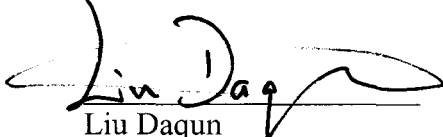
DENIES the Motions;

REQUESTS the Registrar to provide copies of this Decision to the former accused in the three cases the subject of this Decision, namely to Zoran Kupreškić, Miran Kupreškić, Vlatko Kupreškić, Drago Josipović, Vladimir Šantić, Anto Furundžija, and Zlatko Aleksovski, or to their counsel, as appropriate in each case;

ORDERS the aforementioned persons, or their counsel as appropriate, to notify the Registrar within three (3) weeks of the date of this Decision of any confidential material, forming part of the record in their respective cases, that is subject to provider's consent in accordance with subparagraph (C) of Rule 70; and **ORDERS** any such notifying party to seek consent of the provider of the material and promptly notify the Registrar of the result of such request;

REQUESTS the Registrar to allow counsel for Paško Ljubičić access to the relevant files at the end of the aforementioned period of three weeks having removed any material which is subject to the notification procedure described above, access to which shall be granted only if and when the consent of providers has been obtained.

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



Liu Daqun
Presiding

Dated this twenty-seventh day of March 2003
At The Hague
The Netherlands

[Seal of the Tribunal]